

NO MORE MIXED MESSAGE, MISSING MONEY: REVISITING  
THE BIRTH OF ICL’S VICTIM RESTORATION-REPARATIONS  
REGIME TO CONCEPTUALIZE ITS MODERN REFORM

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## I. INTRODUCTION

International criminal law's (ICL) victim restoration/reparations system is broken.<sup>1</sup> At the International Criminal Court (ICC), ICL's most important modern adjudicative body, the quest for healing and compensating atrocity victims is foiled by a fundamental mission dissonance within the Court's very DNA—the incompatibility of simultaneously pursuing retributive and reparative goals.<sup>2</sup> This is best illustrated by the institutional tensions between two key actors within the Court's atrocity victim justice process: the Office of the Prosecutor (OTP), whose goals are primarily punitive in nature, and the Trust Fund for Victims (TFV), who, despite having restorative aims, must often work hand in glove with the OTP.<sup>3</sup> But this schizophrenic

<sup>1</sup> See 17 July: *Ensuring Justice for Victims at the ICC on International Criminal Justice Day*, INT'L FED. FOR HUM. RTS. (July 17, 2024) [hereinafter *Justice for Victims*], <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/17-july-ensuring-justice-for-victims-at-the-icc-international> [https://perma.cc/24BG-LZQQ] (describing insufficient protection of victims' interests/rights during the early phases of ICC cases); Luke Moffett & Clara Sandoval, *Tilting at Windmills: Reparations and the International Criminal Court*, 34 LEIDEN J. INT'L L. 749, 764 (2021) [hereinafter *Tilting at Windmills*] (detailing serious problems with the ICC's reparations regime).

<sup>2</sup> Anne Dutton & Fionnuala Ní Aoláin, *Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims under Its Assistance Mandate*, 19 CHINESE J. INT'L L. 490, 494 (2019).

<sup>3</sup> Maria Juliana Machado Forero, Sandra Karlsson & Lisa-Marie Rudi, *The Victims Who Are Not Quite Victim Enough: How the International Criminal Court*

arrangement is not the only problem. There is also resource rivalry, as the TFV and OTP are often competing for slices of the same pie.<sup>4</sup> In terms of TFV involvement in helping victims at the investigative stage, this has caused a funding deficit.<sup>5</sup> Moreover, given the ICC's existing regulatory constraints on how the TFV may access funds, the latter is not positioned to compensate for the funding shortfalls at either the beginning or ending stages of a case.<sup>6</sup> As a result, victims are underserved both in terms of restoration and reparation.<sup>7</sup>

But must the TFV and OTP be forced to work together under the same justice tent to the detriment of atrocity victim welfare? The early history of victim reparations in ICL suggests an alternative arrangement. In particular, the work of ICL pioneer Benjamin Ferencz demonstrates how past practices, applied to and updated for the modern context, could result in reforms significantly improving

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*Creates Divides Within Victim Communities*, 88 DIE FRIEDENS-WARTE 207, 225 (2013) (painting a picture of the tension between the Trust Fund for Victim's reparative/restorative mandate and the Office of the Prosecutor's accountability mandate when the two organs have to work together in the field).

<sup>4</sup> See Eric Wiebelhaus-Brahm & Kirsten Ainley, *The Evolution of Funding for the International Criminal Court: Budgets, Donors and Gender Justice*, 22 J. HUM. RTS. 31, 41-42 (2023) (pointing out that, within the primarily punitive setting of the ICC, the ICC Trust Fund for Victims gets only a tiny percentage of the ICC budget).

<sup>5</sup> *Id.*

<sup>6</sup> See Regulations of the Trust Fund for Victims, Regul. 21, ICC-ASP/4/Res.3, ICC-ASP/4/32 (2005) [hereinafter TFV Regulations], [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/Publications/Compendium/Compendium.3rd.11.EN.G.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/Publications/Compendium/Compendium.3rd.11.EN.G.pdf) [<https://perma.cc/42J8-M7UM>]. Per Regulation 21, the TFV's annual budget will consist of voluntary donations from various entities (primarily governments), money collected through fines/forfeitures/reparations awards, and "such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund." *Id.* Regarding the latter, an annual financial allocation for "core capacity" costs (i.e., expenses for funding the Board of Directors and Secretariat) is funded by the budget of the Court. THE REDRESS TR. & FORENSIC RISK ALL., 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), <https://redress.org/wp-content/uploads/2018/01/TFVReport.pdf> [<https://perma.cc/HF37-E9RG>]. This is in accordance with Article 114 of the Rome Statute, the ICC's constitutive charter, which states that "[e]xpenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court." Rome Statute of the International Criminal Court art. 114, *adopted* July 17, 1998, 2178 U.N.T.S. 90 [hereinafter Rome Statute] (entered into force July 1, 2002).

<sup>7</sup> See *Justice for Victims*, *supra* note 1 (describing deficits in the early phase restorative mission of the ICC—i.e., helping victims during the investigative stage); *Tilting at Windmills*, *supra* note 1 (detailing the problems with reparations at the ICC).

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today's victim justice framework.<sup>8</sup> To understand how, one must first consider that, having served as a U.S. Army war crimes investigator who ministered to victims in liberating Nazi concentration camps and then as a Chief Prosecutor at the Nuremberg Trials (for the *Einsatzgruppen* proceeding, the most Holocaust-focused of those trials), Ferencz subsequently sought reparations for Holocaust victims.<sup>9</sup> But his wartime victim assistance and this post-prosecution reparative quest was not within the institutional confines of the Nuremberg adjudicative apparatus. Rather, Ferencz's pre-and post-World War II work in Holocaust justice was institutionally bifurcated, with investigations and prosecutions under the aegis of the U.S. Army/government and reparations through nongovernmental organizations (NGOs): namely, the Jewish Restitution Successor Organization (JRSO) and the Conference on Jewish Material Claims Against Germany (Claims Conference) and its related administrative branches, including the United Restitution Organization and the Compensation Trust Society.<sup>10</sup>

Moreover, his pre-/post-Nuremberg restorative/reparative work was with institutions dedicated uniquely to investigations (with the Judge Advocate office of the Third Army) and reparations (with the NGOs just described), and therefore not impeded by having to reconcile internally competing/schizophrenic punitive/restitutive objectives or by competing for internal resources at a prosecution-focused institution and pursuant to the specific budgetary rules of such an institution (as the TFV must now do at the ICC).<sup>11</sup> Thus, Ferencz was able to take care of victims' needs in an unencumbered way and seek financing through creative means, including borrowing money, seeking in-kind donations, accessing frozen/confiscated funds, and entering into bilateral treaty arrangements, while still benefiting from built-in organizational budgets. Within the contemporary global justice framework, if a similar institutional disentangling, inspired by the Ferencz model, could be effectuated at the ICC, separating the

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<sup>8</sup> See generally Gregory S. Gordon, *Benjamin Ferencz and the Treatment of Victims in International Criminal Law: Mapping Out Lex Lata and Lex Ferenda (Ferencza?) in an Emerging Field*, 23 INT'L CRIM. L. REV. 239, 244-66 (2023) [hereinafter *Lex Lata*].

<sup>9</sup> *Id.* at 239.

<sup>10</sup> *Id.* at 250-51.

<sup>11</sup> See Wiebelhaus-Brahm and Ainley, *supra* note 4 (specifying that the ICC Trust Fund for Victims is responsible for "50 percent of the [ICC]'s impact but only 2 percent of its budget").

OTP from the TFV, this Article posits that mission dissonance and money shortfalls could also be eliminated.

With that goal in mind, the Article is divided into four parts. After this Introduction, Part 2 examines Ben Ferencz's history working separately, as well as sequentially, as first an investigator of Holocaust crimes, then a prosecutor of Holocaust crimes, and finally a lawyer seeking reparations for Holocaust crimes. This institutional disaggregating/sequencing permitted effective justice efforts for the Army, then before the Nuremberg Military Tribunals and finally, unfettered by law enforcement/punishment priorities, securing compensation for survivors of Hitler's genocide against the Jews. Part 2 also explores how Ferencz took advantage of this institutional independence by pursuing a creative smorgasbord of resource acquisition/funding strategies, including seconding personnel, securing in-kind donations from the government, borrowing funds from occupation authorities, obtaining reparations via bilateral treaty, and accessing compensation through distribution of frozen assets. And he did this while still taking advantage of preexisting annual budget allocations.

Having laid out this history, Part 3 then examines how the current arrangement of TFV-OTP institutional fusion wreaks havoc on the atrocity victim justice framework. It does so by sending mixed messages to both OTP and TFV personnel that adversely impacts what should be the former's focus on retributive goals (e.g., finding evidence, securing convictions while protecting defendants' due process rights) and the latter's restorative mission in ministering to victims' physical/mental needs during investigations and then making them whole via reparations. This Jekyll-and-Hyde pairing appears especially problematic when defendants are acquitted and victims are denied reparations after years of stretched-out proceedings and the promise of eventual healing. Moreover, this Part will demonstrate how OTP/TFV competition for limited resources within the strictures of the ICC's budgetary schema further hampers the TFV by stymying its outreach efforts and squelching its reparations capacity.

With these problems in mind, Part 4 investigates how the Ferencz template for institutional bifurcation and creative resource acquisition/financing might work if grafted onto the contemporary victim justice framework. It maps out how the split might function logistically—with a separated TFV coming under the aegis of the United Nations (as negotiators for the ICC treaty originally intended) and working with a proposed "Atrocity Victims Reparations Tribunal"

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(AVRT). Unmoored from the constricting mission dissonance and administrative confines of the ICC, this Part of the Article then considers financing arrangements that go beyond the current model of seeking voluntary donations from nation-states. Harking back to Ferencz's model of creative budget building for Holocaust survivors, an independent TFV could satisfy its assistance/reparations mandates via: (1) in-kind donation of goods and services from governments and other entities, including NGOs and corporations; (2) borrowed funds secured from the same entities, a portion of which could be invested in an endowment that would earn interest and permit repayment; (3) accessing ill-gotten wealth connected to gross human rights violations that has been frozen/confiscated by national authorities according to legitimate due process standards; and (4) entering into bilateral treaties with nation-states to ensure regular and systemic funding that would permit better budget planning and effective distribution of needed resources. Part 4 then concludes by considering the potential advantages of this Article's separation proposal (hereinafter the Proposal), including bestowing the quest for reparations with philosophical/conceptual clarity, institutional/administrative coherence, and procedural/due process integrity. It also examines potential pitfalls, including poor institutional fit in the UN, forced-fusion culture clashes, the loss of collaborative synergies, and the potential for human resources overlap and waste. Finally, a concluding Part helps put the Proposal into broader perspective by analyzing how it might provide victims with additional opportunities to have their voices heard and calling on other scholars to take this research further so as to flesh out the details of keeping the new TFV vital and effective in the decades to come.

## II. FERENCZ'S HOLOCAUST JUSTICE EXPERIENCE: MODELING SUCCESSFUL INSTITUTIONAL SEPARATION AND SEQUENCING

### *A. Background*

Having grown up in Hell's Kitchen, a crime-ridden slum in New York City where victims of violence were routinely found dead or suffering on the streets, Ben Ferencz opted for a career devoted to helping such unfortunates.<sup>12</sup> He took criminology/criminology-related classes at City College of New York as part of his social sciences

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<sup>12</sup> *Lex Lata*, *supra* note 8, at 239.

major, and then excelled in criminal law courses during his studies at Harvard Law School (HLS).<sup>13</sup> After earning his degree at HLS in 1943, he was drafted into the U.S. Army, first serving in an artillery battalion and then transferring to the Third Army's Judge Advocate section.<sup>14</sup> It was at this juncture that his empathy for victims carried over to his work in the burgeoning field of international criminal law.<sup>15</sup>

### B. Investigation

As an investigator who helped liberate Nazi concentration camps during the first half of 1945, Ferencz channelled his deep-seated concern for victims into doing more than just interviewing survivors, taking their statements, and getting investigative leads from them—he also took care of them in multifaceted ways.<sup>16</sup> This included providing them with sustenance, improving their physical surroundings, and tending to their psychological needs.<sup>17</sup>

In doing so, Ferencz had sufficient institutional freedom to access services and resources necessary for any needs not covered by the budget he was allotted as an investigator for Patton's Third Army.<sup>18</sup> For example, he would enlist locals to serve as interpreters,<sup>19</sup> help with retrieval and burial of deceased victims,<sup>20</sup> clean up concentration camp grounds where survivors were still sheltering (in the absence of

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<sup>13</sup> Benjamin B. Ferencz, *Life at City College and the Beginning of Romance*, BENFERENCZ.ORG, <https://benferencz.org/stories/1920-1943/life-at-city-college-and-the-beginning-of-romance/> [<https://perma.cc/8WPP-KP7X>] (last visited Aug. 31, 2024); *Lex Lata*, *supra* note 8, at 243-44.

<sup>14</sup> *Lex Lata*, *supra* note 8, at 244-54.

<sup>15</sup> *Id.* at 245.

<sup>16</sup> *Id.* at 245-46.

<sup>17</sup> *Id.* at 246.

<sup>18</sup> Benjamin B. Ferencz, *Trials by U.S. Military Commissions*, BENFERENCZ.ORG, <https://benferencz.org/stories/1943-1946/trials-by-u.s-military-commissions/> [<https://perma.cc/YKN8-H7YG>] (last visited Oct. 5, 2024) (indicating, through the narrative, that materials provided by the Judge Advocate section where Ferencz worked included vehicles, fuel, maps, and various office supplies).

<sup>19</sup> *Id.*

<sup>20</sup> Interview with Benjamin B. Ferencz in Delray Beach, Fla. (Jan. 17, 2019).



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alternative housing in the immediate wake of liberation),<sup>21</sup> and locate and secure evidence.<sup>22</sup>

He was also able to entrust victim care duties to separate military units. For example, in the course of his concentration camp investigations, he brought in Army doctors to treat badly starving or diseased survivors on the verge of death.<sup>23</sup> And, quite resourcefully, in order to remove a rape victim from a concentration camp location where the sexual abuse was taking place, Ferencz had him transferred to a medics unit, which allowed the young man to assist with medical procedures and stay out of harm's way.<sup>24</sup>

With such free rein, Ferencz also found innovative ways to make desperately needed provisions available to victims. Clothing for nearly naked survivors was found in vacated German apartments.<sup>25</sup> And, through creatively accessing supplies from the military, he devised a plan to appropriate basic sustenance for victim-witnesses, such as soup and simple proteins.<sup>26</sup>

### C. Prosecution

By late 1945, Ferencz was helping the U.S. Army prepare for the Dachau Trials,<sup>27</sup> held at the site of the Nazis' oldest concentration camp. During these proceedings, U.S. JAG lawyers prosecuted personnel from Dachau and other concentration camps (including Mauthausen, Flossenbürg, and Buchenwald), as well as the murderers of downed Allied airmen and various other war criminals, such as the perpetrators of the so-called "Malmedy Massacre," Waffen-SS soldiers who summarily killed a large group of American POWs

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<sup>21</sup> Benjamin B. Ferencz, *Investigating Nazi Concentration Camps*, BEN FERENCZ.ORG [hereinafter *Investigating Nazi Concentration Camps*], <https://benferencz.org/stories/1943-1946/investigating-nazi-concentration-camps/> [https://perma.cc/4YP9-FRZG] (last visited Sept. 14, 2024).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Letter from Benjamin B. Ferencz to Gertrude Fried (Apr. 29, 1945) (on file with U.S. Holocaust Mem'l Museum Archives, Benjamin B. Ferencz Collection, 1919-1994, Series 1, Box 3).

<sup>25</sup> *Investigating Nazi Concentration Camps*, *supra* note 21.

<sup>26</sup> *Id.* Ferencz gives the example of providing sardines to survivors. *Id.*

<sup>27</sup> Interview with Benjamin B. Ferencz in Delray Beach, Fla. (Jan. 18, 2019) [hereinafter Jan. 18 Interview].

during the Battle of the Bulge.<sup>28</sup> Ben Ferencz's investigative results supported charges for many of those trials, and he was eventually invited to join the Dachau Trials' prosecution team.<sup>29</sup> He felt, however, quite viscerally, that it was time for him to separate from the Army and he was honorably discharged on December 26, 1945.<sup>30</sup>

But Ferencz was soon recruited by the American office that was prosecuting the major Nazi war criminals (such as Hermann Göring, Rudolf Hess and Joachim von Ribbentrop) before the International Military Tribunal in Nuremberg.<sup>31</sup> This was an at-large federal government initiative—not part of the military's justice efforts—under the leadership of U.S. Supreme Court Justice Robert Jackson, then serving as the American Chief Prosecutor and working with Soviet, British, and French lawyers and judges.<sup>32</sup> At the Pentagon, Ferencz met with one of Jackson's high-ranking deputies, Colonel Telford Taylor, who had been appointed to succeed Jackson in a series of "subsequent trials" that would bring to justice additional Nazi leaders in "themed" proceedings divided according to the different sectors of the Third Reich—e.g., jurists, doctors, industrialists, security personnel, ministers, and military commanders.<sup>33</sup> Ferencz agreed to join Taylor's unit and traveled to Nuremberg in the spring of 1946.<sup>34</sup>

By the end of the summer, he was running Taylor's main off-site investigative office, the "Berlin Branch."<sup>35</sup> In March 1947, one of

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<sup>28</sup> Durwood "Derry" Riedel, *The U.S. War Crimes Tribunals at the Former Dachau Concentration Camp: Lessons for Today?*, 24 BERKELEY J. INT'L L. 554, 569, 574 (2006).

<sup>29</sup> Interview with Benjamin B. Ferencz in Delray Beach, Fla. (Jan. 20, 2019).

<sup>30</sup> Benjamin B. Ferencz, *Going Home as a Stowaway*, BENFERENCZ.ORG, <https://benferencz.org/stories/1943-1946/getting-home-as-a-stowaway/> [<https://perma.cc/Q5ZP-E4TV>] (last visited Sept. 15, 2024).

<sup>31</sup> Jan. 18 Interview, *supra* note 27.

<sup>32</sup> Riedel, *supra* note 28, at 568-69.

<sup>33</sup> Benjamin Ferencz & Michael P. Scharf, *Last Living Nuremberg Trial Prosecutor Recalls His Work on the Einsatzgruppen Trial*, 105 JUDICATURE, no.1, 2021, at 14, 16; Benjamin B. Ferencz, *How to Gain Fame in Nuremberg*, BENFERENCZ.ORG, <https://benferencz.org/stories/1946-1949/how-to-gain-fame-in-nuremberg/> [<https://perma.cc/8GMX-F975>] (last visited Sept. 16, 2024).

<sup>34</sup> Benjamin B. Ferencz, *Detained for Impersonating an Officer*, BENFERENCZ.ORG, <https://benferencz.org/stories/1946-1949/detained-for-impersonating-an-officer/> [<https://perma.cc/ERQ4-8BES>] (last visited Sept. 16, 2024).

<sup>35</sup> Benjamin B. Ferencz, *Life in Berlin 1946*, BENFERENCZ.ORG, <https://benferencz.org/stories/1946-1949/life-in-berlin-1946/> [<https://perma.cc/R86M-RYWZ>] (last visited Sept. 16, 2024).

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Ferencz's investigators discovered an enormous tranche of secret dispatches that had been sent by the Gestapo office in Berlin to a hundred or so top officials of the Nazi regime.<sup>36</sup> These were the daily reports of a SS (*Schutzstaffel*) formation known as the *Einsatzgruppen*, special units that had been created to follow the German army into the Soviet Union and kill Nazi "enemies," primarily Jews (although Soviet Commissars, the handicapped, Roma, and Jehovah's Witnesses were also targeted).<sup>37</sup> This communications cache chronicled in minute detail all the activities of these mobile murder squads.<sup>38</sup>

Based on these documents, Ferencz persuaded Taylor to put on an additional trial to bring the *Einsatzgruppen* leaders to justice.<sup>39</sup> And the twenty-seven year-old Harvard Law graduate was designated as Chief Prosecutor.<sup>40</sup> His case, which began on September 29, 1947, was based entirely on documents and took only two court days.<sup>41</sup> The trial continued to proceed efficiently even with the twenty-two defendants presenting their cases, and with time taken out for the winter holidays, closing arguments were completed by February 13, 1948.<sup>42</sup> After the judges had some time to deliberate, judgement was issued on April 8 and the defendants were sentenced on April 10. All twenty-two who sat in the dock were found guilty of war crimes, crimes against humanity, and/or membership in a criminal organization (i.e., either the SS or *Sicherheitsdienst* (SD), the SS's intelligence agency), and/or the Gestapo (*Geheime Staatspolizei*, the Nazi secret police).<sup>43</sup> Fourteen of the defendants were sentenced to death, two to life

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<sup>36</sup> MICHAEL J. BAZYLER & FRANK M. TURKHEIMER, FORGOTTEN TRIALS OF THE HOLOCAUST 162 (2014).

<sup>37</sup> *Id.* at 163.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Benjamin B. Ferencz, *The Biggest Murder Trial in History*, BENFERENCZ.ORG, <https://benferencz.org/stories/1946-1949/the-biggest-murder-trial-in-history/> [<https://perma.cc/YN72-ZASD>] (last visited Oct. 13, 2024).

<sup>42</sup> *Trial 9 – Einsatzgruppen Case*, UNIV. OF GA. DIGIT. COMMONS, <https://digitalcommons.law.uga.edu/nmt9/> [<https://perma.cc/RL8C-DA2C>] (last visited Oct. 13, 2024).

<sup>43</sup> BAZYLER & TURKHEIMER, *supra* note 36, at 164-65; MICHAEL A. MUSMANNO, THE EICHMANN KOMMANDOS 259-64 (1961). There were originally twenty-four defendants indicted but one had committed suicide and one had been excused for medical reasons. BAZYLER & TURKHEIMER, *supra* note 36, at 163-64.

imprisonment, three to twenty years, one to fifteen years, and two to ten years.<sup>44</sup>

Following the trial, Ferencz spent most of his remaining time in Taylor's office serving as Executive Counsel, managing the conclusion of the final Nuremberg Trials.<sup>45</sup> But during this time (beginning with the end portion of the *Einsatzgruppen* trial and through his work as Executive Counsel), he had a revelation about his work to that point and where it might be going in the future:

Well, it occurred to me before the trial was over that there's a sequence we have to follow in a time of war. First, you have to end the war [and investigate the war crimes, as he did] . . . Secondly, you have to bring to justice those who . . . committed [the war] crimes . . . That was the *Einsatzgruppen* . . . But what about the victims?<sup>46</sup>

#### D. Reparations

##### 1. Restitution via the JRSO

His quizzical musings turned out to be prophetic. Having prosecuted the most Holocaust-centered of the Nuremberg Trials (*Einsatzgruppen*),<sup>47</sup> Ferencz was recruited by leaders of Jewish civil society in August 1948 to head the Jewish Restitution Successor Organization (JRSO).<sup>48</sup> Its remit was to distribute Nazi-appropriated property of heirless Holocaust victims found in the American-

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<sup>44</sup> *The Einsatzgruppen: Einsatzgruppen Trial*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/the-einsatzgruppen-2> [<https://perma.cc/9JEN-XDGF>] (last visited Oct. 13, 2024).

<sup>45</sup> Gregory S. Gordon & Mia Swart, *Benjamin Ferencz: The Last Surviving Nuremberg Prosecutor*, AL JAZEERA (Mar. 11, 2020), <https://www.aljazeera.com/features/2020/3/11/benjamin-ferencz-the-last-surviving-nuremberg-prosecutor> [<https://perma.cc/9CCG-5PSY>].

<sup>46</sup> Ferencz & Scharf, *supra* note 33, at 16.

<sup>47</sup> See KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 81 (2011) (referring to *Einsatzgruppen* as the Nuremberg trial "that focused most specifically on the extermination of the Jews").

<sup>48</sup> Gordon & Swart, *supra* note 45.

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controlled sector of Germany and distribute it (or its proceeds after sale) to needy Jewish refugees around the world.<sup>49</sup>

The problem was that the American regulation creating the JRSO, Military Law No. 59, required filing claims for individual pieces of property by December 31, 1948, giving Ferencz little more than four months to do so upon starting the new job.<sup>50</sup> But he lacked the resources to file even a fraction of the likely total claims within such a short time span (although the JRSO did furnish him with a preexisting (albeit limited) starting budget that was built into the organization's establishment).<sup>51</sup>

So given the JRSO's constrained capacities in light of the looming December filing cut-off date, Ferencz applied for an extension of the deadline with the U.S. military governor, General Lucius Clay, who, however, held firm on the filing due date.<sup>52</sup> Resorting to his fallback plan, Ferencz asked to borrow additional funds to increase his claim-filing capacity and Clay agreed, advancing the JRSO one million Occupation Marks.<sup>53</sup> (When Clay asked Ferencz whether such a loan would be legal, Ferencz told him he had prepared a memorandum explaining that it was, but Ferencz had not put together any such document and Clay was likely not authorized to make the loan).<sup>54</sup>

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<sup>49</sup> *Jewish Successor Organizations*, JEWISH VIRTUAL LIBR., [https://www.jewishvirtuallibrary.org/jewish-successor-organizations#google\\_vignette](https://www.jewishvirtuallibrary.org/jewish-successor-organizations#google_vignette) [<https://perma.cc/2RTY-9T8T>] (last visited Sept. 16, 2024).

<sup>50</sup> Military Law No. 59, Restitution of Identifiable Property, art. 56 (Nov. 1947) [hereinafter Law No. 59].

<sup>51</sup> Benjamin B. Ferencz, *Restitution of Confiscated Property*, BENFERENCZ.ORG [hereinafter *Restitution of Confiscated Property*], <https://benferencz.org/stories/1948-1956/restitution-of-confiscated-property/> [<https://perma.cc/2U5V-U4U9>] (last visited Oct. 5, 2024) (noting that the JRSO's organizers invested their "limited charitable funds" into the organization's restitution mission "because they felt it was their moral duty to try").

<sup>52</sup> PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS, PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS 155 (2000), <https://dn790003.ca.archive.org/0/items/PlunderAndRestitution/PB2001103550.pdf> [<https://perma.cc/P7YQ-J7CA>].

<sup>53</sup> *Id.*

<sup>54</sup> Transcript of Interview of Benjamin B. Ferencz by Joan Ringelheim 76-77 (Aug. 26, 1994) [hereinafter USHMM Interview], [https://collections.ushmm.org/oh\\_findingaids/RG-50.030.0269\\_trs\\_en.pdf](https://collections.ushmm.org/oh_findingaids/RG-50.030.0269_trs_en.pdf) [<https://perma.cc/LHW3-4VP5>].

With the cash infusion, Ferencz could now hire a veritable army of German investigators. And then, with the institutional freedom he had running the JRSO separate from the Nuremberg prosecutions, he became even more creative in resource acquisition. As he explained in an interview with the U.S. Holocaust Memorial Museum:

I had requisitioned cars from the Army using my old Army authorizations as a war crimes investigator. I immediately seized every Jeep, every car I could grab from any motor pool and sent investigators into every real estate registry in Germany with instructions to copy down the names of any Jewish names that transferred property since 1933. [Then] in Nuremberg, there [was] a club that [was] occupied by Latvians, [many of whom had been] very busy killing Jews before they retreated with the Germans and were captured by the Americans . . . . So, I said, "We'll throw them out of that building. I need it for restitution." And bango [sic], I move them out. I move my furniture from the courthouse in Nuremberg as a prosecutor across the street to this Latvian club. And we set up there [in this] big hall [, with so many] tables [that they were] right touching each other. Typewriters on every table, requisitioned or bought or seized from somewhere and 24 hours a day we filed claims.<sup>55</sup>

Properly resourced and staffed, Ferencz overcame the odds and missed not a single potential claim. But, in filing them, he had to requisition even more property creatively:

[A]nd about the day of the filing deadline, we loaded all the claims into [a] U.S. Army ambulance, which I had requisitioned somewhere, and there was a claims center where we had to file these claims. And we took this ambulance and drove it up the claims center and filed, I think it was 173,000 claims for 173,000 pieces of property in the American Zone of Germany. And I

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<sup>55</sup> *Id.*

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called up Lucius Clay and said, “We don’t need an extension. We filed everything.”<sup>56</sup>

Over the next few years, Ferencz was able to convince General Clay’s replacement, U.S. High Commissioner for Germany John J. McCloy, that additional American funds, to the tune of two million Occupation marks, were needed to carry on the work.<sup>57</sup> He also convinced McCloy to cancel the entire debt (i.e., the money borrowed from both Clay and McCloy) toward the end of McCloy’s term as U.S. High Commissioner.<sup>58</sup> With such means, Ferencz and the JRSO pursued the individual claims in a specially-created judicial system, which consisted of a U.S. administrative agency, whose decisions could ultimately be reviewed by a “Court of Restitution Appeals.”<sup>59</sup>

## 2. *Reparations via Bilateral Treaty*

Ferencz continued his restitution work with the JRSO and developed it over time, helping hundreds of thousands of Jewish refugees reestablish their lives and communities around the world. But the problem of property unlawfully/unfairly appropriated from Jews, as well as effectuating its return—the aim of restitution—was only one aspect of assisting Holocaust survivors. Those returning from the concentration camps, the slave-labor sites, and the hiding places were not only the victims of property crimes; most of them had also endured horrific physical and emotional abuse. Was there some way to compensate them for their suffering? Indeed, experts were considering another legal method designed to provide material assistance to such victims: “reparations.” An umbrella term that could also include

<sup>56</sup> *Id.* at 77.

<sup>57</sup> *Restitution of Confiscated Property*, *supra* note 51.

<sup>58</sup> *Id.*

<sup>59</sup> See Law No. 59, *supra* note 50, pt. 10; U.S. CTS. OF THE ALLIED HIGH COMM’N FOR GER., COURT OF RESTITUTION APPEALS REPORTS (1951), [https://iif.harvard.edu/manifests/view/drs:6347670\\$1i](https://iif.harvard.edu/manifests/view/drs:6347670$1i) [<https://perma.cc/H4R5-3EYC>]. The intermediate levels of appeal went through German courts. See Benjamin B. Ferencz, *Bulk Settlements for Property Claims*, BENFERENCZ.ORG, <https://benferencz.org/stories/1948-1956/bulk-settlements-for-property-claims/> [<https://perma.cc/DWV9-QNYL>] (last visited Oct. 15, 2024). Purchasers of the property for which the JRSO sought restitution would often file a responsive pleading with the administrative agency requesting that the claim be rejected for various reasons, including, among others, that the purchaser was an innocent third-party recipient of a deed in good faith or that the purchaser paid greater than fair market value to help a persecution victim raise funds to emigrate. *Id.*

restitution, “reparations” means the “act of making amends for a wrong” or “compensation for an injury or wrong.”<sup>60</sup>

And the new state of West Germany, formed in May 1949 via the unification of the American, British, and French occupation zones, began considering reparations for Holocaust survivors soon after attaining nationhood. In addressing his country’s Parliament (*Bundestag*) on September 27, 1951, West Germany’s first Chancellor, Konrad Adenauer, acknowledged that “unspeakable crimes have been committed in the name of the German people, calling for moral and material indemnity . . . .”<sup>61</sup> He then offered “to bring about a solution of the material indemnity problem, thus easing the way to the spiritual settlement of infinite suffering.”<sup>62</sup>

Soon there was discussion of a treaty between West Germany, the new state of Israel, which had been founded in May 1948 and was becoming the home for many Holocaust survivors, as well as for other survivors in the Jewish diaspora outside Israel.<sup>63</sup> These physically and emotionally scarred victims outside of Israel would be represented by a group consisting of a large number of major international Jewish civil society organizations known as the “Conference on Jewish Material Claims Against Germany” or the “Claims Conference.”<sup>64</sup>

With his renown as a Holocaust restitution lawyer, Ben Ferencz was invited to take a lead in negotiating with West Germany on behalf of the Claims Conference.<sup>65</sup> Ferencz and the negotiating team, headed by Nahum Goldmann, founder of the World Jewish Congress, met in London in late 1951 to strategize.<sup>66</sup> Once negotiations began in Wassenaar, the Netherlands (just outside of The Hague), Ferencz played a principal part in creatively devising treaty terms and

<sup>60</sup> *Reparation*, BLACK’S LAW DICTIONARY (11 ed. 2019).

<sup>61</sup> RONALD W. ZWEIG, *GERMAN REPARATIONS AND THE JEWISH WORLD: A HISTORY OF THE CLAIMS CONFERENCE* 21 (2d ed. 2013).

<sup>62</sup> *Id.*

<sup>63</sup> Benjamin B. Ferencz, *A Treaty to Compensate Victims*, BENFERENCZ.ORG [hereinafter *A Treaty to Compensate Victims*], <https://benferencz.org/stories/1948-1956/a-treaty-to-compensate-victims/> [<https://perma.cc/G5RL-FX73>] (last visited Sept. 17, 2024).

<sup>64</sup> *History*, CONF. ON JEWISH MATERIALS CLAIMS AGAINST GER. [hereinafter *Claims Conference History*], <https://www.claimscon.org/about/history/> [<https://perma.cc/CRW4-FWDZ>] (last visited Sept. 17, 2024).

<sup>65</sup> Rich Shapiro, ‘A Treasure of Humanity’: 102-Year-Old Nazi Prosecutor Is Still Pushing for Peace, NBC NEWS (Jan. 15, 2023, 6:00 AM), <https://www.nbcnews.com/news/-treasure-humanity-102-year-old-nazi-prosecutor-still-pushing-peace-rcna65327> [<https://perma.cc/S2GV-JN6D>].

<sup>66</sup> *A Treaty to Compensate Victims*, *supra* note 63.



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parameters to lead the March-September 1952 negotiations to a successful conclusion. In his memoirs, he described the thorny issues he needed to work through as a lead negotiator/strategist:

The negotiations were very difficult and painful. Does one ask for compensation for the six million Jews murdered? How much is one human life worth? How do you measure or prove degrees of fear, or pain, or suffering? I never found such questions in my law books at Harvard . . . . We finally reached agreements on the outlines of what could be presented as valid legal claims. Incarceration in a concentration camp, for example, was illegal deprivation of liberty—its duration could be measured and verified. Physical disability caused by persecution could also be translated into measurable financial terms. Other economic losses could also be calculated. Compensation would be demanded for three distinct categories of claims: first and foremost for still-undefined personal injuries; next would be a global sum to the State of Israel to reimburse the costs of rehabilitating survivors; lastly, a sum would have to be given to the Claims Conference for ongoing relief of Nazi victims outside of Israel.<sup>67</sup>

The treaty was signed by the parties on September 10, 1952, at Luxembourg City Hall and would therefore be known as the “Luxembourg Agreement.”<sup>68</sup> Indicating his importance in the negotiations, at the signing ceremony, Ben Ferencz sat right next to Claims Conference chief Nahum Goldmann and directly across from West German Chancellor Konrad Adenauer (in fact, Adenauer borrowed Ferencz’s pen to sign the agreement).<sup>69</sup>

Overall, the pact consisted of a treaty and two protocols.<sup>70</sup> The former was between the Federal Republic of Germany and the State

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<sup>67</sup> *Id.*

<sup>68</sup> Ariel Colonomos & Andrea Armstrong, *German Reparations to the Jews after World War II: A Turning Point in the History of Reparations*, in *THE HANDBOOK OF REPARATIONS* 391 (Pablo de Greiff ed., 2006).

<sup>69</sup> *A Treaty to Compensate Victims*, *supra* note 63.

<sup>70</sup> Colonomos & Armstrong, *supra* note 68, at 399.

of Israel.<sup>71</sup> This was unprecedented and historic given that one of the countries did not even exist at the time the acts giving rise to the reparations were committed.<sup>72</sup> Chief Israeli negotiator Felix Shinnar described the accord as “the most memorable in history.”<sup>73</sup> According to the Israeli Foreign Minister, Moshe Sharett, the signing was a “political fact of enormous international significance, something quite unprecedented, which has taken a most momentous place in the history of Israel and of Germany.”<sup>74</sup>

In particular, the treaty furnished Israel over a twelve-year period with three billion DM (US\$7 billion today), as goods in kind rather than cash payment. This permitted the Israelis to build up their new nation’s infrastructure and economy. The figure was based on the amount the Jewish state estimated it needed to absorb 500,000 refugees at a cost of US\$3,000 per person. Ben Ferencz later noted that the arrangement provided Israel with needed materials and supplies, which translated into railways, airplanes, energy, chemicals and consumer goods and services that were “vital” and allowed “the Jewish state to survive.”<sup>75</sup>

The two “Hague Protocols” with the Claims Conference were also instrumental in allowing Holocaust survivors in the diaspora to

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<sup>71</sup> *Id.*

<sup>72</sup> The Holocaust took place between the period of 1941 and 1945. *See* DONALD BLOXHAM, *THE FINAL SOLUTION: A GENOCIDE* 8-9 (2009). But the State of Israel did not come into being until May 14, 1948. *See* Ruth Gavison, *Constitutional Anchoring of Israel’s Vision: Recommendations Submitted to the Minister of Justice*, in *DEFINING ISRAEL: THE JEWISH STATE, DEMOCRACY, AND THE LAW* 102 (Simon Rabinovitch ed., 2018). Arguably, the state of West Germany did not exist either at the time of the commission of the crimes in question. *See West Germany*, *ENCYCLOPAEDIA BRITANNICA*, <https://www.britannica.com/place/West-Germany> [<https://perma.cc/7ZD3-NQCM>] (Mar. 8, 2025). That said, it was a successor state to Nazi Germany. *See* Brandon Tensley, *It’s Been 25 Years Since German Reunification. Why Are Former East Germans Responsible for So Much Xenophobic Violence?*, *WASH. POST* (Oct. 2, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/02/its-been-25-years-since-german-reunification-why-are-former-east-germans-responsible-for-so-much-xenophobic-violence/> [<https://perma.cc/M5W5-UEDP>]. So, in that sense, it was in existence at the time of the perpetration of the Holocaust.

<sup>73</sup> Lily Gardner Feldman, *The September 1952 Reparations Agreement between West Germany and Israel: The Beginning of a Remarkable Friendship*, *AM.-GERMAN INST.* (Nov. 12, 2019), <https://www.aicgs.org/2019/11/the-september-1952-reparations-agreement-between-west-germany-and-israel-the-beginning-of-a-remarkable-friendship/> [<https://perma.cc/9XLL-SQNZ>].

<sup>74</sup> *Id.*

<sup>75</sup> USHMM Interview, *supra* note 54, at 104; *see also* Colonomos & Armstrong, *supra* note 68, at 400-01.

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rebuild their lives. Hague Protocol No. 1 permitted filing of individual claims in special German courts—pursuant to contemplated German law to be enacted—which would compensate Nazi victims directly via claims for indemnification and restitution (Ben Ferencz would eventually run the organization that would help survivors file these claims, the United Restitution Organization or URO, and the claims were heard by German Finance Ministry administrative judges).<sup>76</sup> Protocol No. 1 claims would be submitted to and, in the first instance, adjudicated by specialized German administrative arbiters.<sup>77</sup> Protocol No. 2 consisted of a pledge by the West Germans to provide the Claims Conference with DM 450 million (approximately \$100 million in today's US dollars) for the relief, rehabilitation, and resettlement of Jewish victims of Nazi persecution, according to the urgency of their needs as determined by the Conference.<sup>78</sup>

In his memoirs, Ben Ferencz explained why the compensation figures grew so much beyond the 1950s, becoming arguably the most successful reparations program in history:

No one anticipated that the initial indemnification law that was called for by the Reparations Agreement of September 1952, which led to the Indemnification Law of October 1953, would have to be expanded repeatedly over time. Additional special agreements were later reached with West Germany to close some of the undeniable holes in the compensation net.<sup>79</sup>

Thus, through the years, via continuing negotiations with the Claims Conference post-1952, the German government (including the unified polity that took over and combined West and East Germany in 1990)

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<sup>76</sup> Colonomos & Armstrong, *supra* note 68, at 399.

<sup>77</sup> See Benjamin B. Ferencz, *Implementing Compensation Agreements*, BENFERENCZ.ORG [hereinafter *Implementing Compensation Agreements*], <https://benferencz.org/stories/1948-1956/implementing-compensation-agreements/> [https://perma.cc/7Y3V-ZNDE] (last visited Sept. 19, 2024) (noting that “special Finance Ministry agencies dealt with the indemnification claims”).

<sup>78</sup> Colonomos & Armstrong, *supra* note 68, at 399.

<sup>79</sup> Benjamin B. Ferencz, *Some Unanticipated Consequences*, BENFERENCZ.ORG, <https://benferencz.org/stories/1948-1956/some-unanticipated-consequences/> [https://perma.cc/H4RW-3KME] (last visited Sept. 19, 2024).

has paid more than \$90 billion in indemnification to individuals for suffering and losses resulting from persecution by the Nazis.<sup>80</sup>

### 3. *Reparations via Accessing Frozen Assets*

After the Luxembourg Agreement, Ben Ferencz continued to represent the Claims Conference in Germany while still running the JRSO and having taken on the leadership of the URO.<sup>81</sup> By 1956, ten years after joining the American Nuremberg prosecution team and having started a family that had grown to four children, Ferencz felt it was time to return to the United States and begin a law practice in New York.<sup>82</sup>

Once in the Big Apple, the former *Einsatzgruppen* chief prosecutor continued serving as an adviser to the Claims Conference and the URO.<sup>83</sup> Eventually, he joined his old boss, Telford Taylor, in a law partnership.<sup>84</sup> He also began representing Holocaust survivors in matters outside of his Claims Conference and URO roles. For example, he secured reparations for “good Samaritan” private health providers who had treated the medical problems of the victims of Hitler’s thugs and obtained compensation for East German women who had survived Nazi medical experimentation (the so-called “Ravensbrück Rabbits”).<sup>85</sup>

<sup>80</sup> *Claims Conference History*, *supra* note 64.

<sup>81</sup> *See Implementing Compensation Agreements*, *supra* note 77; Benjamin B. Ferencz, *Returning to New York in 1956*, BENFERENCZ.ORG [hereinafter *Returning to New York*], <https://benferencz.org/stories/1956-1970/returning-home-to-new-york-in-1956/> [<https://perma.cc/DJ26-ZPBZ>] (last visited Sept. 19, 2024). During this time, Ferencz was also in charge of a Claims Conference “Pensions Advisory Board.” *See Implementing Compensation Agreements*, *supra* note 77.

<sup>82</sup> *Returning to New York*, *supra* note 81.

<sup>83</sup> While wearing this hat, Ferencz sued several Nazi slave laborers, such as Krupp and Rheinmetall, and was able to obtain some compensation for survivors as recounted in his award-winning book. *See* BENJAMIN B. FERENCZ & TELFORD TAYLOR, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* (1979).

<sup>84</sup> Clyde Haberman, *Ben Ferencz: Never Give Up*, PBS (Nov. 16, 2022), <https://www.pbs.org/wnet/exploring-hate/2022/11/16/ben-ferencz-never-give-up/> [<https://perma.cc/Y74T-7GT9>].

<sup>85</sup> *See* Benjamin B. Ferencz, *Reimbursing Good Samaritans*, BENFERENCZ.ORG, <https://benferencz.org/stories/1956-1970/reimbursing-good-samaritans/> [<https://perma.cc/EMV3-8RGZ>] (last visited Sept. 19, 2024); SAVING THE RABBITS OF RAVENSBRÜCK, *How Ben Ferencz and Caroline Ferriday Helped the Rabbits after the War* (YouTube, Mar. 11, 2020), <https://www.youtube.com/watch?v=b6c5hI-s7uI> [<https://perma.cc/ZXE6-VJF9>].

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But perhaps Ferencz's most involved, and successful, Holocaust reparations case was brought on behalf of the Jewish organization B'nai B'rith (or "Children of the Covenant" in Hebrew). Since its founding in New York City in 1843, B'nai B'rith's goal had been to provide economic and social assistance to low-income Jewish citizens and immigrants.<sup>86</sup> Over time, it built up a system of fraternal lodges and chapters throughout the U.S. and, eventually, the world.<sup>87</sup> After Hitler acceded to power in 1933, he closed down and appropriated B'nai B'rith's German properties.<sup>88</sup>

As Ben Ferencz was growing his reparations practice in the early 1960s, he seized on a novel restitution prospect. Per the War Claims Act (WCA) of 1948, the U.S. had accumulated a fund, based on frozen assets and/or money from the sale of properties on American territory, which had been owned by German enemy nationals and seized by the Alien Property Custodian.<sup>89</sup> The proceeds were then earmarked, in part, for distribution to Americans to compensate them for what they lost via Third Reich property seizures.<sup>90</sup>

Ferencz believed that B'nai B'rith, which was headquartered in Washington D.C., was eligible under the WCA to access the frozen/seized funds based on its lost German properties.<sup>91</sup> Despite the argument that the properties were not technically owned by the D.C. headquarters, the former JRSO director believed there were forceful equitable considerations in B'nai B'rith's favor.<sup>92</sup> (Ferencz had already secured some JRSO-derived restitution for B'nai B'rith and was well acquainted with the organization and its travails vis-à-vis the Nazis.)<sup>93</sup> Thus, he decided to float his idea regarding the WCA funds to B'nai B'rith's president, Philip Klutznick, who would eventually

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<sup>86</sup> *About B'nai B'rith*, B'NAI B'RITH U.K., <https://www.bnaibrithuk.org/about> [<https://perma.cc/N92H-FYXH>] (last visited Sept. 20, 2024).

<sup>87</sup> *Id.*

<sup>88</sup> Robert Rockaway, *The B'nai B'rith Encounters Nazi Germany, 1933*, 101 AM. JEWISH HIST. 245, 246-48 (2017).

<sup>89</sup> Thomas D. Grant, *Reparation for Injuries in Consequence of Aggression: A Multilateral Action Model for Ukraine*, 33 TRANSNAT'L L. & CONTEMP. PROBS. 95, 141 (2024).

<sup>90</sup> *Id.*

<sup>91</sup> Benjamin B. Ferencz, *Creative Approach to Law Practice*, BENFERENCZ.ORG [hereinafter *Creative Approach to Law Practice*], <https://benferencz.org/stories/1956-1970/creative-approach-to-law-practice/> [<https://perma.cc/93UV-R7FX>] (last visited Sept. 23, 2024).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

become President Jimmy Carter's Secretary of Commerce.<sup>94</sup> His pitch was successful, and Klutznick authorized him to proceed.<sup>95</sup>

Thus, Ferencz filed a case with the relevant adjudicative body, the War Claims Commission, which was "very impressed by the creative legal arguments" and issued an award, which was subsequently affirmed and increased by the Foreign Claims Settlement Commission.<sup>96</sup> The final amount earmarked for B'nai B'rith was nearly \$1.5 million.<sup>97</sup>

### III. THE CURRENT FUSION MODEL AND ITS PROBLEMS

#### *A. Background: ICL's Original Focus on Perpetrators, Not Victims*

As Ben Ferencz's post-World War II trial experience demonstrates, victim participation and reparations were not focal points at Nuremberg or at the trial of the major Japanese war criminals before the International Military Tribunal for the Far East (IMTFE). According to Mahdev Mohan:

Neither [the IMT or IMTFE] tribunal provided protection, support, representation or participatory rights of any sort for victims. Victims were a peripheral concern as these trials were devoted to delivering retributive . . . justice . . . . It is telling that the Nuremberg tribunal's founding statute does not even mention the phrase "victim."<sup>98</sup>

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<sup>94</sup> Eric Pace, Obituary, *Philip M. Klutznick, 92, Builder and a Leader in Jewish Affairs*, N.Y. TIMES, Aug. 17, 1991, at C21.

<sup>95</sup> *Creative Approach to Law Practice*, *supra* note 91.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* Accessing the awarded funds turned out to be quite difficult because, as explained by Ferencz, "with the help of some astute Washington lobbyists, a preference had been written into the War Claims Law that would allocate all of the money to a few privileged corporate clients with very substantial awards." *Id.* So Ferencz created a coalition of religious groups that had also been dispossessed of property by the Nazis and, on their behalf, was able to lobby Congress to eliminate the corporate preference provision and thereby allow his religious organization clients, including B'nai B'rith, to gain access to the funds. *Id.*

<sup>98</sup> Mahdev Mohan, *The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal*, 9 INT'L CRIM. L. REV. 733, 742 n.42 (2009) [hereinafter *The Paradox*].

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ICL's post-Cold War revivification, with the creation and operation of the ad hoc tribunals for the former Yugoslavia (the ICTY) and Rwanda (the ICTR), did not lead to victims being treated differently.<sup>99</sup> Mohan notes that:

The ad hoc tribunals [failed to venture] outside the adversarial foundation of international criminal procedure that [emphasizes] conferring rights to defendants, not victims . . . . [T]he victim-witness, whose complaint [was] instrumental in initiating the case, play[ed] a limited role: she [could] only speak in court if called by the prosecution, and [could] only relay information to the judges within the questioning parameters laid down by counsel.<sup>100</sup>

Another ad hoc international accountability mechanism that was established not long after the ICTY and ICTR and whose statute was predominately based on theirs, the Special Court for Sierra Leone (SCSL) similarly marginalized victims in terms of participation and reparations.<sup>101</sup> As observed by Christine Evans, the “Special Court . . . interpreted its mandate as essentially retributive, [and] did not replicate the provisions relating to victims and reparations” in the International Criminal Court’s founding charter, known as the “Rome Statue” (for its being negotiated in the Italian capital city—it will be considered below).<sup>102</sup>

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<sup>99</sup> Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 4 DENV. J. INT’L L. & POL’Y 169, 179, 264-65 (2016).

<sup>100</sup> Mohan, *supra* note 98, at 741-42. One might wonder why the framers of the ad hoc tribunals for the former Yugoslavia and Rwanda did not take stock of the entire Holocaust justice program, so successfully modelled in the work of Ben Ferencz, and include a reparations component. It should be noted that, although the UN Security Council did not include this victim-oriented feature, the judicial branches of both the ICTY and ICTR, with the benefit of experience, would later ask the UN to include a reparations procedure. *See infra* notes 303-304 and accompanying text.

<sup>101</sup> *See* CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 164 (2012).

<sup>102</sup> *Id.* That said, it did have more ambitious victim-witness protection and community outreach programs. *See* David Tolbert, *SCSL Holds Valuable Lessons for International Justice*, INT’L CTR. FOR TRANSITIONAL JUST. (Nov. 4, 2012, 7:02 PM), <https://www.ictj.org/sites/default/files/subsites/scsl-legacy/ictj-scsl-holds-valuable-lessons-international-justice/index.html> [<https://perma.cc/ZKK4-HCVR>]

*B. A New Model: The UN's Basic Principles and The International Criminal Court*

In 2005, a hortatory normative revolution at the international level, which had been taking place among experts and governments in the background, became apparent with the issuance of the UN General Assembly's *Basic Principles on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Basic Principles).<sup>103</sup> This instrument encouraged expanded victim participation in international legal proceedings and enumerated crucial rights for them, including those of legal representation, receipt and examination of evidence, protective measures, and reparations.<sup>104</sup>

Via the leadership and encouragement of the French (discussed in greater detail below),<sup>105</sup> the architects of the ICC, mindful of the victim-exclusion problems over which global experts lamented and that were ultimately dealt with by Basic Principles, integrated victim participation and reparations provisions explicitly and generously into the Rome Statute.<sup>106</sup> In the Section that follows, the ICC victim framework, both in terms of legal rights and personnel deployed to effectuate those rights, will be laid out.

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(describing the superior community outreach and victim-witness protection features of the SCSL).

<sup>103</sup> G.A. Res. 60/147, annex, Basic Principles on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006).

<sup>104</sup> *Id.*; see also Mahdev Mohan, *Interpolative Statements of Suffering: Victim-Led Justice at the ECCC*, PANDORA'S BOX, 2017, at 41, 41-42 [hereinafter *Victim-Led Justice*].

<sup>105</sup> See *infra* notes 311-21 and accompanying text (describing France's key contributions); see also *International Criminal Court (ICC)*, MINISTRY FOR EUR. & FOREIGN AFFS., <https://www.diplomatie.gouv.fr/en/french-foreign-policy/international-justice/international-institutions/international-criminal-court-icc/> [https://perma.cc/6M4U-ZHJW] (Aug. 2023) (noting France's "important role" in "creating and implementing" the victim reparations framework).

<sup>106</sup> Christine Van den Wyngaert, *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 CASE W. RES. J. INT'L L. 475, 479 (2011); Rome Statute, *supra* note 6.



### C. The ICC Victim Framework

#### 1. Definition of ‘Victim’ and Legal Representation

According to the ICC Rules of Procedure and Evidence, a “victim” is a “natural person[]” who has “suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”<sup>107</sup> To present their views and concerns to the ICC, victims must submit to the Registrar a written application that is then forwarded to “the relevant Chamber.”<sup>108</sup> If the application is approved, victims may interact with the ICC only through a legal representative.<sup>109</sup>

When victim groups are large, the Chamber may request that they select a common legal representative.<sup>110</sup> This is what happened, for example, in the ICC’s first case to go to trial, *Prosecutor v. Lubanga*, where 146 authorized victims were represented by three different lawyer teams.<sup>111</sup> In *Prosecutor v. Katanga*, 366 victims divided into two groups were permitted to participate in the proceedings.<sup>112</sup> In the more recent case of *Prosecutor v. Ongwen*, 4,096 participating victims were separated into only two groups.<sup>113</sup>

If the victims are unable to select representatives, the Registrar may assign representatives on their behalf.<sup>114</sup> If victims are unable to afford such representation, they are eligible for Registrar-provided

<sup>107</sup> Int’l Crim. Ct., *Rules of Procedure and Evidence*, r. 85, U.N. Doc ICC-ASP/1/3 (2002) [hereinafter ICC RPE].

<sup>108</sup> *Id.* r. 89, ¶ 1.

<sup>109</sup> *Id.* r. 90, ¶ 1.

<sup>110</sup> *Id.* ¶ 2.

<sup>111</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision Establishing the Principles and Procedures to Be Applied to Reparations, ¶ 13 (Aug. 7, 2012), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012\\_07872.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07872.PDF) [<https://perma.cc/E2GA-P3X6>]. The three teams were the ICC Office of Public Counsel for Victims and two groups designated, respectively, as “V01” and “V02.” *Id.*; see also Allyson Reynolds, *Victims’ Participation in the ICC: Perspectives from a Global Justice Fellow*, PENN CAREY L. (June 28, 2018), <https://www.law.upenn.edu/live/blogs/14-victims-participation-in-the-icc-perspectives-from> [<https://perma.cc/FN68-K5RD>].

<sup>112</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Order on the Organisation of Common Legal Representation of Victims, ¶ 36 (July 22, 2009), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009\\_05319.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_05319.PDF) [<https://perma.cc/79NE-PA9X>].

<sup>113</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15, Reparations Order, ¶ 3 n.5 (Feb. 28, 2024) [hereinafter *Ongwen Reparations Order*], <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd18078e195.pdf> [<https://perma.cc/WT9Q-9WX6>].

<sup>114</sup> ICC RPE, *supra* note 107, r. 90, ¶ 3.

financial assistance.<sup>115</sup> Alternatively, they may take advantage of the pro bono lawyers provided by the Office of Public Counsel for Victims (OPCV).<sup>116</sup>

## 2. *The Stages of Victim Participation/Involvement*

### a. Preliminary Stage

Under the ICC's current procedural framework, victims play a central role at various points through the life of the case, a role that starts as early as the initiation of an investigation. Article 15 of the Rome Statute permits victims to express their views in writing to the Pre-Trial Chamber during the investigative stage.<sup>117</sup> In broader perspective, per Article 68(3), where the "personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court . . . ."<sup>118</sup> And ICC jurisprudence confirms that those views and concerns can be expressed as early as the investigation stage.<sup>119</sup>

### b. During the Proceedings

And victims continue to play an important role in the proceedings beyond this initial phase, as indicated by Article 68(3) of the Rome Statute, which allows them to express their views during the pre-trial and trial phases.<sup>120</sup> Their views may also factor into the later phases of the case, including when the Court is considering a guilty plea from the defendant.<sup>121</sup> Similarly, although not provided for explicitly in the

<sup>115</sup> *Id.* ¶ 5.

<sup>116</sup> *Victims*, INT'L CRIM. CT, <https://www.icc-cpi.int/about/victims> [<https://perma.cc/S77B-4XVV>] (last visited Sept. 23, 2024).

<sup>117</sup> Rome Statute, *supra* note 6, art. 15.

<sup>118</sup> *Id.* art. 68, ¶ 3.

<sup>119</sup> *See* Situation in the Democratic Republic of Congo, ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Jan. 17, 2006), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006\\_01689.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01689.PDF) [<https://perma.cc/FD5L-TCVT>].

<sup>120</sup> Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 697 (2007) [hereinafter *Due Process Aspirations*].

<sup>121</sup> Rome Statute, *supra* note 6, art. 65, ¶ 4; *see also* *Due Process Aspirations*, *supra* note 120.

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Rome Statute, the ICC grants victims the right to participate in sentencing of the accused.<sup>122</sup>

c. Post-Conviction/Sentencing: Reparations

Further, the ICC gives victims a key role in post-conviction/sentencing. In particular, Article 75 of the Statute provides for victim reparations “including restitution, compensation and rehabilitation.”<sup>123</sup> This could be via an order “directly against a convicted person” or “through the Trust Fund provided for in article 79.”<sup>124</sup>

Article 79 stipulates the creation of a trust fund “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.”<sup>125</sup> Soon after the Rome Statute’s 2002 effective date (i.e., post-sixty ratifications), the ICC’s Assembly of States Parties (ASP) adopted a resolution establishing the “Trust Fund for Victims.”<sup>126</sup> A 2005 ASP resolution then laid out the “Fund’s Regulations,” pursuant to which the entity is managed by a Board of Directors whose members participate in their individual capacity and serve on a pro bono basis.<sup>127</sup>

In the main, the Fund is financed through voluntary contributions by states and non-state entities, but does not accept donations that “create [a] manifestly inequitable distribution of available funds and property among the different groups of victims.”<sup>128</sup> Apart from voluntary contributions, the trust fund may be replenished by money and other property collected through fines or forfeiture transferred to the Fund if ordered by the Court pursuant to Article 79(2) of the Rome

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<sup>122</sup> ICC RPE, *supra* note 107, r. 143; *see also* Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT’L L. 93, 110 (2009).

<sup>123</sup> Rome Statute, *supra* note 6, art. 75, ¶ 1.

<sup>124</sup> *Id.* ¶ 2.

<sup>125</sup> *Id.* art. 79, ¶ 1.

<sup>126</sup> Int’l Crim. Ct., *Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such Victims*, ¶ 1, ICC-ASP/1/Res.6 (Sept. 9, 2002) [hereinafter *Establishment of a Fund for the Benefit of Victims*].

<sup>127</sup> Int’l Crim. Ct., *Regulations of the Trust Fund for Victims, Annex*, ¶ 16, ICC-ASP/4/Res.3 (Dec. 3, 2005).

<sup>128</sup> *Id.* ¶ 10; TFV Regulations, *supra* note 6, Regul. 30, ¶ d.

Statute.<sup>129</sup> It can also be subsidized via “[r]esources collected through awards for reparation if ordered by the Court . . . .”<sup>130</sup>

### 3. *Victim Support Via Institutional Human Resources*

To effectuate victim participation through each stage of the process, the ICC has embedded personnel within various sectors of the framework. Apart from those Court organs already alluded to—i.e., the Registry, the OTP, and the Chambers—other offices are dedicated to helping victims through various phases of the process. While there has been reference to the OPCV and the TFV, additional services are provided by the Victims Participation and Reparations Section (VPRS), which acts as a liaison between victims and the court by administering the application process for victims to participate in proceedings.<sup>131</sup>

The VPRS also assists victims “in organizing their legal representation before the court, which includes referring victims to the list of counsel in order to make a selection.”<sup>132</sup> In addition, the VPRS is responsible for “fulfilling the Registry’s obligations to facilitate the participation of victims,” such as alerting victims regarding Court decisions that potentially impact their interests or taking gender-sensitive measures to enable participation of sexual violence victims throughout the proceedings.<sup>133</sup>

Elaboration on the work of the TFV would also be helpful here. The Trust Fund has a dual mandate: (1) even before the commencement of ICC proceedings, to deliver general assistance to victims; and (2) to enforce ICC reparations orders.<sup>134</sup> With regard to

<sup>129</sup> Rome Statute, *supra* note 6, art. 79, ¶ 2.

<sup>130</sup> *Establishment of a Fund for the Benefit of Victims*, *supra* note 126, ¶ 21(b)–(c). It should be added that, in a conditional manner, victims are permitted to present their views at hearings on applications of convicted defendants for early release. ICC RPE, *supra* note 107, r. 224. Per RPE Rule 224, a three-judge panel may, “to the extent possible, invite the victims or their legal representatives who participated in the proceedings, to participate in the hearing [on the application] or to submit written observations.” *Id.*

<sup>131</sup> HUM. RTS. WATCH, *COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT’S FIRST YEARS* 179 (2008), <https://www.hrw.org/report/2008/07/11/courting-history/landmark-international-criminal-courts-first-years> [<https://perma.cc/7YT7-Q4C8>].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Rome Statute, *supra* note 6, arts. 79–80; *see also* Dutton & Ni Aoláin, *supra* note 2.

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the former function, Regulation 50 of the TFV Regulations provides that the assistance mission includes psychological and physical rehabilitation as well as “material” support.<sup>135</sup> Material support can include economic assistance, such as job training and establishment of Village Savings and Loan Associations.<sup>136</sup> Reparations can be symbolic (apologies, memorials, commemorations), individual (primarily financial compensation or services, such as for medical rehabilitation) or collective (establishing an “economic resilience facility” or restoring cultural and religious relics, both of these were implicated in the *Prosecutor v. Al Mahdi* case, which involved the defendant destroying religious shrines in Timbuktu, Mali).<sup>137</sup>

#### *D. Problems with the Current Framework*

##### *1. Overview*

As we have seen, the TFV has been inserted into the ICC victim framework to help with two key phases of proceedings—investigation-adjudication (i.e., restoration via the assistance mandate)<sup>138</sup> and reparations (i.e., compensation via the reparations mandate).<sup>139</sup> As the next Section will demonstrate, it has not been equal to the task with respect to either phase. First, the TFV is largely stymied by resource deprivation. The current ICC structural/regulatory framework marginalizes the TFV’s access to needed funding. In particular, it has to rely primarily on voluntary contributions from ICC member states, which function based on the altruistic whims of national fiscs and fail to satisfy the TFV’s needs in respect of both the reparation and investigation.

Part of the problem also lies in the TFV’s awkward placement within the institutional confines of the ICC, where it is a restorative-focused outlier in an essentially retributive-focused mechanism. This hinders the TFV’s mission of providing effective, holistic care to

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<sup>135</sup> TFV Regulations, *supra* note 6, Regul. 50(a)(i).

<sup>136</sup> Dutton & Ni Aoláin, *supra* note 2, at 503.

<sup>137</sup> *Id.*; see also *Ahmad Al Faqi Al Mahdi Case: Collective Reparations Launched*, DIPLOMAT MAG. (July 12, 2022), <https://diplomatmagazine.eu/2022/07/12/ahmad-al-faqi-al-mahdi-case-collective-reparations-launched/> [https://perma.cc/4MY2-S33U].

<sup>138</sup> See *supra* notes 135 and 136 and accompanying text.

<sup>139</sup> See *supra* note 137 and accompanying text.

victim communities in atrocity zones where the ICC is otherwise attempting to collect evidence to support possible criminal charges.

## 2. *Funding Deficits*

Indicating its mission importance but budgetary marginalization, Eric Wiebelhaus-Brahm and Kirsten Ainley have explained that the TFV is responsible for “50 percent of the ICC’s impact but only 2 percent of its budget.”<sup>140</sup> As a result, the TFV is experiencing “[s]ignificant shortfalls” that have stymied its reparative justice mission.<sup>141</sup> In numerical terms, the TFV’s approximate annual funding needs (for both reparations and assistance program costs) amount to roughly €10 million. Since 2004, however, when TFV began its operations, through 2018, voluntary contributions, which should have amounted to €140 million, added up to an anemic €33.3 million.<sup>142</sup> In 2020, the TFV took in only €2,788,796 from States Parties and €14,526 from private donors.<sup>143</sup> Even after the full-scale invasion of Ukraine in 2022, the TFV’s 2023 voluntary contributions added up to only €5.3 million in 2023 (the most it has ever received in one year).<sup>144</sup> This is well short of the aforementioned €10 million per year needed to satisfy TFV funding needs, assuming that this amount has not gone

<sup>140</sup> Wiebelhaus-Brahm & Ainley, *supra* note 4, at 41 (quoting Janet Anderson & Stephanie van den Berg, *ICC Trust Fund: The Black Hole*, JUST. INFO (Dec. 9, 2020), <https://www.justiceinfo.net/en/46199-icc-trust-fund-black-hole.html> [<https://perma.cc/WX7N-XMDK>]). Wiebelhaus-Brahm and Ainley also back up this observation with data of the former TFV Executive Director Pieter de Baan. *Id.*; see also Anderson & van den Berg, *supra*.

<sup>141</sup> David Scheffer, *The Rising Challenge of Funding Victims’ Needs at the International Criminal Court*, JUST SEC. (Dec. 3, 2018), <https://www.justsecurity.org/61701/rising-challenge-funding-victims-international-criminal-court/> [<https://perma.cc/D53P-8A3Y>].

<sup>142</sup> *Id.*; see also Regina E. Rauxloh, *Good Intentions and Bad Consequences: The General Assistance Mandate of the Trust Fund for Victims of the ICC*, 34 LEIDEN J. INT’L L. 203, 209-10 (2021) (also examining the fundraising failures of the TFV via voluntary donations).

<sup>143</sup> *Our Donors*, TR. FUND FOR VICTIMS, <https://www.trustfundforvictims.org/en/about/our-donors> [<https://perma.cc/BZZ4-48BC>] (last visited Sept. 25, 2024).

<sup>144</sup> Press Release, Int’l Crim. Ct., Bulgaria Makes Voluntary Contribution to the Trust Fund for Victims at the ICC to Support Victims in Georgia (June 7, 2024), [www.icc-cpi.int/news/bulgaria-makes-voluntary-contribution-trust-fund-victims-icc-support-victims-georgia#:~:text=The%20Trust%20Fund%20for%20Victims%20\(TFV\)%20at%20the%20International%20Criminal,in%20the%20situation%20in%20Georgia](http://www.icc-cpi.int/news/bulgaria-makes-voluntary-contribution-trust-fund-victims-icc-support-victims-georgia#:~:text=The%20Trust%20Fund%20for%20Victims%20(TFV)%20at%20the%20International%20Criminal,in%20the%20situation%20in%20Georgia) [<https://perma.cc/6P53-GNYH>].

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up with the ICC's increased case load over the past few years, including ramped up investigations into the situations in Ukraine, Georgia and Palestine.<sup>145</sup>

Taking cognizance of this predicament, the former U.S. Ambassador-at-Large for War Crimes Issues, David Scheffer, has indicated that "surviving victims unjustifiably suffer" and that the "credibility of the ICC [has been] undermined, perhaps fatally."<sup>146</sup> Significantly, as pointed out by Wiebelhaus-Brahm and Ainley in light of the ICC's Independent Expert Review (IER), the TFV's reputational damage is largely due to its "absence of a fundraising strategy" and resulting "under-implementation rate of the TFV on budget."<sup>147</sup>

And this has been disastrous for the TFV's reparations mandate. In particular, these budgetary deficits have compromised implementation of "reparations awards in the *Lubanga* [case] [against Thomas Dyilo Lubanga, convicted in 2012 of recruiting/using child soldiers in DR Congo, for €9.2 million] [and the] *Al Mahdi* case[] [against Ahmad Al Faqi Al Mahdi, convicted in 2016 for directing attacks against religious and historic buildings in Timbuktu, Mali, for €2.7 million] . . . ."<sup>148</sup>

And, recently, the demands have become even more onerous. To put it into perspective, in 2024, the ICC confirmed on appeal a €27.5 million reparations award in *Prosecutor v. Ntaganda*, which stemmed from Bosco Ntaganda's 2019 war crimes/crimes against humanity conviction for atrocities committed in the Democratic Republic of the

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<sup>145</sup> See *Speakers Urge More Resources for International Criminal Court, Victims' Trust Fund, as President Briefs General Assembly on Record High Caseload, Ongoing Trials*, UNITED NATIONS (Oct. 31, 2022), <https://press.un.org/en/2022/ga12462.doc.htm> [<https://perma.cc/M2F2-DU3Z>].

<sup>146</sup> Scheffer, *supra* note 141; see also Lucy Gaynor, *The Wild Reparations Order of the ICC*, JUST. INFO (Feb. 29, 2024), <https://www.justiceinfo.net/en/128948-wild-reparations-order-icc.html> [<https://perma.cc/ZJ5T-WYPA>].

<sup>147</sup> See Wiebelhaus-Brahm & Ainley, *supra* note 4, at 42 (quoting INT'L CRIM. CT., INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM: FINAL REPORT 292, 308 (2020) [hereinafter INDEPENDENT EXPERT REVIEW], [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf) [<https://perma.cc/VHT3-4HXR>]).

<sup>148</sup> INDEPENDENT EXPERT REVIEW, *supra* note 147, at 291; Press Release, Int'l Crim. Ct., *Al Mahdi Case: ICC Trial Chamber VIII Issues Reparations Order* (Aug. 17, 2017), <https://www.icc-cpi.int/news/al-mahdi-case-icc-trial-chamber-viii-issues-reparations-order> [<https://perma.cc/VHT3-4HXR>].

Congo.<sup>149</sup> And 2025's *Prosecutor v. Ongwen* Reparations Order (in the wake of the 2021 conviction for crimes against humanity and war crimes of Lord's Resistance Army commander Daniel Ongwen) saddled the TFV with an additional €52.4 million obligation for ministering to the needs of more than 40,000 victims in Uganda (this being the ICC's largest reparations award ever).<sup>150</sup> This has caused the TFV to launch to potential donors an "urgent appeal of EUR 5 million [that] seeks to address the victims' urgent needs and vulnerability . . . ." <sup>151</sup> If, to date, the most the TFV has received *per year* for *all its situations* is €5.3 million in 2023, how can it expect to draw that much for one case alone in any single given year?

And even if it could, that would only represent less than a tenth of the *Ongwen* reparations award alone, not to mention the others that have not been fulfilled to date, namely those in *Ntaganda*, *Lubanga* and *Al Mahdi*.<sup>152</sup> As a result, the IER has found that, within the current framework, the TFV has "not delivered fair, adequate, effective and prompt reparations to victims of crimes under the jurisdiction of the Court."<sup>153</sup>

These financial problems have had an adverse impact not only on the TFV's reparations mandate but also on its assistance mandate. And that TFV function has been especially needed, yet unavailable, during the investigative phase of cases. Why? Badly traumatized victims who will likely have frequent contact with representatives of the Office of the Prosecutor (OTP) during that early juncture, soon after

<sup>149</sup> Gaynor, *supra* note 146.

<sup>150</sup> Ongwen Reparations Order, *supra* note 113, ¶ 796; Press Release, Int'l Crim. Ct., ICC Trust Fund For Victims Issues Its First Urgent Funding Appeal of EUR 5 Million To Launch a Reparation Programme For Victims of Dominic Ongwen, (June 27, 2024) [hereinafter Urgent Funding Appeal], <https://www.icc-cpi.int/news/icc-trust-fund-victims-issues-its-first-urgent-funding-appeal-eur-5-million-launch-reparation> [<https://perma.cc/U5XR-YXQN>].

<sup>151</sup> Urgent Funding Appeal, *supra* note 150.

<sup>152</sup> It should be noted that one ICC reparations order, a relatively small one in the case of *Prosecutor v. Katanga*, has been fulfilled. See Press Release, Int'l Crim. Ct., Symbolic Ceremony Marks End of ICC-Ordered Reparations for Victims in the Case of The Prosecutor v. Germain Katanga in the Democratic Republic of Congo (Apr. 24, 2024), <https://www.icc-cpi.int/news/symbolic-ceremony-marks-end-icc-ordered-reparations-victims-case-prosecutor-v-germain-katanga> [<https://perma.cc/Q57K-6VDD>]. The approximately €900,000 reparation amount had been collected and distributed by the TFV to 297 identified victims (a symbolic compensation award of roughly €225 to each individual) and to satisfy four collective awards to all victims, in the form of (1) housing assistance, (2) education assistance, (3) income generating activities, and (4) psychological rehabilitation.

<sup>153</sup> INDEPENDENT EXPERT REVIEW, *supra* note 147, at 290-91.



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experiencing an atrocity, will likely seek physical and psychological assistance from the ICC.

But OTP investigators are unlikely to provide this for three reasons. First, the scope of these investigations is massive and ICC sleuths on the ground often lack sufficient manpower, resources, and training to minister to victims' physical and psychological needs.<sup>154</sup> Regarding the manpower shortage, Stuart Ford observes:

[T]he ICC does not have sufficient investigative resources. It has significantly fewer resources than states think is appropriate when investigating similar atrocity crimes committed on their own territory. Second, this lack of resources has contributed to the ICC's relative lack of success so far. The ICC's investigations have been too "thin" and several prosecutions have collapsed or been compromised as a result.<sup>155</sup>

After Ford's analysis, the drain on resources intensified even more once the ICC launched its post-Russian-invasion investigation in 2022.<sup>156</sup> Moreover, even were it not so resource deprived, the ICC does not provide sufficient training for investigators to provide such physical and mental assistance to victims.<sup>157</sup>

### 3. *Retributive-Reparative Incompatibility*

But even if OTP investigators were sufficiently resourced and trained, their provision of physical and psychological assistance to victims during the initial phases of the case would still not likely be forthcoming. This is because the ICC is a retributive-focused mechanism that tries to accommodate the reparative mission strands

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<sup>154</sup> Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOBAL STUD. L. REV. 1, 4 (2017) (footnote omitted).

<sup>155</sup> *Id.*

<sup>156</sup> ICC: *International Civil Society Calls for More Resources for Ukraine Investigation*, INT'L P'SHIP FOR HUM. RTS. (Mar. 3, 2022) [hereinafter *Ukraine Investigation*], <https://iphonline.org/articles/icc-civil-society-ukraine-appeal/> [<https://perma.cc/VYK7-B8MV>] (noting that "the investigation needs money and experts").

<sup>157</sup> *Lex Lata*, *supra* note 8, at 26 (noting that OTP investigators do not look after victim welfare in a dedicated fashion during the investigative phase).

within its DNA but seems to do so only gesturally/symbolically. This is evidenced via four separate phenomena connected to the investigative phase: (1) the “legalism” problem; (2) the “winnowing” problem; (3) the “mission dissonance” problem; and (4) the “defendant acquittal” problem. Each of these shall now be treated in turn.

a. The “Legalism” Problem

The first of these owes to what expert Stephen Cody refers to as the OTP’s culture of “legalism” in dealing with victims.<sup>158</sup> Instead of prioritizing victims’ extra-judicial needs when carrying out atrocity inquiries, myopic OTP investigators are more concerned with “formality, bureaucratic authority, and objective rationality.”<sup>159</sup> Consequently, “traumatized victims could be subject to relatively aggressive interrogation by (or under the auspices of) the OTP during the investigative phase without sufficient concern for procedures/protocols that take their special needs into account (e.g., psychiatric considerations, medical needs).”<sup>160</sup> This can lead to what is known as “secondary victimization.”<sup>161</sup>

b. The “Procedural Winnowing” Problem

Second, compounding the “legalism” problem is that ICC procedural realities impose structural resource constraints during the investigative phase. This is known as the “procedural winnowing” phenomenon. More specifically, as a matter moves from the “situation” stage to the “case” stage (i.e., specific incidents/suspects have been identified and/or arrest warrants have been issued), “[o]nly victims of the Prosecutor’s specific charges (specific acts at specific times and at a specific location)” can take advantage of being treated as a “victim” within the OTP/Court’s processing of the case.<sup>162</sup>

Illustrative of this is the ICC’s Kenya matter, whose gravamen was atrocities committed against civilians during the country’s 2007-

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<sup>158</sup> Stephen Cody, *Victims and Prosecutors: Clientelism, Legalism, and Culture at the International Criminal Court*, 53 CORNELL INT’L L.J. 339, 364-65 (2020) (footnote omitted).

<sup>159</sup> *Id.* at 364.

<sup>160</sup> *Lex Lata*, *supra* note 8, at 271.

<sup>161</sup> Van den Wyngaert, *supra* note 106, at 477.

<sup>162</sup> Forero, Karlsson & Rudi, *supra* note 3, at 215.

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2008 post-election violence.<sup>163</sup> As part of the proceeding's initial phase, 560 victims were accredited as participants. But many of them were subsequently disqualified as the ICC transitioned beyond the investigative phase and the scope of incidents/suspects was whittled down.<sup>164</sup> Thus, as observed by María Juliana Machado Forero, Sandra Karlsson and Lisa-Marie Rudi, the ICC not confirming charges against the Commissioner of Police "meant that all victims of police violence lost their judicial status as victims in the case" and "felt that the harm against them was being ignored or denied by the ICC . . . ."<sup>165</sup> Per Forero, Karlsson and Rudi, this evidences "the Court's practice of dividing victims into two groups that is not clearly mandated by the Rome Statute or clearly explained by the Chamber, [which] creates a division that can appear arbitrary to the victims and creates all kinds of difficulties in the field."<sup>166</sup> Of course, one of those difficulties can be a failure to cater to victims' physical and psychological needs on the ground.

### c. The "Mission Dissonance" Problem

Forero, Karlsson and Rudi suggest that TFV personnel should fill this gap.<sup>167</sup> This would be particularly valuable when investigators carry out large-scale labor/resource-intensive inquiries, such as when a widespread area or population is affected or there has been extensive cover-up by the perpetrators.<sup>168</sup> In such scenarios, while ministering to survivors' needs the best they can when facing such logistical challenges, coordinating with the TFV personnel onsite would permit OTP investigators to consecrate the necessary time and resources to investigating while the TFV and its partners assists victims.<sup>169</sup>

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<sup>163</sup> See *Kenya*, INT'L CRIM. CT., <https://www.icc-cpi.int/kenya> [<https://perma.cc/7ZWA-JSBU>]. (last visited Apr. 22, 2024).

<sup>164</sup> Forero, Karlsson & Rudi, *supra* note 3, at 217.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 218.

<sup>167</sup> *Id.* at 227 (noting that, in light of what is often the ICC's current failures to minister to victim needs, the TFV should be the organ to fill the gap and provide "post-conflict . . . mending to all affected [victim] communities").

<sup>168</sup> This would be the case, for example, with regard to the investigation related to the February 2022 Russian full-scale invasion of Ukraine. See, e.g., *Ukraine Investigation*, *supra* note 156.

<sup>169</sup> The TFV's labor/resources in its assistance mission are largely deployed via NGO partners on the ground. See Rauxloh, *supra* note 142, at 206 (noting that the TFV "funds individual programmes that are run by intermediaries, in most cases NGOs").

However, what prevents the TFV from doing this is not only related to funding deficits<sup>170</sup>; it is also due to internal retributive versus reparative mission dissonance that creates institutional dysfunction by marginalizing the TFV and thereby thwarting its aims. Particularly, there is an arguable incompatibility between the punitive and restorative aims of the OTP and the TFV when working together in atrocity crucibles as “implementing rehabilitative programs within the strictures of a system that at its core is a criminal legal system is a challenge.”<sup>171</sup> For example, when the TFV enters into an agreement with local partners for provision of services, the ICC’s Procurement Review Committee (PRC) needs to give the final approval. However, “the PRC is staffed by ICC employees who often have no experience with rehabilitative program design.”<sup>172</sup>

In the end, starved of resources and hindered in its reparative mission by an internally prevailing retributive culture, the TFV’s impact on the ground in ICC atrocity hot spots is fatally minimized or altogether absent. Per Dutton and Aoláin, Trust Fund staff are so marginalized during the investigative stage that they are reduced to advocating “for [the Fund’s] role in the ICC.”<sup>173</sup> Thus, for example, traumatized victims could be subject to relatively aggressive interrogation by (or under the auspices of) the OTP during the investigative phase without sufficient concern for procedures that take their special needs into account (e.g., psychiatric considerations and medical needs).

And this is manifested on the ground. In Georgia, for example, where an ICC probe began in 2016 regarding alleged Russian-sponsored ethnic cleansing during armed conflict in the South Ossetia region, formal receipt of applications for soliciting victim views/concerns/needs has largely been perceived as an empty gesture. NGOs representing victims have complained about a “non victim-oriented approach.”<sup>174</sup> Per Nino Jomarjidge of the Georgian Young Lawyers Association, Gyla, which accounts for 300 of the 5,782

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<sup>170</sup> *Id.*

<sup>171</sup> Dutton & Ni Aoláin, *supra* note 2, at 537.

<sup>172</sup> *Id.* at 537-38 (footnote omitted).

<sup>173</sup> *Id.* at 538. And the VPRS has very limited resources to deal with victims during the investigative phase. See Telephone Interview with Phillip Ambach, Chief of the Victims Participation and Reparations Section (VPRS) (June 14, 2022).

<sup>174</sup> Franck Petit, *ICC Victims Fund: Waiting for Godot in Georgia*, JUST. INFO (Jan. 28, 2021), <https://www.justiceinfo.net/en/68922-icc-victims-fund-waiting-for-godot-in-georgia.html> [<https://perma.cc/3S34-Q7R7>].

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victims officially “participating” in the case: “When we started to work actively with the ICC, our hope vanished. Every response from them was like ‘it’s confidential’ or ‘we can do it without you.’ It took us five years, but the trust of victims and civil society disappeared.”<sup>175</sup> Thus, Georgian human rights activist Nika Jeiranashvili concludes that there is a disconnect between the “ICC investigation” and the “victim assistance mandate.”<sup>176</sup>

#### d. The “Defendant Acquittal” Problem

Given the incompatibility between punitive and restorative aims at the ICC, those designated as victims by the Court have been disillusioned in yet another important way—a defendant’s acquittal, which strips anticipated reparations even from those who have survived procedural winnowing. This is what happened in the case of *Prosecutor v. Ngudjolo Chui*, where the defendant was charged with war crimes and crimes against humanity in the context of a brutal 1999-2003 armed conflict in the Ituri province of eastern Democratic Republic of the Congo between the Lendu, Ngiti, and Hema ethnic groups.<sup>177</sup> On February 24, 2003, the Force de résistance patriotique d’Ituri (FRPI) and the Front des Nationalistes et Intégrationnistes (FNI) militias, consisting of Ngiti and Lendu rebels respectively, launched a reprisal operation against Hema civilians in the strategically-situated village of Bogoro, then under Hema control.<sup>178</sup> Ngudjolo Chui led the FNI in the attack, which involved the murders of hundreds of innocent civilians, pillaging, destruction of civilian property, use of child soldiers, and sexual crimes (women and girls were abducted to serve as “wives” for combatants).<sup>179</sup>

The ICC issued a warrant for Ngudjolo Chui’s arrest in 2007, took custody of him in 2008, and put him on trial starting in November

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *Germain Katanga*, COAL. FOR THE INT’L CRIM. CT., <https://www.coalitionfortheicc.org/cases/germain-katanga> [https://perma.cc/3WZT-BFTW] (last visited Oct. 8, 2024). It should be noted that, initially, Germain Katanga, leader of the FRPI rebel group, was put on trial with Ngudjolo Chui for crimes arising from the same attack on Bogoro but their cases were severed in November 2012. Nearly two years later in March 2014, in his separate trial, Katanga was found guilty of war crimes and crimes against humanity and sentenced to twelve years of imprisonment.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

2009. In December 2012, he was controversially acquitted because the Trial Chamber could not find beyond a reasonable doubt that the defendant was “the leader of the Lendu combatants who participated in the attack on Bogoro.”<sup>180</sup> However, it implicitly acknowledged that the crimes occurred and that there were survivors waiting for justice.<sup>181</sup> In the wake of the acquittal, Amnesty International rued the absence of reparations for survivors of the attack, who had been waiting for justice for nearly a decade.<sup>182</sup> ICC Prosecutor Fatou Bensouda “emphasized the lasting harm suffered by [them], particularly the victims of sexual violence who suffered from stigmatization and rejection by their families and communities following their rape and sexual enslavement.”<sup>183</sup>

The situation is even worse for victims in cases that result in a conviction at trial but are followed by an acquittal on appeal. That is the scenario that played out in the case of *Prosecutor v. Bemba*. Defendant Jean-Pierre Bemba, a former Vice President of the Democratic Republic of the Congo as well as the President and Commander-in-Chief of the Mouvement de libération du Congo (MLC) militia, was charged with two counts of crimes against humanity (murder and rape) and five counts of war crimes (murder, rape, and pillaging) premised on command responsibility.<sup>184</sup> In March 2016, the Trial Chamber convicted him unanimously of all charges

<sup>180</sup> *Prosecutor v. Ngudjolo*, ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute, ¶ 110 (Dec. 18, 2012), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013\\_02993.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_02993.PDF) [<https://perma.cc/9X6K-H2J3>]. The acquittal was upheld on appeal. *Prosecutor v. Chui*, ICC-01/04-02/12 A, Judgment on the Prosecutor’s Appeal, ¶ 117 (Apr. 7, 2015), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015\\_03782.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_03782.PDF) [<https://perma.cc/JRH5-XWYX>].

<sup>181</sup> *Ngudjolo*, ICC-01/04-02/12, ¶ 314 (alluding to the findings of the Pre-Trial Chamber in its decision confirming the charges).

<sup>182</sup> *ICC Acquits Congolese Armed Group Leader*, AMNESTY INT’L (Dec. 19, 2012), <https://www.amnesty.org/ar/wp-content/uploads/2021/06/afr620172012en.pdf> [<https://perma.cc/ZUG6-N66A>].

<sup>183</sup> Jelja Sane, *Mathieu Ngudjolo Chui: Reflections on the ICC’s First Acquittal*, OPINIO JURIS (Dec. 24, 2012), <http://opiniojuris.org/2012/12/24/mathieu-ngudjolo-chui-reflections-on-the-iccs-first-acquittal/> [<https://perma.cc/LMX3-NE4Z>] (describing the acquittal as a “shock and disappointment” leaving victims of the Bogoro massacre without justice).

<sup>184</sup> *Case Information Sheet: The Prosecutor v. Jean-Pierre Bemba Gombo*, INT’L CRIM. CT. (Mar. 2019), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf> [<https://perma.cc/X7HE-GMX2>].

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based on evidence that, from 2002-2003, his troops committed mass atrocities in military operations in the Central African Republic (CAR).<sup>185</sup>

However, pursuant to a 3-2 decision, his convictions were overturned on appeal, with the majority of the reviewing panel finding “serious errors” in the lower chamber’s finding that Bemba did not take necessary measures to prevent, repress, or punish the commission of crimes by his subordinates.<sup>186</sup> The three appellate judges also noted the trial chamber’s failure “to properly appreciate the limitations” Bemba faced in investigating and prosecuting crimes as a “remote commander” of troops stationed in a foreign country (as Bemba was in the Democratic Republic of the Congo and his subordinates in CAR).<sup>187</sup>

The acquittal, which highlighted the tensions between retributive and reparative justice operating under the same institutional tent, extinguished the opportunity for victims to obtain reparations. Human Rights Watch lamented the Court’s failure to provide “justice for victims [of MLC abuse who] . . . are left without meaningful redress.”<sup>188</sup> The International Federation for Human Rights described victims as being: “‘Enraged,’ ‘shocked,’ ‘sad,’ ‘abandoned by the ICC,’ ‘disappointed with international justice and the satisfaction we expected.’”<sup>189</sup> In the poignant words of one victim: “After having

<sup>185</sup> Prosecutor v. Bemba, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (Mar. 21, 2016), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016\\_02238.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF) [<https://perma.cc/6445-WWM8>].

<sup>186</sup> Prosecutor v. Bemba, ICC-01/05-01/08 A, Judgement on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III’s “Judgement Pursuant to Article 74 of the Statute,” ¶ 166 (June 8, 2018), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018\\_02984.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF) [<https://perma.cc/G9SJ-AFUV>].

<sup>187</sup> *Id.* ¶ 189. This judgment has been criticized on the grounds that the three-judge majority: “(i) chose not to follow settled precedent regarding its appellate standard of review; (ii) imposed new requirements on prosecutors during the pre-trial stages of a case; and (iii) applied a different interpretation of the command responsibility doctrine than what had been used by the Trial Chamber.” See Sarah Hibbert, Note & Case Comment, *The Bemba Acquittal: A Blow to the ICC’s Legitimacy in a Time of Crisis*, 34 TEMP. INT’L & COMPAR. L.J. 95, 97 (2019).

<sup>188</sup> Elise Keppler, *No Redress for Central African Victims*, HUM. RTS. WATCH (June 11, 2018, 9:20 AM), <https://www.hrw.org/news/2018/06/11/no-redress-central-african-victims> [<https://perma.cc/GW53-4LSM>].

<sup>189</sup> Press Release, Int’l Fed’n for Hum. Rts., *The Bemba Case: Heavily Criticised, the ICC Must Maintain Victims’ Legal Representation as the Establishment of Assistance Programmes for Victims Is Awaited* (Oct. 1, 2018), <https://www.fidh.org/en/region/Africa/central-african-republic/the-bemba-case->

testified, participated, and attended many meetings, everything stopped, no one came to see us. What hurts the most, is, that in the eyes of the world, we don't exist anymore."<sup>190</sup>

#### IV. PROPOSED SOLUTION: SEPARATION AND HARMONIZATION

It would now behoove us to recall that the current TFV-ICC (i.e., reparation-retribution) "fusion model" is not the only one ICL has employed in its relatively young history. In fact, it is submitted that Ben Ferencz's "separation model," which took shape as part of his pioneering work as an investigator, prosecutor and reparations lawyer on Holocaust cases, deserves consideration as a more effective template that could bring about needed reforms in the current system. So how would it work, and would it be feasible? To find answers to these questions, three main analytical-logistical considerations must be explored: (1) the conceptual and operational aspects of effectuating the reparations separation; (2) the strategies and mechanics of financing the new reparations model; and (3) the potential advantages and disadvantages of this proposal. Let us now examine each of these in turn.

##### *A. Effectuating the Reparations Separation: Conceptual and Logistical Aspects*

The first major consideration would be the conceptual and logistical aspects of separating the TFV from the ICC. Exploring the origins of the TFV, which might superficially suggest deep

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heavily-criticised-the-icc-must-maintain-victims-legal [<https://perma.cc/X3Z6-5K54>].

<sup>190</sup> *Id.* This is true as well for the 727 ICC-designated victims who were denied reparations based on prosecutors failing to secure convictions at trial against former Côte d'Ivoire President Laurent Gbagbo and Charles Blé Goudé, leader of Gbagbo's party's youth militia. See Luke Moffett, *Why Gbagbo Acquittal is a Bigger Blow for the ICC than the Bemba Decision*, QUEEN'S UNIV. BELFAST: REPARATIONS, RESP. & VICTIMHOOD IN TRANSITIONAL SOC'YS (Jan. 15, 2019), <https://reparations.qub.ac.uk/why-gbagbo-acquittal-is-a-bigger-blow-for-the-icc-than-the-bemba-decision> [<https://perma.cc/9GW8-JHZF>]. Each defendant faced four charges of crimes against humanity, with enumerated offenses of murder, rape, inhumane acts and persecution of opponents between December 2010 and April 2011, in the aftermath of Côte d'Ivoire's violently disputed presidential election. 3,000 people died in the upheaval. Moffett calls the acquittal a "blow for victims." *Id.* Also, given that the TFV can only provide reparations if the ICC secures convictions, he concludes that this is evidence of the current restorative scheme having yet again "faltered and failed to deliver redress to victims." *Id.*



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institutional links to the ICC from a legislative history perspective, instead reveals a foundationally weak connection. Thus, separation is not as radical of a proposal as it might seem at first blush.

*1. Background: The TFV and Its Legislative History*

a. The TFV's Current ICC-Dominated and More Limited Textual Scope

A surface glance at the TFV's origins suggests a straightforward structural embedding within the ICC. Article 79 of the Rome Statute provides:

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.<sup>191</sup>

RPE Rule 98 then provides limited details on the mechanics of the TFV's reparations and assistance mandates, stipulating that reparations awards be deposited with and disbursed by the TFV (reparations mandate) and that other "resources of the Trust Fund may be used for the benefit of victims" (assistance mandate).<sup>192</sup> Three key ASP resolutions then established and fleshed out the TFV: (1) ICC-ASP/1/Res.6 (2002), creating the TFV<sup>193</sup>; (2) ICC-ASP/3/Res.7 (2004), establishing the TFV Secretariat<sup>194</sup>; and (3) ICC-ASP/4/Res.3

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<sup>191</sup> Rome Statute, *supra* note 6, art. 79.

<sup>192</sup> ICC RPE, *supra* note 107, r. 98.

<sup>193</sup> *Establishment of a Fund for the Benefit of Victims*, *supra* note 126.

<sup>194</sup> Int'l Crim. Ct., *Establishment of the Secretariat of the Trust Fund for Victims*, ICC-ASP/3/Res.7 (Sept. 10, 2004), [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/Resolutions/ICC-ASP-ASP3-Res-07-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ICC-ASP-ASP3-Res-07-ENG.pdf) [<https://perma.cc/7787-A4LP>].

(2005), adopting the TFV Regulations, which are contained in an attached annex.<sup>195</sup>

b. Digging Deeper: A Legislative History Contemplating Greater Independence and Broader Scope

But a deeper dive into the TFV's history demonstrates that it was not originally intended to be embedded within, and operated pursuant to, the institutional prerogatives of the ICC. In particular, the legislative history of Article 79 of the Rome Statute indicates that the TFV was not conceived of as only operating under the aegis of the ICC.<sup>196</sup>

By way of background, in 1994, after being so tasked by the UN General Assembly (UNGA) in 1989, the International Law Commission (ILC) presented its final ICC draft statute to the UNGA.<sup>197</sup> The UNGA then established an Ad Hoc Committee on the Establishment of the ICC, which provided commentary on the ILC draft statute.<sup>198</sup> It later created a Preparatory Committee on the Establishment of the ICC (Prep. Comm.), which was charged with putting together a consolidated text reconciling the ILC draft statute and the Ad Hoc Committee's written feedback.<sup>199</sup>

Significantly, Article 79 of the Prep. Comm.'s reconciled draft statute (Prep. Comm. Statute) referred to "[as a matter of priority,] a trust fund [established by the Secretary-General of the United Nations] . . . for the benefit of victims of the crime [and their families]."<sup>200</sup> In

<sup>195</sup> Int'l Crim. Ct., *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res.3 (Dec. 3, 2005), [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/Resolutions/ICC-ASP-ASP4-Res-03-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ICC-ASP-ASP4-Res-03-ENG.pdf) [<https://perma.cc/2TFZ-UXY9>]. Of course, certain finer points regarding the operation of the TFV, such as earmarking voluntary contributions for specific purposes, were covered in later Resolutions. *See, e.g.*, Int'l Crim. Ct., *Amendment to the Regulations of the Trust Fund for Victims*, ICC-ASP/6/Res.3 (Dec. 14, 2007), [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/Resolutions/ICC-ASP-ASP6-Res-03-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ICC-ASP-ASP6-Res-03-ENG.pdf) [<https://perma.cc/Z9NM-N9QC>].

<sup>196</sup> Forero, Karlsson & Rudi, *supra* note 3, at 218-19.

<sup>197</sup> Int'l Crim. Ct. Project, *Evolution of International Criminal Justice*, AM. BAR ASS'N, <https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/> [<https://perma.cc/AV2U-4SDA>].

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, art. 79, A/CONF.183/2/Add.1 (Apr. 14, 1998) [hereinafter Prep. Comm. Statute],

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other words, this foundational draft of the Rome Statute envisioned a strong, independent TFV in three different ways.<sup>201</sup>

First, and most importantly, the Prep. Comm. Statute contemplated a TFV that could be created by and operated under the aegis of the UN Secretary-General, not the ICC.<sup>202</sup> This might have led to a strong TFV capable of ensuring “the Fund’s independence from the Court and leadership free from political influence that the ASP itself might be [subject] to.”<sup>203</sup> Moreover, such an arrangement was not without precedent as there had already been the creation of the “Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice,” which was established in 1989 by the Secretary-General under the Financial Regulations and Rules of the United Nations following consultations with the President of the International Court of Justice.<sup>204</sup>

Second, while the final version of the Rome Statute’s Article 79 refers to the TFV being for the benefit of “victims of crimes *within the jurisdiction* of the Court,”<sup>205</sup> the Prep. Comm. Statute significantly expanded the TFV’s coverage, giving it the potential to cover related victim pools more holistically. As explained by Forero, Karlsson and Rudi:

Such a proposal would have broadened the scope of potential victims covered by the Fund’s mandate, since the original wording did not imply that only victims of the crimes under the Court’s jurisdiction were to be under the authority of the Trust Fund. Rather, it suggested that victims of any crime that occurred in a situation country could potentially be covered. If the ASP had adopted this position, the Trust Fund would have more leeway regarding its decisions of who

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<https://digitallibrary.un.org/record/253772?ln=en&v=pdf> [<https://perma.cc/76CU-X9AH>]. It should be noted that Article 79 of the document also referenced the possibility of the TFV being “[administered by the Court].” *Id.*

<sup>201</sup> Forero, Karlsson & Rudi, *supra* note 3, at 219.

<sup>202</sup> Preparatory Comm. Statute, *supra* note 200, art. 79.

<sup>203</sup> Forero, Karlsson & Rudi, *supra* note 3, at 219.

<sup>204</sup> See U.N. Secretary-General, *Rep. of the International Court of Justice: Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice*, annex, U.N. Doc. A/47/444 (Oct. 7, 1992), <https://documents.un.org/doc/undoc/gen/n92/487/72/pdf/n9248772.pdf> [<https://perma.cc/B2V6-ZSK2>].

<sup>205</sup> Rome Statute, *supra* note 6, art. 79, ¶ 1 (emphasis added).

should benefit from [its] projects. . . . [T]he provision [would have permitted the Fund to more effectively address] the immense need for reconciliation of victims of international crimes in situation countries. Not expressly limiting its mandate to crimes within the jurisdiction of the Court would have allowed the TFV to adopt a more holistic approach and to target whole communities that are in need of reconciliation and peace building, even if some community members were not victims of crimes within the jurisdiction of the Court.<sup>206</sup>

Third, the Prep Com Statute had the phrase “as a matter of priority” linked directly to the TFV but it was eventually removed, arguably diminishing from a textual perspective the Fund’s importance within the ICC framework.<sup>207</sup> According to Forero, Karlsson and Rudi:

[The Prep. Comm. Statute’s language] suggests that the Fund was initially seen as a very important organ. However, since the [Rome Statute drafters] chose not to include this line in the final draft, [they], effectively, demoted its position. Even though the absence of the wording does not change any specific aspect of the TFV’s functions, the decision is indicative of the value the drafters accorded the fund.<sup>208</sup>

## 2. *Effectuating the Separation: An Exercise in Both Creating and Preserving*

Separating the TFV from the ICC—in other words, returning to the original vision of the Prep. Comm. Statute—finds historical support in the Holocaust justice work of Ben Ferencz; however, it would not be a simple operation. It would have various aspects and dimensions—some that would create new players within new institutional frameworks and some that would entail preserving parts

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<sup>206</sup> Forero, Karlsson & Rudi, *supra* note 3, at 219-20.

<sup>207</sup> Prep. Comm. Statute, *supra* note 200, art. 79, ¶ a.

<sup>208</sup> Forero, Karlsson & Rudi, *supra* note 3, at 220.

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of the existing system. Those various aspects, and competing dynamics, will now be explored.

a. Larger Conceptual Questions

As a threshold matter, it would be helpful to pose certain “big picture” questions that would help inform the details of the separation. Particularly, should the TFV be excised entirely from the ICC? If not, what parts of it might remain? Of the parts that would be moved, how and where would they be relocated? Which aspects of the Fund’s operations would continue to be linked to the ICC? How? Would this institutional cleavage entail the creation of new infrastructure elements and permit/require new funding strategies? Would there be judicial reparations implications?

b. Relationship with and Role of the ICC/VPRS

As has been indicated above, the thrust of this paper’s proposal is to take the TFV out from under the ICC’s aegis and place it within the institutional framework of the UN. Thus, as a threshold matter, one issue should be clarified right away. Pursuant to the Proposal, there would remain substantial institutional connections between the TFV and the ICC. If so, how would this work? Initially, it must be emphasized that the ICC would continue to make reparations orders pursuant to the Rome Statute’s Article 75.<sup>209</sup>

However, reparations orders would contain two important changes. First, they would be limited to funds that could be acquired from defendants themselves or their assets (or liquidation thereof); in other words, the ICC would not concern itself with funds not directly connected to the defendant (i.e., funds provided by voluntary donors). This is commonly done in national jurisdictions to restitute victims via forfeiture of a defendant’s assets.<sup>210</sup> It can also be done in ICC

<sup>209</sup> Rome Statute, *supra* note 6, art. 75.

<sup>210</sup> See, e.g., ASSET FORFEITURE PROG., U.S. DEP’T OF JUST., RETURNING FORFEITED ASSETS TO CRIME VICTIMS: AN OVERVIEW OF REMISSION AND RESTORATION 2-4, <https://www.justice.gov/file/440746/dl#:~:text=Restoration%20is%20used%20when%20the,fulfill%20the%20defendant’s%20restitution%20obligation> [https://perma.cc/WA62-NS6T] (last visited Mar. 5, 2025); MINISTÈRE DE LA JUSTICE, GUIDE FOR THE RECOVERY OF CIVIL ASSETS IN FRANCE 2 (2022), <https://star.worldbank.org/sites/default/files/2023-01/Guide%20for%20the%20recovery%20of%20criminal%20assets%20in%20France%20%28Nov%202022%29.pdf> [https://perma.cc/5DYS-3QPG].

proceedings under the current system notwithstanding the availability of state party-donated funds, even if the defendant's assets are not derived from the charged criminal activity.<sup>211</sup>

Second, under the new schema, the details regarding the amount of any such award, as well as the persons who are entitled to partake of it, would still be within the province of the TFV in conjunction with the Victim Participation Reparations Section (VPRS). The latter would remain within the ICC and serve as the liaison between the TFV and the ICC. The VPRS would continue with its "participation" role assisting victims in the process of applying for participation in the ICC's criminal proceedings.<sup>212</sup> Moreover, the Proposal envisages the VPRS's "reparations" function continuing as it would keep the ICC apprised of the TFV's reparations work, including details about the recipients of reparations awards.

c. The Creation and Role of the Atrocity Victim Reparations Tribunal (AVRT)

However, the TFV would not be alone in dealing with reparations issues and logistics—it would work in very close tandem with a new organ pursuant to this paper's proposal: an Atrocity Victim Reparations Tribunal (AVRT). Just as this proposal would take the TFV and place it under the aegis of the UN Secretary General (as contemplated by the Prep. Comm. Statute), the same would be true of the AVRT, which would be grafted onto the existing architecture of the UN Dispute Tribunal.<sup>213</sup> The Dispute Tribunal, which adjudicates internal UN justice matters (such as employment discrimination

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<sup>211</sup> See Daley J. Birkett, *Pre-Trial 'Protective Measures for the Purpose of Forfeiture' at the International Criminal Court: Safeguarding and Balancing Competing Rights and Interests*, 32 LEIDEN J. INT'L L. 585, 593-97 (2019) [hereinafter *Forfeiture at the ICC*].

<sup>212</sup> See Mélissa Fardel & Nuria Vehils Olarra, *The Application Process: Procedure and Players*, in VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL JUSTICE: PRACTITIONERS' GUIDE 13-14 (Kinga Tibori-Szabó & Megan Hirst eds., 2017).

<sup>213</sup> See *About the UN Dispute Tribunal*, UNITED NATIONS, <https://www.un.org/en/internaljustice/undt/about-contact.shtml> [https://perma.cc/4MAL-9EN4] (last visited Sept. 30, 2024).

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claims),<sup>214</sup> has three branches in New York, Geneva, and Nairobi and is supported by a Registry at each location.<sup>215</sup>

Per this proposal, a separate AVRT chamber and dedicated Registry personnel would be added within each tribunal location. This would have the advantage of leveraging existing and necessary infrastructure. The special AVRT chamber would consist of nine dedicated jurists with ICL reparations expertise and specialized knowledge about the region to which they are assigned. If reparations activity were light, the judges could be selected for active service via a roster.<sup>216</sup> The judges would hear cases in panels of three.

For criminal cases giving rise to reparations in the Americas/Caribbean (e.g., the ICC current situation in Venezuela or previously in Colombia and Bolivia),<sup>217</sup> matters would be adjudicated in New York; in the Eurasia/Oceania region (e.g., the ICC situations in Ukraine, Myanmar, and the Philippines)<sup>218</sup> they would be handled in Geneva; and those from Africa/Middle East (e.g., the ICC situations in the Democratic Republic of the Congo, Mali, and Palestine)<sup>219</sup> would be assigned to the AVRT chamber in Nairobi.<sup>220</sup>

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<sup>214</sup> ADMIN. OF JUST., UNITED NATIONS, A STAFF MEMBER'S GUIDE TO RESOLVING DISPUTES 22-23, <https://www.un.org/en/internaljustice/assets/pdf/StaffMembersGuideToResolvingDisputes.pdf> [https://perma.cc/LTK5-HRUA] (last visited Sept. 30, 2024).

<sup>215</sup> *Id.* at 23.

<sup>216</sup> This would be analogous to other judicial institutions, such as the Kosovo Specialist Chambers, which employ adjudicators with specialized expertise and assemble a roster of them who can be called on when needed to keep costs and administrative burdens down during periods of relative inactivity. *See, e.g.,* Kos. Specialist Chambers, *Rules on the Assignment of Specialist Chamber Judges from the Roster of International Judges*, rs. 1-4, KSC-BD-02 (Mar. 27, 2017), [https://www.scp-ks.org/sites/default/files/public/ksc-bd-02\\_rulesonassignment.pdf](https://www.scp-ks.org/sites/default/files/public/ksc-bd-02_rulesonassignment.pdf) [https://perma.cc/NVT7-UASE].

<sup>217</sup> *See* Naomi Roht-Arriaza, *The ICC in Latin America: An Old Friend with New Challenges*, 47 GA. J. INT'L & COMPAR. L. 607, 610, 614 (2019); OFF. OF THE PROSECUTOR, INT'L CRIM. CT., SITUATION IN THE PLURINATIONAL STATE OF BOLIVIA: FINAL REPORT (2022), <https://www.icc-cpi.int/sites/default/files/2022-06/2022-02-14-otp-report-bolivia-eng.pdf> [https://perma.cc/RU98-D7QP].

<sup>218</sup> *See Situations Under Investigations*, INT'L CRIM. CT., <https://www.icc-cpi.int/situations-under-investigations> [https://perma.cc/R5QW-FM7F] (last visited Oct. 1, 2024).

<sup>219</sup> *Id.*

<sup>220</sup> These geographical assignments align with the UNDT's existing venue selection criteria. *See* G.A. Res. 63/253, Statute of the United Nations Dispute Tribunal, art. 6, ¶ 2 (Dec. 24, 2008) [hereinafter UNDT Statute], <https://www.un.org/en/internaljustice/undt/undt-statute.shtml> [https://perma.cc/G4VS-V9PZ].

Appeals would be heard by a separate and dedicated AVRT appeals chamber (and registry) attached to the UN Appeals Tribunal in New York, which already services the UN Dispute Tribunal.<sup>221</sup> It would consist of seven judges. Moreover, the TFV would have offices in the same locations as the AVRT chambers in each region (i.e., one in New York, Geneva, and Nairobi). If deemed necessary, an Asian TVN-AVRT location could be considered on an ad hoc basis, given that this continent—the world's largest—now has additional active ICC situations, such as in Afghanistan.<sup>222</sup>

This would be in line with Ben Ferencz's Holocaust reparations experience. The URO claims filed by Ferencz and his teams of lawyers were handled by special administrative judges established by authority of German law and in compliance with Germany's Luxembourg Agreement obligations to adjudicate reparations claims.<sup>223</sup> Similarly, JRSO restitution claims under Government Law No. 59 were heard by a specially-created judicial apparatus, which was comprised of U.S. administrative adjudicators whose decisions could be ultimately challenged in a "Court of Restitution Appeals."<sup>224</sup>

#### d. The TFV Assistance Mandate

It is important to note that the TFV would retain its assistance mandate.<sup>225</sup> Thus, assuming proper funding (which will be discussed below), it could still provide physical and psychological assistance to victims in ICC situation countries, even in the absence of formal judicial proceedings or reparations orders.<sup>226</sup> In other words, properly resourced TFV personnel would accompany ICC OTP investigators into the field during investigations and assist victims as needed.<sup>227</sup> The

<sup>221</sup> See *Administration of Justice at the UN: United Nations Appeal Tribunal*, UNITED NATIONS, <https://www.un.org/en/internaljustice/unat/> [<https://perma.cc/PYW4-6363>] (last visited Oct. 1, 2024).

<sup>222</sup> UNDT Statute, *supra* note 220, art. 5, ¶ 3 ("The Dispute Tribunal may decide to hold sessions at . . . duty stations [other than New York, Geneva and Nairobi] as required by its caseload.").

<sup>223</sup> See *Implementing Compensation Agreements*, *supra* note 77.

<sup>224</sup> See *supra* note 59 and accompanying text.

<sup>225</sup> TFV Regulations, *supra* note 6, Regul. 50(a)(ii).

<sup>226</sup> See Mariana Goetz, *Reparative Justice at the International Criminal Court: Best Practice or Tokenism*, in REPARATION FOR VICTIMS OF CRIMES AGAINST HUMANITY: THE HEALING ROLE OF REPARATION 53, 60 (Jo-Anne M. Wemmers ed., 2014).

<sup>227</sup> *Id.* (noting that, pursuant to best practices, TFV personnel on the ground in atrocity zones would be sufficiently resourced to "respond to victims' immediate



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TFV would report its assistance mandate activities to the regional AVRT on a periodic basis, and the AVRT would have the prerogative of calling for a hearing to ask questions about the resources being used. It would also have the capacity to order the TFV to modify its assistance mandate activities and spending, subject to the TFV appealing to the AVRT appeals chamber. Both the TFV and the AVRT would submit annual reports on activities and progress to the UN Office of Administration of Justice and the UN Secretary-General.<sup>228</sup>

#### e. Imagining the New System in Practice

##### i. Street Gang v. Government NIAC in Honduras

At this juncture, via a hypothetical case, it would be helpful to sketch out how the ICC and the TFV-AVRT would work together in practice. Let us assume that, in response to recent street gang-linked mass murders and rapes in Honduras,<sup>229</sup> the government were to initiate a crackdown that would result in tens of thousands of deaths of innocent civilians.<sup>230</sup> Assume further that, after conducting a preliminary examination, the ICC Prosecutor opens a Pre-Trial Chamber-sanctioned Article 15 *proprio motu* investigation into the matter based on initial evidence from NGOs on the ground that an extremely well-armed Honduran gang has not only committed the

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needs for medical, psychosocial or other material imperatives pending the outcome of justice processes”).

<sup>228</sup> The UN Office of Administration of Justice (OAJ), an independent office, based in New York, is responsible for the overall coordination of the formal components of the UN’s internal justice system. See Off. of Admin. of Just., *Ensuring the Independence of the UN’s Internal Justice System*, UNITED NATIONS, <https://www.un.org/en/internaljustice/oaj/> [https://perma.cc/9LMQ-VXNE] (last visited Oct. 1, 2024). It is headed by an Executive Director, who is appointed by the UN Secretary-General. Pursuant to the Proposal, the annual TFV-AVRT reports would be submitted to the OAJ Executive Director, who would, in turn, submit them (with comments/feedback) to the Secretary General.

<sup>229</sup> See Sandra Pellegrini & Aleksander Pappalardo, *Fighting Gangs Under the State of Exception in Honduras*, ACLED (Dec. 5, 2023), <https://acleddata.com/2023/12/05/fighting-gangs-under-the-state-of-exception-in-honduras/> [https://perma.cc/L334-FL74] (“Over the years, criminal groups have wielded considerable influence across Honduras, a country that geographically constitutes a key transit point for transnational drug trafficking.”).

<sup>230</sup> This is an entirely plausible scenario. See Steve Inskeep & Eyder Peralta, *Honduras Cracks Down on Gangs after the Country Was Engulfed in Violence*, NPR (June 28, 2023, 5:06 AM), <https://www.npr.org/2023/06/28/1184726287/honduras-cracks-down-on-gangs-after-the-country-was-engulfed-in-violence> [https://perma.cc/N37R-2J9T].

mass murder of civilians but has also been fighting a guerilla insurgency against the government and controls a sizable portion of Honduran territory.<sup>231</sup> The Prosecutor, supported by the Pre-Trial Chamber decision, considers it a non-state armed group and its crimes (which include murder, torture, sexual violence, and use of child soldiers), as well as those committed by the Honduran government in its crackdown (including murder, illegal detention and torture),<sup>232</sup> as having been committed in the context of a non-international armed conflict.<sup>233</sup> Finally, suppose that there has been a subsequent coup d'état in Honduras, and a new government has been able to defeat the street gang militarily and restore a semblance of order to the country.

## ii. The TFV Point of Entry

The entry point for the new TFV is the preliminary examination, when the New York-based TFV takes cognizance of the situation in Honduras via communications with the ICC VPRS.<sup>234</sup> Even if, based on dangerous conditions on the ground, ICC OTP investigators, ICC VPRS representatives and/or TFV personnel are not able to start working in country, the TFV might be able to begin its assistance mandate by funding NGO personnel still on the ground (if any remain

<sup>231</sup> Rome Statute, *supra* note 6, art. 15. Again, this is not an entirely fanciful hypothetical. See Pellegrini & Pappalardo, *supra* note 229 (“Recognizing criminal groups’ wider reach, the government has announced military police operations in Atlántida, Copán, and Yoro, and the deployment of additional military forces in Colón, Olancho, El Paraíso, and Gracias a Dios . . .”).

<sup>232</sup> These would likely be charged as both crimes against humanity, under Rome Statute Article 7 (i.e., art. 7, ¶¶ 1(a) (murder), 1(f) (torture), 1(e) (imprisonment), 1(g) (rape and other forms of sexual violence)), and war crimes pursuant to Rome Statute Article 8 (i.e., art. 8, ¶¶ 2(c)(i) (murder, torture), 2(e)(vi) (rape, sexual slavery), 2(e)(vii) (use of child soldiers)). Rome Statute, *supra* note 6, art. 7, ¶¶ 1(a), (f), (e), (g); art. 8, ¶¶ 2(c)(i), (e)(vi), (e)(vii).

<sup>233</sup> A non-international armed conflict (NIAC) is defined as protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising in the territory of a State. The armed confrontation must reach a minimum level of intensity, and the parties involved in the conflict must show a minimum of organisation. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995), <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<https://perma.cc/6UZV-554Q>]; Prosecutor v. Tadić, Case No. IT-94-1, Opinion and Judgment, ¶ 562 (May 7, 1997), <https://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> [<https://perma.cc/53MY-VTLS>]; see also YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 37-43 (2014).

<sup>234</sup> Rome Statute, *supra* note 6, art. 15, ¶¶ 1-2.

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who can help victims).<sup>235</sup> Once the situation on the ground has improved, TFV personnel could accompany ICC investigators/VPRS representatives in helping victims via the assistance mandate (while continuing to work with NGOs on this).<sup>236</sup> During this time, the TFV would alert the AVRT that its assistance mandate has been triggered and the latter would schedule periodic hearings wherein the TFV would provide updates and answer questions (while also potentially being subject to AVRT orders to modify aspects of the TFV's assistance mandate functions).

### iii. The Issuance of Arrest Warrants and Asset Freezing Orders

Let us assume that, as the case progresses, and pursuant to requests by the OTP, the Pre-Trial Chamber issues arrest warrants against two leaders of the street gang as well as the former Honduran Minister of Defense and the former Director General of the National Police.<sup>237</sup> With respect to the gang leaders, the OTP learns through its investigation that, as part of their criminal enterprise, they subjected thousands of women to sexual slavery in running an extensive prostitution ring. Through this activity and others (including narcotics trafficking), the gang leaders earned millions of dollars that the OTP was able to trace to American banks. As a result, along with the arrest warrants, the OTP successfully requests that the Pre-Trial Chamber issue orders freezing the gang leaders' assets.<sup>238</sup>

### iv. The Trial

Eventually, the case goes to trial and the OTP secures crimes against humanity and war crimes convictions against the Honduran

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<sup>235</sup> See Rauxloh, *supra* note 142, at 206 (explaining that the TFV provides funds to NGOs to do needed TFV work on the ground).

<sup>236</sup> See Forero, Karlsson & Rudi, *supra* note 3, at 224 (explaining that, through its assistance mandate, the TFV should be able to work on "reconciliation and community mending in conflict-stricken societies . . . [and] help alleviate the unintended harm inflicted by the Court's judicial process in *all* the communities affected by the Court's proceedings").

<sup>237</sup> Rome Statute, *supra* note 6, art. 58 (Issuance by the Pre-Trial Chamber of a Warrant of Arrest or a Summons to Appear).

<sup>238</sup> Under Article 93, ¶ 1(k) of the Rome Statute, the ICC can request its States Parties to identify, trace, freeze, and seize assets "in relation to investigations or prosecutions." Rome Statute, *supra* note 6, art. 93, ¶ 1(k). Such measures can be requested by the pre-trial chamber, under Rome Statute Article 57, ¶ 3(e), "[w]here a warrant of arrest or a summons has been issued . . . having due regard to the strength of the evidence and the rights of the parties concerned." *Id.* art. 57, ¶ 3(e).

officials and the gang leaders.<sup>239</sup> Before the trial, the VPRS helps victims organize into three separate participation groups (victims of sexual violence, victims of torture, and former child soldiers),<sup>240</sup> which are represented by the OPCV and by lawyers funded by the Registry or serving on a pro bono basis.<sup>241</sup> In sentencing the gang leaders, the ICC Trial Chamber finds that a certain portion of their frozen funds can be directly traceable to their sexual slavery crimes.<sup>242</sup> Those funds are ordered forfeited and subject to reparations. (It should be noted that, to the extent the defendants were acquitted, either after trial or later on appeal, victims would still be entitled to seek reparations with the TFV, now that it would have been detached from the ICC—reparations would not be premised on finding the defendant guilty).

#### v. Reparations and the AVRT

During the ICC proceedings, the TFV, which continued its assistance mandate and has observers watching the trial, is coordinating with and being updated on certain trial matters by the VPRS.<sup>243</sup> Once the convictions and forfeiture orders have been affirmed on appeal, the TFV initiates reparations proceedings with the AVRT. As part of this, VPRS representatives help victims apply for reparations (other victims may be helped by NGOs). The victims who

<sup>239</sup> See Rome Statute, *supra* note 6, pt. 6 (The Trial).

<sup>240</sup> *Id.* art. 68, ¶ 3 (permitting victim participation at trial); see also Sigurd D'hondt, Juan-Pablo Pérez-León-Acevedo, Fabio Ferraz de Almeida & Elena Barrett, *Evidence about Harm: Dual Status Victim Participant Testimony at the International Criminal Court and the Straitjacketing of Narratives about Suffering*, 33 CRIM. L. F. 191, 192 (2022).

<sup>241</sup> Pursuant to ICC RPE Rule 90, ¶ 5, and ICC Registry Regulation 113, ¶ 1, when victims have no financial means to pay for a lawyer, and the OPVC is conflicted out because it is representing other victims, they may apply for legal assistance to be paid for by the Court. ICC RPE, *supra* note 107, r. 90, ¶ 5; Int'l Crim. Ct., *Regulations of the Registry*, Regul. 113, ¶ 1, U.N. Doc. ICC-BD/03-01-06 (Mar. 6, 2006) [hereinafter *Registry Regulations*], [http://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/140149/ICCBD\\_030106\\_English1.pdf](http://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/140149/ICCBD_030106_English1.pdf) [<http://perma.cc/KVZ3-5SLK?type=pdf>]. Via the Registry, victims can also secure counsel on a pro bono basis. *Id.* ¶ 2.

<sup>242</sup> For the process and mechanics of how this would work, see generally Birkett, *supra* note 211.

<sup>243</sup> Although the TFV may have an observer or two at trial, it would still benefit from the insights/communication and coordination with VPRS representatives who would know the victim groups well and could offer insights based on previous experience with the case.

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cannot access the reparations are not limited to those who participated at trial—they may include those who were caught up in the mass violence that had swept across Honduras but not specifically connected to the defendants who went to trial (e.g., victims of a different street gang whose lower-level operatives partially collaborated with the convicted gang leaders but were not within their chain of command).<sup>244</sup>

The Proposal herein envisions proceedings before the AVRT, where TFV lawyers will present evidence and make arguments, and determine which victims will be entitled to reparations and in which amounts. The standard of proof will be preponderance of the evidence, which is “common to reparations proceedings.”<sup>245</sup> The reparations pot will include funds not only collected via the methods to be detailed below, but also the gang leaders’ assets that were frozen by the ICC Pre-Trial Chamber. The amount of the ICC’s reparations order consisting of the forfeiture of the frozen funds tied to the gang leaders will be distributed as determined by the AVRT decision on reparations. As noted above, per this paper’s proposal, that decision (or decisions) can be appealed to the dedicated AVRT appeals chamber attached to the UN Appeals Tribunal.

f. The Scope of the New System: Beyond the ICC and a Strict Reparations Focus

Two other points should be made here. First, the scope of reparations could be bigger than the facts of our hypothetical to this point have suggested. In particular, let us assume that related gang violence and sexual slavery was being perpetrated across the border in Nicaragua by gangs loosely affiliated with those in Honduras. Nicaragua is not a party to the Rome Statute, and we will suppose that those victims did not participate in the ICC proceeding.<sup>246</sup> But let us

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<sup>244</sup> This satisfies the concerns raised by Forero, Karlsson and Rudi about “general situation” victims being excluded from the victims benefit regime as the Prosecutor focuses on specific defendants whose victims may not include the “general situation” victims. See Forero, Karlsson & Rudi, *supra* note 3, at 226 (lamenting the practice of separating victims into “victims of a case” and “victims of a situation,” with the latter being excluded as the case narrows based on defendant selection as it works its way toward trial).

<sup>245</sup> Luke Moffett, *Reparations for Victims at the International Criminal Court: A New Way Forward?*, 21 INT’L J. HUM. RTS. 1204, 1216 (2017) [hereinafter *New Way Forward*].

<sup>246</sup> See Iván Olivares, *International Law Can Prosecute Crimes against Humanity*, CONFIDENTIAL (Feb. 4, 2022), <https://confidential.digital/english/international-law->

assume further that a truth commission has been set up in Nicaragua as part of relevant transitional justice efforts there.<sup>247</sup> If the truth commission awards reparations to Nicaraguan victims but lacks the funds to pay them out,<sup>248</sup> the new version of the TFV proposed here could include them in the reparation payouts connected to the ICC case (in all likelihood, truth commission transcripts/judgments would be presented before the AVRT and, if necessary, victim-witnesses could testify).

Second, the advantages of the AVRT proceedings, where specialized jurists consider reparations on a dedicated basis, do not have to be limited to reparations. Victims who participated in the ICC proceedings but were unable to testify or otherwise express themselves in court, could be allowed to do so before the AVRT.<sup>249</sup> As noted by Leila Ullrich:

Of course, if we look at the courtroom, the victims' role does look rather limited. We can see the victims' lawyers but no victims, except when they act as witnesses. In the Ongwen case, the first case in Uganda, only seven out of the 4095 participating victims actually "had their day in court" in The Hague.<sup>250</sup>

In this sense, the proposed TFV-AVRT process could provide victims with important opportunities to establish a more complete historical record, and, more crucially, to facilitate healing via actual participation in a formal judicial setting.

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can-prosecute-crimes-against-humanity/ [https://perma.cc/BQV5-Y55T] (explaining that Nicaragua is not a signatory of the Rome Statute).

<sup>247</sup> A truth commission has been previously established in Nicaragua, so, again, this is not an implausible scenario. See José Miguel Vivanco, *Nicaragua's 'Truth Commission' a Farce*, HUM. RTS. WATCH (May 14, 2018, 5:00 PM), <https://www.hrw.org/news/2018/05/14/nicaraguas-truth-commission-farce> [https://perma.cc/8XW2-XTQX].

<sup>248</sup> Truth commissions often award reparations. See Eric Brahm, *Truth Commissions*, BEYOND INTRACTABILITY (June 2004), <https://www.beyondintractability.org/essay/truth-commissions> [https://perma.cc/7EH2-UHRP].

<sup>249</sup> Leila Ullrich, *#Workingforjustice: Victim Participation at the International Criminal Court (ICC)*, EUR. J. INT'L L.: EJIL: TALK! (Sept. 11, 2024), <https://www.ejiltalk.org/workingforjustice-victim-participation-at-the-international-criminal-court-icc/> [https://perma.cc/X2LY-H8ZV].

<sup>250</sup> *Id.*

### B. Financing the New System

Under the current ICC system, the TFV has been placed in a straitjacket when it comes to satisfying its budgetary needs. The allotment for its Secretariat, comprising staff and non-staff costs, is part of the overall ICC budget, funded from annual assessed contributions by ICC States Parties.<sup>251</sup> Again, with the ICC's emphasis on retribution over restoration, we can recall the expert insight that the TFV is responsible for "50 percent of the ICC's impact but only 2 percent of its budget."<sup>252</sup> At the same time, under the current model, the TFV's funds for its assistance and reparations mandates are derived from voluntary contributions, primarily from States Parties.<sup>253</sup>

But how might the TFV's funding situation change if it had the kind of institutional independence that Ben Ferencz enjoyed in the Holocaust justice context, both during the investigation phase (the equivalent of the TFV's current assistance mandate) and during the reparations phase? In *The "Bookend" Problem in Atrocity Victim Justice: World War II Lessons with Modern Perspectives for Fixing the Investigative and Early Release Phases*,<sup>254</sup> I have already explored this in the context of the TFV's assistance mandate.

One can imagine a much-improved financial position, based on the following fund-generating activities undertaken by Ferencz (as well as his built-in administrative budget) during these periods of institutional independence: (1) arranging for treaty-based funding rather than voluntary contributions; (2) borrowing money to establish an endowment fund that could be invested to generate supplementary annual revenue streams and repay the loan; (3) using judicial and administrative means to obtain assets frozen and derived from closely-related criminal enterprises; (4) partnering with other organizations for secondment of personnel and donations of goods and services; and (5)

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<sup>251</sup> TR. FUND FOR VICTIMS, 2020 ANNUAL ACTIVITY REPORT 47 (2021) [hereinafter 2020 TFV ACTIVITY REPORT], [https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20AnnualReport%202020\\_final.pdf](https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20AnnualReport%202020_final.pdf) [<https://perma.cc/EK6L-MCGF>].

<sup>252</sup> Wiebelhaus-Brahm & Ainley, *supra* note 4, at 41 (quoting Anderson & van Den Berg, *supra* note 140).

<sup>253</sup> See, e.g., 2020 TFV ACTIVITY REPORT, *supra* note 251, at 47-51 (demonstrating that States Parties' donations amounted to €2.8 million but only €14,527 came in from individual donors).

<sup>254</sup> Gregory S. Gordon, *The "Bookend" Problem in Atrocity Victim Justice: World War II Lessons with Modern Perspectives for Fixing the Investigative and Early Release Phases*, CHINESE J. INT'L L. (forthcoming) [hereinafter *Bookend Problem*].

enjoying a preexisting, built-in institutional budget. Each of these strategies will now be examined.

### *1. Securing Steady Income Streams via Bilateral Treaties*

It will be recalled that one of the most important mechanisms for funding Holocaust reparations was the 1952 Luxembourg Agreement between West Germany and Israel,<sup>255</sup> the legal framing and success of which Ben Ferencz played a principal role.<sup>256</sup> As noted above, I have already written about the potential for bilateral treaties between the ICC and donor nations to help erase TFV fundraising deficits with respect to the assistance mandate.<sup>257</sup> This would mean that better-heeled nations, such as those in Scandinavia (e.g., Sweden and Denmark) and Western Europe (e.g., France and Germany) or in the Far East (e.g., Japan and South Korea), would continue their generous donations but on a standardized basis with contractually required amounts, rather than through random gifts inspired by impulsive munificence.<sup>258</sup> At the same time, developing nations, including those in the Global South, could agree to make smaller contributions via schedules laid out in similar treaties.<sup>259</sup>

### *2. Borrowing Money and Creating an Endowment Fund*

As JRSO director, Ben Ferencz took many creative approaches to funding the organization's Holocaust restitution activities. One of the principal ways he did so was through borrowing money from the U.S. arm of the German occupation administration. While Ferencz was eventually able to convince American authorities to cancel the debt, such a scenario would be highly unlikely in today's world. Still, the Ferencz approach could work if the borrowed funds were invested in an endowment fund that could be built up over time and invested in

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<sup>255</sup> Agreement Between Israel and the Federal Republic of Germany, Isr.-Ger., Sept. 10, 1952, 162 U.N.T.S. 205. This has been referred to as "the most important breakthrough" in Holocaust reparations. See Eva Fogelman, Elazar Barkan, Vivian Grosswald Curran & Otto Graf Lambsdorff, *The Evolution and Objectives of the Holocaust Restitution Initiatives*, 25 FORDHAM INT'L L.J. 145, 149 (2001).

<sup>256</sup> Menachem Z. Rosensaft & Joana D. Rosensaft, *The Early History of German Jewish Reparations*, 25 FORDHAM INT'L L.J. 1, 31 (2001).

<sup>257</sup> *Bookend Problem*, *supra* note 254.

<sup>258</sup> See *id*; see also *Lex Lata*, *supra* note 8, at 31.

<sup>259</sup> *Lex Lata*, *supra* note 8, at 31.



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stock markets, hedge funds, or properties and earn steady income.<sup>260</sup> More specifically, a portion of the fund could be made available annually while the remaining assets would be retained in the fund to provide for growth over time and permit servicing the loan. Upon extinguishing the debt (up to which time, a certain pro rata portion of the income could be earmarked for reparations), the endowment could continue to grow and be a strong and steady source of revenue.

There is good precedent for this type of endowment funding. There is the American Red Cross (ARC), which, comparable to the ICC TFFV, provides succor to trauma victims (with the ARC providing succor to the victims of natural disasters).<sup>261</sup> A healthy percentage of its revenue is derived from an ARC endowment fund. In 2022, for instance, this totaled approximately \$1.25 million.<sup>262</sup> Moreover, the ICC TFFV could benefit from endowment gifts originating from more than nation-states—the ARC financial statements refer to a large variety of potential donor pools, including wills, trusts, and similar charitable sources.<sup>263</sup>

### 3. *Accessing Repurposed Frozen Funds*

In the later stages of his reparations work, once he was in private practice in New York, Ferencz found another way to generate funds for Holocaust reparations—via accessing frozen funds (i.e., assets of Nazi German citizens, enemy aliens, frozen by the U.S. government). As we have seen, he was able to obtain a significant portion of frozen Nazi money for B'nai B'rith and its Holocaust victim members. The TFFV, whose budget consists almost exclusively of voluntary nation-state donations, has not attempted to collect money via Ferencz's frozen funds strategy. But if the TFFV were free to pursue budgetary

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<sup>260</sup> Karen Houghton, *Nonprofit Endowments: The Ultimate Guide to Build Your Fund*, INFINITE GIVING (June 3, 2023), <https://www.infinitegiving.com/blog/nonprofit-endowments> [https://perma.cc/BEG8-2TPW].

<sup>261</sup> KPMG, THE AMERICAN RED CROSS CONSOLIDATED FINANCIAL STATEMENTS (2022), [https://www.redcross.org/content/dam/redcross/about-us/publications/2022-publications/FY2022\\_Red\\_Cross\\_Financial\\_Statement\\_FINAL.pdf?srsltid=AfmBOoq2u2eX2pIfuEsnJ8J0ayVieM7JmiCYTjiKalfSELw4VioY111e](https://www.redcross.org/content/dam/redcross/about-us/publications/2022-publications/FY2022_Red_Cross_Financial_Statement_FINAL.pdf?srsltid=AfmBOoq2u2eX2pIfuEsnJ8J0ayVieM7JmiCYTjiKalfSELw4VioY111e) [https://perma.cc/LAL6-M3YA].

<sup>262</sup> *Id.* at 24.

<sup>263</sup> *Id.* at 9. In other scholarship, I have floated this idea in respect of the TFFV's assistance mandate. See, e.g., *Bookend Problem*, *supra* note 254. It is submitted here, however, that this could apply equally well to the reparations mandate.

strategies beyond the current ICC model, accessing frozen funds could help redress many of the TFV's current resources challenges.

This new revenue stream could come from assets that have been frozen by domestic jurisdictions.<sup>264</sup> In certain cases, its origin could be funds frozen at the behest of the UN Security Council pursuant to its Chapter VII mandate to maintain international peace and security.<sup>265</sup> When those assets are the result of ill-gotten gains from criminal conduct or gross human rights violations related to an ICC situation (even if technically outside its jurisdiction but related to connected criminal transactions),<sup>266</sup> and not being investigated/prosecuted by the ICC, then it might be possible for the ICC to access those funds (even though such an option is not now being pursued by the ICC). According to ICL asset freezing expert Daley J. Birkett:

If untethered from the International Criminal Court, and thus free to pursue new—and likely more effective—methods for generating reparations funds, it would behoove the Trust Fund for Victims to direct its efforts toward accessing assets frozen by national jurisdictions for gross human rights violations. If done pursuant to well-recognized guarantees of due process, a more independent TFV, possibly under the auspices of the United Nations, could plausibly enter into agreements with domestic authorities to access such funds. And this would be consistent with international

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<sup>264</sup> See Larissa van den Herik, *The Individualization of Enforcement in International Law: Exploring the Interplay Between United Nations Targeted Sanctions and International Criminal Proceedings*, in *THE PURSUIT OF A BRAVE NEW WORLD IN INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN DUGGARD* 234, 259-62 (Tijanjana Maluwa, Max du Plessis & Dire Tladi eds., 2017); Daley J. Birkett, *Coexistent but Uncoordinated: Asset Freezing Measures at the International Criminal Court and the UN Security Council*, 20 INT'L CRIM. L. REV. 983, 991 (2020) [hereinafter *Coexistence*].

<sup>265</sup> See, e.g., van den Herik, *supra* note 264; see also *Coexistence*, *supra* note 264.

<sup>266</sup> This would be the case, for example, if an instance of mass atrocity were committed within an ICC member state but related spillover violence occurred across a national frontier inside a country not a party to the Rome Statute. This could be the object of the TFV assistance mandate and reparations awarded by a truth commission, for instance. See, e.g., hypothetical example of Honduras and Nicaragua, *supra* notes 246-250 and accompanying text.

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criminal law’s existing asset freezing legal landscape, which prioritizes the ultimate benefit of victims.<sup>267</sup>

A prominent feature in that landscape is what are called “national repurposing frameworks,” which allow domestic jurisdictions to freeze assets linked to criminal activity or gross human rights violations and then allocate them to victims.<sup>268</sup> According to a report by British barristers Goldsmith Chambers:

Our research demonstrates that legal mechanisms exist . . . that allow for seized assets to be repurposed for restorative use. Moreover, these frameworks have survived rights-based challenges on the legal reasoning that the systems of designation are fair and just. It is the designation of assets which empowers, in theory, a state or body to freeze any such assets.<sup>269</sup>

In its report, Goldsmith provided examples of these in the United States, Switzerland, the United Kingdom, Canada, and Italy.<sup>270</sup> For purposes of the Proposal, a fine model of such a mechanism can be found in the U.K.’s “civil recovery proceeding” (CRP).<sup>271</sup> The CRP’s objective is to seize property obtained through unlawful acts, which includes overseas conduct “connected with the commission of a gross human rights abuse or violation.”<sup>272</sup> Per Birkett:

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<sup>267</sup> Zoom Interview with Daley J. Birkett, Senior Lecturer, Macquarie Univ. (Oct. 4, 2024).

<sup>268</sup> See generally GOLDSMITH CHAMBERS, FINANCE FOR RESTORATIVE JUSTICE OPINION (2021), <https://www.goldsmithchambers.com/wp-content/uploads/2021/03/YazidiConsolidatedOpinion-FINAL-VERSION-1.5.pdf> [<https://perma.cc/RDZ6-6C9C>].

<sup>269</sup> *Id.* at 26.

<sup>270</sup> *Id.* at 42, 45, 55-58. The Canadian Frozen Assets Repurposing Act, which allows for freezing/seizing assets connected to perpetrators of gross human rights violations, has been introduced into parliament but has not yet been enacted as law. *Id.* at 55.

<sup>271</sup> *Id.* at 59. To the extent a domestic jurisdiction could object to the TFV’s making efforts to access frozen funds because that country is not an ICC member would not be an issue with respect to this mechanism as the U.K. is an ICC State Party. See *United Kingdom and the Rome Statute*, PARLIAMENTARIANS FOR GLOB. ACTION, <https://www.pgaction.org/ilhr/rome-statute/united-kingdom.html> [<https://perma.cc/Z6DQ-UXNW>] (last visited Oct. 4, 2024).

<sup>272</sup> GOLDSMITH CHAMBERS, *supra* note 268, at 59.

This type of mechanism could allow a TFV situated outside of the ICC to leverage its relative operational freedom and access frozen assets. Thus, for example, the civil recovery process in the U.K. represents an unrealized revenue stream that, so long as confiscation and repurposing comply with human rights safeguards, could be used to help finance the TFV's assistance and reparations mandates. The justification for exploiting these funding sources is even more compelling when such assets are the product of gross human rights violations, and this directly relates to the TFV's core mission of helping victims of such violations (e.g., survivors of mass atrocity).<sup>273</sup>

A very contemporary instance of employing such a repurposing mechanism is linked to the 2022 Russian full-scale invasion of Ukraine and various crimes arising out of that. On April 24, 2024, President Joe Biden signed into law the "Rebuilding Economic Prosperity and Opportunity for Ukrainians Act" (REPO Act), which establishes a legal framework for the president to authorize seizure of

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<sup>273</sup> Zoom Interview with Daley J. Birkett, *supra* note 267. Of course, if ICC defendants are affluent and their wealth can be frozen/seized, the ICC may request cooperation from ICC States Parties, as well as from States that have filed ad hoc declarations with the Court, and States requested by the UN Security Council to cooperate with the ICC for the purpose of eventual forfeiture. See Daley J. Birkett, *Pre-Trial 'Protective Measures for the Purpose of Forfeiture' at the International Criminal Court: Safeguarding and Balancing Competing Rights and Interests*, 32 LEIDEN J. INT'L L. 585, 587–88 (2019). Prominent examples of well-heeled individuals for whom international criminal tribunals have issued arrest warrants include: (1) former Congolese Vice-President Jean-Pierre Bemba Gombo (charged with and convicted of war crimes and crimes against humanity committed in the Central African Republic, but acquitted on appeal); (2) former Libyan Head of State Muammar Gaddafi (accused of crimes against humanity—ICC case terminated on his death); and (3) Félicien Kabuga, President of the Comité d'initiative of Radio Télévision Libre des Mille Collines (charged by the ICTR with genocide, direct and public incitement to commit genocide, and crimes against humanity—trial indefinitely stayed on account of the accused's health). See Daley J. Birkett, *Managing Frozen Assets at the International Criminal Court: The Fallout of the Bemba Acquittal*, 18 J. INT'L CRIM. J. 765, 769 (2020) (on Bemba). See generally Daley J. Birkett, *Distilling the Aims of International(ized) Criminal Tribunals: Asset Freezing Powers through the Crucible of Prosecutor v Félicien Kabuga*, 5 PKI GLOB. JUST. J. 38 (2021) (on Kabuga). As these matters reveal, though, defendants of such means are not the norm. Further, a final conviction is needed to access their assets. As a result, even if they might be occasionally helpful as sources of funding, such cases cannot be counted on for steady/sufficient revenue streams.

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Russian sovereign assets subject to U.S. jurisdiction and their “repurposing” for the support of Ukrainian victims.<sup>274</sup> This frozen wealth could potentially be accessed by the TFV in reference to the ICC’s Ukraine Situation since—in a “striking moment of bipartisanship”—Congress “lifted longstanding legal restrictions on the scope of possible cooperation between the United States and the ICC, at least as to Ukraine.”<sup>275</sup>

#### 4. *Secondment and In-Kind Goods/Services Donations*

As both a war crimes investigator and reparations lawyer, Ben Ferencz had sufficient institutional freedom to leverage his logistics genius to secure needed funding and services in resource-deprived contexts. As a sleuth conducting probes in concentration camps for Patton’s Third Army, Ferencz had leeway to enlist persons on the ground for various services, such as clean-up, burial, and evidence collection. He took advantage of the personnel of separate military units to take care of gravely ill concentration camp survivors and used their supplies to feed many of those poor souls. He was able to find clothing for many survivors in apartments vacated by Germans during the war. Later, while representing survivors in reparations matters as JRSO director, he requisitioned a fleet of vehicles from the U.S. Army (including jeeps and an ambulance) and borrowed and repurposed U.S. real estate holdings to run his restitution operations in Germany.

The Proposal envisages similar modes of securing needed resources for the institutionally-liberated TFV. More specifically, rather than funding itself uniquely through monetary donations, the TFV could improve its assistance mandate operational capacity (and thereby augment its reparations pot) through secondment of personnel or in-kind donations of needed goods and services.<sup>276</sup> The Cambridge

<sup>274</sup> Katie Davies, Brian J. Egan, Eytan J. Fisch, Ryan D. Junck, Dmitri V. Kovalenko, Timothy G. Nelson & Inara Blagopoluchnaya, *REPO for Ukrainians Act Provides for the ‘Repurposing’ of Seized Russian Sovereign Assets*, SKADDEN (May 2, 2024), <https://www.skadden.com/insights/publications/2024/05/repo-for-ukrainians-act> [<https://perma.cc/9MPK-5DB7>].

<sup>275</sup> Laura A. Dickinson, *U.S. Cooperation with the ICC to Investigate and Prosecute Atrocities in Ukraine: Possibilities and Challenges*, LIEBER INST. (June 20, 2023), <https://lieber.westpoint.edu/us-cooperation-with-icc-investigate-prosecute-atrocities-ukraine/> [<https://perma.cc/8F4F-D3WA>].

<sup>276</sup> It should be noted that Post-Cold War secondment of personnel to assist international accountability mechanisms has been a common practice beginning with the operations of the ICTY/ICTR. See Morten Bergsmo & Viviane E. Dittrich, *Preface by the Co-Editors*, in *INTEGRITY IN INTERNATIONAL JUSTICE*, at iii (2020)

Dictionary refers to “secondment” as a “period of time when an employee is sent to work somewhere else, to increase the number of workers, to replace other workers, or to exchange experience or skills.”<sup>277</sup> This could involve, for instance, a medical professional from a Danish public hospital being “seconded” to work at the TFV for a period of two years (while still being on the Danish government’s payroll) to help treat victims in an atrocity zone as part of the TFV’s assistance mission.<sup>278</sup>

### 5. *Enjoying a New Built-In Institutional Budget*

Finally, it should be noted that, despite all his creative ways of bringing in resources during his time as an investigator with the U.S. Army and a reparations lawyer for Holocaust victims, Ben Ferencz was also able to benefit from budgetary resources earmarked for his various positions. Thus, the lion’s share of his resources as a war crimes investigator came from the Third Army’s Judge Advocate section.<sup>279</sup> Ferencz was also able to take advantage of the limited resources provided by the annual JRSO budget.<sup>280</sup>

Similarly, as this Proposal places the TFV within the United Nations, it is anticipated that it will be furnished with a certain amount of UN funding (even if, in the end, that turns out not to be sufficient

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(referring to prosecutors, investigators and other professionals being seconded to the ICTY OTP by the US government during the period 1994-1995). The ICC has also looked to secondment to help with its investigative needs. *See Secondments of Investigators to the OTP – A Second Best Solution to the Court’s Capacity Crisis*, AMNESTY INT’L (Oct. 19, 2022), <https://hrij.amnesty.nl/secondments-of-investigators-to-the-otp-a-second-best-solution-to-the-courts-capacity-crisis> [<https://perma.cc/EA26-QBPS>] (indicating that, in reference to the Ukraine investigation, “21 States had indicated their willingness to second national experts in support of the work of the Office” including “a significant number of Dutch experts”). This indicates that this could be a viable option of an accountability mechanism-connected institution, such as the TFV as contemplated by the Proposal.

<sup>277</sup> *Secondment*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/secondment> [<https://perma.cc/P4ML-788F>] (last visited Oct. 5, 2024).

<sup>278</sup> *See, e.g.*, Jessica S. Grignon, Jenny H. Ledikwe, Ditsapelo Makati, Robert Nyangah, Baraedi W. Sento & Bazghina-werq Semo, *Maximizing the Benefit of Health Workforce Secondment in Botswana: An Approach for Strengthening Health Systems in Resource-Limited Settings*, 7 RISK MGMT. & HEALTHCARE POL’Y 91 (2014) (dealing with the scenario of American medical professionals working in public university hospitals being seconded help with health care needs in Botswana).

<sup>279</sup> *See supra* notes 18-27 and accompanying text.

<sup>280</sup> *See supra* notes 50-53 and accompanying text.

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in and of itself).<sup>281</sup> At the very least, one might imagine that TFF executive and administrative costs will be covered by the UN, as would those of the AVRT.<sup>282</sup> For example, the UN Voluntary Trust Fund for Victims of Trafficking in Persons Especially Women and Children (the Trafficking Victims Trust Fund) received US\$3.7 million in contributions primarily from a wide range of UN Member States, including Italy, Qatar, France, Australia, and the UAE, the five largest UN Member State contributors to the Trust Fund during that period.<sup>283</sup>

It might be reasonable to assume that similar UN funding could provide a portion of the costs for the personnel and materials necessary to run the relocated TFF's Secretariat. In this regard, it is important to note that those costs currently paid by the ICC for the TFF's Secretariat could instead be reallocated to the VPRS to help it with victim outreach efforts and liaison work with the new UN-placed TFF.

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<sup>281</sup> According to Article 17 of the United Nations Charter the General Assembly shall consider and approve the budget of the Organization and the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly. U.N. Charter art. 17, ¶¶ 1-2.

<sup>282</sup> See U.N. Charter art. 17, ¶ 3 ("The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned."). Article 57, in turn, states:

The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63. (2) Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

*Id.* art. 57.

<sup>283</sup> U.N. OFF. ON DRUGS & CRIME, UNITED NATIONS VOLUNTARY TRUST FUND FOR VICTIMS OF HUMAN TRAFFICKING: BASIC FACTS [hereinafter *TRAFFICKING VICTIMS TRUST FUND BASIC FACTS*], [https://www.unodc.org/pdf/human\\_trafficking/UN\\_Victims\\_Trust\\_Fund\\_Basic\\_Facts\\_Dec2017.pdf](https://www.unodc.org/pdf/human_trafficking/UN_Victims_Trust_Fund_Basic_Facts_Dec2017.pdf) [https://perma.cc/JQF7-ATFC] (last visited Oct. 9, 2024).

*C. Potential Advantages and Disadvantages of the New System**1. Potential Advantages**a. Philosophical/Conceptual*

The restorative-oriented TFV, it is submitted, does not fit comfortably within the institutional and structural confines of the retributive-oriented ICC. From a philosophical/conceptual perspective, integrating the TFV into the ICC has largely been an exercise in fitting the proverbial square peg into the round hole.

To understand why, one need only reflect on the essentially retributive nature of the ICC.<sup>284</sup> It is a court that flows directly from the epochal international military tribunals at Nuremberg and Tokyo and then the ad hoc international tribunals for the former Yugoslavia and Rwanda.<sup>285</sup> As noted by Ben Ferencz himself, the Nuremberg IMT, which was the model for the Tokyo IMTFE,<sup>286</sup> was focused on “punishment through the channel of organized justice, of those guilty or responsible [for violations of the rules of international law].”<sup>287</sup> And experts have found that the “ICC’s predecessors are primarily the Nuremberg and the Tokyo Tribunals “where violators of international law were held responsible for their crimes” and the focus was on “individual accountability.”<sup>288</sup> Thus, the Court may be considered retributive in nature as its primary emphasis is “punishment based on

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<sup>284</sup> See generally Claire Garbett, *The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice*, 5 RESTORATIVE JUST. 198 (2017) (finding that, in substance, the ICC takes a retributive approach to justice and its restorative features are merely symbolic).

<sup>285</sup> See Richard Goldstone, *Historical Evolution: From Nuremberg to the International Criminal Court*, 25 PENN. STATE INT'L L. REV. 763, 772 (2007) (showing a golden thread of being focused on “prosecuting those individuals who [have done] such horrible things”).

<sup>286</sup> Kristen D. Burton, *War Crimes on Trial: The Nuremberg and Tokyo Trials*, NAT'L WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/nuremberg-and-tokyo-war-crimes-trials> [<https://perma.cc/D36X-HGGP>] (last visited Oct. 7, 2024) (“The trials held in Nuremberg became the model for the trials that followed in Tokyo.”).

<sup>287</sup> Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 210 (1998).

<sup>288</sup> *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERT H. JACKSON CTR., <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> [<https://perma.cc/6MHB-GT6L>] (last visited Oct. 7, 2024).



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culpability of the accused rather than by reference to its social benefits . . . .”<sup>289</sup>

This is true notwithstanding the ICC’s nominal inclusion of victim participation and reparations in the Rome Statute. In her piece *The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice*, Claire Garbett explains why ICC victim participation and reparations seem only tacked on and symbolic, not substantive. She describes this as a “retributive approach” being undertaken by “lawyers as the central actors” of the ICC’s “conventional criminal justice” process.<sup>290</sup>

Moreover, “if the rhetoric of the ICC centres upon the inclusion of victims as participants, its practice often serves as a mode of exclusion.”<sup>291</sup> This is based on a number of problems identified by Garbett, including the “procedural winnowing” phenomenon,<sup>292</sup> the fact that, the vast majority of time, “victim participants have their views and concerns put forward by a legal representative rather than appearing in person during proceedings,”<sup>293</sup> and the fact that such attorneys represent large groups, not individual victims.<sup>294</sup> All of this is underscored by the fact that neither “victim participants nor their legal representatives are ‘parties’ to the trial” as the Prosecution and Defense are.<sup>295</sup> Nor are they able to “initiate a case to be heard by the Chambers” and thus “the procedural rights granted to victim representatives do not equate to those held by the Prosecution and Defense.” Garbett concludes:

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<sup>289</sup> Alexander K.A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. INT’L L. 969, 972 (2014).

<sup>290</sup> Garbett, *supra* note 284, at 202.

<sup>291</sup> *Id.* at 208.

<sup>292</sup> See *supra* notes 162-66 and accompanying text; Garbett, *supra* note 284, at 208 (citing Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood*, 76 L. & CONTEMP. PROBS. 205, 244 (2014)) (noting how the ICC processes “narrow the persons [who] may be accepted to participate as victims during proceedings” when a “situation” is narrowed to a case focusing on specific defendants and “situation” victims “lose their status as participants”).

<sup>293</sup> Garbett, *supra* note 284, at 209 (pointing out illustratively that in the *Lubanga* and *Bemba* proceedings only three victims out of hundreds designated to participate in *Lubanga* and thousands in *Bemba* were able to be heard in court during the respective trials in those cases).

<sup>294</sup> *Id.* at 209. This is so given that ICC RPE Rule 90(2) permits the Court “for the purposes of ensuring the effectiveness of the proceedings, [to] request the victims or particular groups of victims . . . to choose a common legal representative or representatives.” ICC RPE, *supra* note 107, r. 90, ¶ 2.

<sup>295</sup> Garbett, *supra* note 284, at 212.

[V]ictim participation is limited to ensure the retributive structure of the ICC's proceedings. That structure requires the traditional standing of legal professionals as the only parties to proceedings, and judges as the authoritative actors guiding proceedings and rendering judgements . . . . The participation of victims is therefore largely symbolic and not substantive in form . . . . For this reason, the ICC's proceedings are better understood to comprise a retributive approach with the additional participants of legal representatives of victims, and not a typical restorative justice approach.<sup>296</sup>

Thus, within the same time frame, when victims are approached in atrocity zones by two kinds of ICC actors—OTP investigators seeking evidence of guilt and TFV representatives looking to provide victims with assistance—they may be confused about this institutional blend of retributive and restorative efforts. They may wonder if they need to provide evidence of guilt to OTP investigators if they want access to TFV assistance. And that sense of dissonance/confusion may become one of alienation when later being excluded from TFV attention/largesse, via procedural winnowing, as the case progresses toward trial. And even absent procedural winnowing, remaining victims may experience yet a greater sense of disaffection once their individual voices are blended into a large group of other victims represented by an attorney and effectively muted in court, save for a small number of the group who may testify as witnesses.

This is why, in general, victims of crime seek “healing and sometimes reconciliation”—in other words, they want to focus on *restorative*, not retributive justice.<sup>297</sup> And this is equally true, of course, in the ICL context, especially with respect to victims of conflict-based sexual violence, who seek “gender justice.” As noted by Brahm and Ainley:

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<sup>296</sup> *Id.* at 215-16.

<sup>297</sup> Jean Trounstein, *Beyond Revenge: Most Crime Victims Prefer Rehabilitation to Harsh Punishment*, TRUTHOUT (Oct. 29, 2016), <https://truthout.org/articles/beyond-revenge-most-crime-victims-prefer-rehabilitation-to-harsh-punishment/> [<https://perma.cc/XVY2-ARYQ>].

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The Trust Fund for Victims and its reparations practices also are important in assessing the ICC's delivery on gender justice. Women's rights and gender advocates have long held that retributive justice is not gender justice: Gender justice requires rights of participation at trials and rights to reparation for victims [but we have seen minimal participation and] a relatively low level of funding for reparative measures . . . Given that voluntary donations from state parties account for the vast majority of the TFV budget (€2.8m in 2020, compared to €14,500 from private individuals and institutions), responsibility for the underfunding of the TFV rests with wealthy state parties. Again, this supports the claim that the Court is a politicized tool of powerful states, or at least that the state parties that fund the Court are less committed to reparative than to retributive justice.<sup>298</sup>

But, from a philosophical/conceptual point of view, a Trust Fund for Victims cleaved from the ICC would plausibly end the Fund's perceived mission dissonance and organizational schizophrenia. TFV personnel could interact with victims bearing none of the direct and confusing associational ICC punitive trappings. This is especially true since, per the Proposal, the TFV would not be limited to only ICC situation zones (for example, victims of spillover violence in non-ICC zones would be part of the TFV's remit).

Moreover, eliminating venue confusion as well, victims would not be going to The Hague to deal with reparations matters via the voice of their attorneys. Rather, they would appear in one of the regional AVRT chambers, where their own voices might be heard directly and they would only be dealing strictly with issues of restoration, not retribution. In other words, the new reparative/restorative-dedicated TFV, whose philosophical/conceptual placement within the international justice process would now be clear (i.e., a strictly restorative/reparative mechanism), would no longer be communicating mixed messages to victims. As indicated by Christo Papachristopoulos, removing the TFV from the ICC and

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<sup>298</sup> Wiebelhaus-Brahm & Ainley, *supra* note 4.

institutionally resituating it would constitute a move “towards fully restorative justice.”<sup>299</sup>

#### b. Institutional/Administrative

While the philosophical/conceptual advantages just considered may dovetail into certain institutional and administrative advantages, there are other, less philosophical/conceptual, institutional/administrative benefits to consider. As we have seen, given ICC retributive-minded meddling (even if unintentional) in Trust Fund operations (in procurement of services, for example),<sup>300</sup> “this tension” has impaired “the practical needs of the TFV to enable its work on the ground, which requires independence so as not to compromise its . . . mandate.”<sup>301</sup> Thus, there is “a growing frustration” among victims regarding “the convoluted disagreements and the ‘divergence’ of the TFV from victims’ preferences.”<sup>302</sup> For experts Luke Moffett and Clara Sandoval, the problem is that reparations are “confined within the criminal justice paradigm.”<sup>303</sup> As a result, they conclude that the “ICC is not the place to restore social justice as an administrative reparation programme for millions of victims.”<sup>304</sup>

This is especially true in a case like *Prosecutor v. Bemba*, where, as we have seen, the defendant’s initial crimes against humanity and war crimes convictions were overturned on appeal by a 3-2 decision owing to a perceived fatal weakness in the command responsibility basis for liability (the linchpin of the prosecution’s case regarding individual criminal responsibility).<sup>305</sup> Thus, again as we have seen, victims who had expectations of reparations after the conviction had their hopes dashed after the appellate reversal. Per Moffett and Sandoval:

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<sup>299</sup> Christos Papachristopoulos, *On the Punitive Nature of ICC Reparations Orders*, 37 LEIDEN J. INT’L L. 737, 753 (2024) (footnote omitted).

<sup>300</sup> See *supra* notes 170-72 and accompanying text (noting the challenge of implementing reparative-oriented programs within the strictures of a retributive-oriented criminal court in the context of procurement review).

<sup>301</sup> *Tilting at Windmills*, *supra* note 1, at 762.

<sup>302</sup> *Id.* at 764.

<sup>303</sup> *Id.* at 768.

<sup>304</sup> *Id.* at 764.

<sup>305</sup> *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III’s “Judgment Pursuant to Article 74 of the Statute,” ¶¶ 195-98 (June 8, 2018), <https://www.icc-cpi.int/court-record/icc-01/05-01/08-3636-red> [<https://perma.cc/246G-ZH4S>].

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The final submission of the victims in the *Bemba* case makes for sober reading: after 15 years waiting for reparations and justice at the ICC victims felt a ‘deep disappointment and hopelessness for not receiving justice . . . [leaving them] filled with scepticism and distrust towards the Court with their expectations raised for redress, especially when engaged on reparations by the expert team. Their legal representatives wanted the Chamber to establish principles of victims’ harm that could be used to claim reparations before other legal fora but the Chamber rejected this. In the acquittal appeal decision in the *Bemba* case, Judges Van den Wyngaert and Morrison, while recognizing that victims have a right to reparations, [based the acquittal on a consideration of] the rights of defendants [that] are at the heart of ICC proceedings . . . .<sup>306</sup>

But one of the appellate panel jurists who refused to take up the victims’ suggestion to find a legal basis for reparations despite the defendant’s acquittal, Presiding Judge Christine Van den Wyngaert, has elsewhere agreed with the basic premise of the Proposal:

A possible alternative could be to transform the Trust Fund for Victims into a Reparations Commission, which would directly deal with victims’ reparations claims. In this proposal, the victims would detach from the criminal proceedings and be allowed to bring their claims before a Trust Fund for Victims Reparations Commission. Reparation claims before such a Commission would not need to be restricted to convictions, but also could be open to potentially all the victims of the situations investigated by the ICC. The number of beneficiaries of this mechanism would

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<sup>306</sup> *Tilting at Windmills*, *supra* note 1, at 764-65.

be significantly higher than the victims of cases that result in convictions.<sup>307</sup>

Interestingly, this idea of turning the TFV into a “Reparations Commission” was probed by the ICTY. In fact, the ICTY’s judicial branch floated the idea of creating such a “Reparations Commission” in 2000.<sup>308</sup> Its President, Judge Patrick Robinson, addressed the UN General Assembly on this topic, requesting the creation of such a commission to partner with the ICTY.<sup>309</sup>

And placing such a trust fund/commission (or, per the Proposal, AVRT) within the UN is also in line with current international administrative practices. In particular, the UN Trafficking Victims Trust Fund was created as an integral component of a global effort to address trafficking in person.<sup>310</sup> In August 2010, UN Member States established the Trust Fund to provide financial assistance to victims of human trafficking. The United Nations Office on Drugs and Crime (UNODC) was tasked with the management of the Trust Fund, whose assistance is meant to cover victims’ physical, psychological, and social recovery as well as reintegration back into their communities.<sup>311</sup>

Moreover, if one considers the municipal jurisdiction origins of victims participating in criminal cases and obtaining reparations, one should consider the arrangement in France. This is so because the key victims’ rights provisions of what would become the ICC’s Rome Statute, Articles 68(3) (participation) and 75 (reparations), were

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<sup>307</sup> Van den Wyngaert, *supra* note 106, at 495-96; *see also* Papachristopoulos, *supra* note 299, at 753 (proposing a comparable institutional separation); Carsten Stahn, *Reparative Justice after the Lubanga Appeal Judgment*, 13 J. INT’L CRIM. JUSTICE. 801, 806 (2015) (suggesting a similar arrangement).

<sup>308</sup> *See* Van den Wyngaert, *supra* note 106, at 496; *see also* Letter from President of the Int’l Tribunal for the Former Yugoslavia to the President of the Security Council, U.N. Doc. A/60/706 (Oct. 2, 2000) (discussing the possibility of establishing a compensation commission for victims).

<sup>309</sup> Judge Patrick Robinson, Pres., Int’l Crim. Tribunal for the Former Yugoslavia, Address Before the United Nations General Assembly (Nov. 11, 2011), [https://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/111111\\_pdt\\_robinson\\_un\\_ga\\_en.pdf](https://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/111111_pdt_robinson_un_ga_en.pdf) [<https://perma.cc/N476-2TG9>] (calling upon UN Member States to assist ICTY-case-victims beyond via the formation of a trust fund/commission). ICTR judges also made the pitch during this time frame. *See New Way Forward*, *supra* note 245, at 1206.

<sup>310</sup> TRAFFICKING VICTIMS TRUST FUND BASIC FACTS, *supra* note 283.

<sup>311</sup> *Id.*

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inserted/supported by the French during the Prep. Comm. phase.<sup>312</sup> In the words of one of the key members of the French negotiating team, Gilbert Bitti, at the time with the French Justice Ministry, France “played a significant role in ensuring a new, and, as far as possible, central place for victims before the ICC.”<sup>313</sup>

And how does the French system work? In France, persons can become parties to any criminal case in which they are victims (including in hate crimes cases) by filing claims for civil damages (that is, by identifying themselves as “parties civiles” in the case).<sup>314</sup> The *partie civile* benefits from a whole host of legal privileges, such as being able to: (1) access the case file; (2) receive regular updates on important developments in the case; (3) contest certain court decisions; (4) present additional evidence in the case; and (5) testify in court.<sup>315</sup>

Once the penal case is decided, the French criminal court plays a very little part in the matter of compensation to victims.<sup>316</sup> If the defendant is found not guilty, the *partie civile* can file a claim with a civil court and seek compensation as a crime victim.<sup>317</sup> If the defendant is found guilty, the criminal court deals with compensation to the victim only insofar as the defendant has funds/assets that can cover assessed damages related to the gravity of the crime as well as the victim’s physical injuries and psychological trauma.<sup>318</sup>

<sup>312</sup> Christoph Sperfeldt, *Rome’s Legacy: Negotiating the Reparations Mandate of the International Criminal Court*, 17 INT’L CRIM. L. REV. 351, 358 (2016); COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT (Mark Klamberg ed., 2017). Egypt, in line with France, was the initial proponent of Article 68, ¶ 3. COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT, *supra*, at 514 n.557.

<sup>313</sup> Gilbert Bitti, *A Court for Victims?*, in INT’L FED’N HUM. RTS. VICTIMS AT THE CENTRE OF JUSTICE FROM 1998 TO 2018: REFLECTIONS ON THE PROMISES AND THE REALITY OF VICTIM PARTICIPATION AT THE ICC 6, 7 (2018), [https://www.fidh.org/IMG/pdf/droitsdesvictimes730a\\_final.pdf](https://www.fidh.org/IMG/pdf/droitsdesvictimes730a_final.pdf) [<https://perma.cc/KQ8M-NAYK>].

<sup>314</sup> *The Legal Process: Assistance for Victims of Crimes in France*, U.S. EMBASSY & CONSULATES IN FR. [hereinafter *Victims of Crimes in France*], <https://fr.usembassy.gov/services/assistance-for-victims-of-crimes-in-france/the-legal-process/> [<https://perma.cc/3A3A-Q5VM>] (last visited Feb. 28, 2025).

<sup>315</sup> *Id.*; see also *Hate Crime Report, National Frameworks to Address Hate Crimes in France*, ORG. FOR SEC. & CO-OP. IN EUR. [hereinafter *Hate Crime Report*], <https://hatecrime.osce.org/national-frameworks-france> [<https://perma.cc/8RQK-7VG5>] (last visited Oct. 9, 2024).

<sup>316</sup> *Victims of Crimes in France*, *supra* note 314.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

If the defendant is found guilty and does not have funds/assets to cover the victim's damages, then she seeks compensation outside of the criminal court system.<sup>319</sup> In particular, the victim must apply for compensation from the Commission for Compensation to Victims of Offences (Commission d'indemnisation des victimes d'infraction), which forwards the application to the Victims' Guarantee Fund (Fonds de garantie des victimes).<sup>320</sup> If the Commission is unable to pay compensation, the victim must apply to the Offence Victims Recovery Assistance Service (Service d'aide au recouvrement des victimes d'infractions).<sup>321</sup> Moreover, in seeking such compensation, legal assistance is not covered by criminal court personnel; rather, it is outsourced to "[s]pecialized lawyers . . . appointed by local bar associations to assist victims, provide them with legal representation and/or assist them in seeking compensation."<sup>322</sup>

The French system, which inspired the inclusion of the ICC victim framework, is quite similar to the Proposal's contemplated reform of that framework. The French arrangement puts in place an efficient victim compensation division of labor in reference to criminal matters, the criminal court having only a partial role with outside counsel for victims and a separate commission/fund for providing compensation. And the initial draft of the Rome Statute (i.e., the Prep. Comm. Draft) contemplated a similar division of labor with the reparations functions not being administered by the criminal court alone but by a separate organ within the UN. Political compromise in Rome changed that; but, as this Article demonstrates, going back to the original template could confer significant advantages after over two decades of subpar results.

### c. Procedural/Due Process Advantages

Other potential advantages of the proposed new system relate to improvements in procedure and due process. More specifically, the current system is rife with apparent conflicts of interest involving an ICC-attached TFV carrying out its assistance mandate in a context that could incriminate implicated defendants and taint victims who could be future witnesses. The reconfigured system of the Proposal would go a long way toward eliminating this problem by bolstering the

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<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Hate Crime Report*, *supra* note 315.



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presumption of innocence and preserving the credibility of potential future witnesses. Moreover, such involvement by the TFV, operating under the aegis of the ICC, could prejudice domestic jurisdictions challenging the admissibility of a case. Once again, a TFV untethered from the ICC would help ensure that admissibility proceedings are less compromised.

i. Supporting the Presumption of Innocence

In carrying out its assistance mandate during the early phases of an ICC case, the ICC-linked TFV could give the appearance of a “criminal court facilitating tangible aid to victims before having established that any crime has been committed at all . . . .”<sup>323</sup> This is arguably at odds with the Rome Statute’s guarantee of the presumption of innocence in Article 66, which declares:

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.<sup>324</sup>

In light of this, Regina Rauxloh observes:

[O]ne 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

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<sup>323</sup> Rauxloh, *supra* note 142, at 215.

<sup>324</sup> Rome Statute, *supra* note 6, art. 66.

experienced horrendous suffering, these acts could easily lie outside ICC jurisdiction.<sup>325</sup>

Clearly, separating the TFV from the ICC helps remove this potential erosion of the presumption of innocence—a core due process right of the defendant.

#### ii. Removing Potential Witness Taint

A related problem is the Trust Fund assistance mandate beneficiary who is later called to give testimony as a witness. Witness reliability could be damaged “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.”<sup>326</sup> Per Rauxloh:

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. Having previously benefited from the Trust Fund would undermine the credibility of the testimony of the NGO.<sup>327</sup>

Once again, if such witnesses have not benefited from ICC-linked assistance, their credibility is less likely to be impugned or it may

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<sup>325</sup> Rauxloh, *supra* note 142, at 216.

<sup>326</sup> *Id.* at 217.

<sup>327</sup> *Id.*

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avoid taint altogether. Thus, the Proposal confers another important procedural advantage.

### iii. Eliminating or Lessening Admissibility Problems

The ICC-linked TFFV's assistance mandate can create yet another procedural issue—interfering with the Court's evaluation of admissibility issues.<sup>328</sup> As a threshold matter, along with determining whether it has jurisdiction, the ICC must determine if a case is “admissible.”<sup>329</sup> To determine the admissibility of a case before the Court, two criteria must be assessed: complementarity and gravity.<sup>330</sup> Complementarity, one of the ICC's foundational principles, helps define its working relationship with states.<sup>331</sup> Per Article 17(a) of the Rome Statute, cases are found to be admissible from a complementarity perspective if a state either remains wholly inactive or lacks the capacity or will genuinely to investigate and prosecute matters otherwise within the ICC's subject matter jurisdiction.<sup>332</sup> In effect, it creates an institutional preference for national action that empowers municipal courts to handle cases of genocide, crimes against humanity, war crimes and aggression.<sup>333</sup>

Similarly, per Article 17(1)(d), a case will be rejected as inadmissible if it “is not of sufficient gravity to justify further action by the Court.”<sup>334</sup> The “gravity” of crimes will be determined with reference to their scale, nature, manner of commission, and impact.<sup>335</sup> Victims figure prominently in this calculus.<sup>336</sup> Thus, by way of illustration, the “scale” of the crimes “may be assessed in light of, inter alia, the number of direct and indirect victims, the extent of the

<sup>328</sup> *Id.* at 217-19.

<sup>329</sup> PRIYA URS, GRAVITY AT THE INTERNATIONAL CRIMINAL COURT: ADMISSIBILITY AND PROSECUTORIAL DISCRETION 5 (2024).

<sup>330</sup> *Id.*

<sup>331</sup> Gregory S. Gordon, *Complementarity and Alternative Justice*, 88 OR. L. REV. 621, 627 (2009) [hereinafter *Alternative Justice*].

<sup>332</sup> Rome Statute, *supra* note 6, art. 17, ¶ 1(a); *Alternative Justice*, *supra* note 331.

<sup>333</sup> *Alternative Justice*, *supra* note 331, at 627.

<sup>334</sup> Rome Statute, *supra* note 6, art. 17, ¶ 1(d).

<sup>335</sup> URS, *supra* note 329, at 37 (quoting Int'l Crim. Ct., *Regulations of the Office of the Prosecutor*, Regul. 29(2), ICC-BD/05-01/09 (Apr. 23, 2009) [hereinafter *Regulations of the Office of the Prosecutor*]).

<sup>336</sup> *Id.*

damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families . . . .”<sup>337</sup>

Given that admissibility—both as to complementarity and gravity—can be challenged by a suspect after the TFV, as part of the ICC, has begun its assistance mandate work, Rauxloh sees potential problems:

[In] a situation [that] 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 only years after the ICC opened investigation into this situation and the Trust Fund began to operate the general assistance mandate.<sup>338</sup>

According to Rauxloh, a TFV continuing under the aegis of the ICC could be especially problematic with respect to the gravity admissibility criterion:

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

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<sup>337</sup> *Id.* (quoting OFF. OF THE PROSECUTOR, INT’L CRIM. CT., POLICY PAPER ON PRELIMINARY EXAMINATIONS, ¶ 62 (2013), <https://www.legal-tools.org/doc/acb906/> [<https://perma.cc/D4FA-8QYZ>]).

<sup>338</sup> Rauxloh, *supra* note 142, at 217-18.

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such finding . . . . [T]he more the general assistance mandate is run, the more likely will it be that these concerns regarding complementarity and gravity will be raised.<sup>339</sup>

If the TFV were detached from the ICC, these concerns about the “impartiality of the court” being impugned with respect to admissibility challenges would reduce, if not eliminate any alleged procedural taint.

## 2. *Potential Disadvantages*

### a. Organizational Merger Challenges?

Of course, major institutional reconfigurations, such as the one in the Proposal, are never without potential disadvantages. To begin, the TFV has been a part of the ICC for more than two decades and is institutionally well ingrained. Although it has come up short in fulfilling its mission, severing it from its mother institution could entail tremendous short-term logistical disruption and work culture clashes for TFV management and personnel. Julia González, Jorge Lemus, and Guillermo Marshall point out that, in general, organizational mergers create “*organizational* challenges [because] they must consolidate diverse workforces, labor contracts, physical capital, technology systems, and other factors affecting . . . productivity . . . .”<sup>340</sup> On the other hand, over time, it is possible for the smaller organization that has merged into the larger one to adapt and “improve[] . . . performance after . . . consolidation, suggesting synergies.”<sup>341</sup>

This is especially true when the move is made in anticipation of potential problems and communication between managers and personnel of both the incoming organization and the existing one that will incorporate it. Steven Aronowitz, Aaron De Smet, and Deirdre McGinty opine that, in such a case, the odds for success improve vastly:

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<sup>339</sup> *Id.* at 218.

<sup>340</sup> Julia González, Jorge Lemus & Guillermo Marshall, *Mergers and Organizational Disruption: Evidence from the US Airline Industry*, 33 J. ECON. MGMT. STRATEGY 111, 111 (2023) (analyzing this phenomenon in the context of the airline industry).

<sup>341</sup> *Id.* at 126.

Organizational redesign involves the integration of structure, processes, and people to support the implementation of strategy and therefore goes beyond the traditional tinkering with “lines and boxes.” Today, it comprises the processes that people follow, the management of individual performance, the recruitment of talent, and the development of employees’ skills. When the organizational redesign . . . matches its strategic intentions, everyone will be primed to execute and deliver them. The company’s structure, processes, and people will all support the most important outcomes and channel the organization’s efforts into achieving them.<sup>342</sup>

Comparable organizational linkages have been successful in analogous milieus, such as smaller into larger law firm mergers and minor-major NGO mergers.<sup>343</sup> With respect to larger, international organizations, an instance of successful institutional integration would be the African Commission on Human and Peoples’ Rights (ACHPR) merging into the African Union (AU). The ACHPR was created in 1986 via the African Charter on Human and Peoples’ Rights under the aegis of the Organization for African Unity (OAU).<sup>344</sup> It was later incorporated into the African Union, which was created via the African Charter in 2002 and replaced the OAU.<sup>345</sup> More specifically, the ACHPR “is one of the organs of the African Union as set out by

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<sup>342</sup> Steven Aronowitz, Aaron De Smet & Deirdre McGinty, *Getting Organizational Redesign Right*, MCKINSEY Q. (June 1, 2015), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/getting-organizational-redesign-right> [<https://perma.cc/U2BX-8GHD>].

<sup>343</sup> See Justin Henry, *Merging Law Firms Face Challenge of Creating New Identity*, BLOOMBERG L. (Oct. 1, 2024), <https://news.bloomberglaw.com/business-and-practice/merging-law-firms-face-challenge-of-creating-new-identity> [<https://perma.cc/SBA2-MPPF>] (in respect to law firms); Donald Haider, *Nonprofit Mergers That Work*, STAN. SOC. INNOVATION REV. (Mar. 2, 2017), [https://ssir.org/articles/entry/nonprofit\\_mergers\\_that\\_work](https://ssir.org/articles/entry/nonprofit_mergers_that_work) [<https://perma.cc/N5HY-368G>] (in the case of NGOs).

<sup>344</sup> *History*, AFR. COMM’N ON HUM. & PEOPLES’ RTS., <https://achpr.au.int/en/about/history> [<https://perma.cc/K97N-LZS5>] (last visited Oct. 12, 2024).

<sup>345</sup> *Id.*

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the African Charter.”<sup>346</sup> And, in the years since merging into the AU, the ACHPR has carried out its mission quite successfully.<sup>347</sup>

Of course, the smaller League of Nations might be seen as having merged into the new United Nations in 1945. It must be understood that the League did not cease to function during World War II, although its work was drastically reduced. Its Secretariat carried on in Geneva, while some personnel worked in offices set up in London, Washington, D.C., and on the campus of Princeton University in the United States. When the slightly larger, fifty-nation United Nations was created on October 24, 1945, the forty-six-nation League was still active. Thus, for several months, the two organizations coexisted. Then, in April 1946, thirty-five of the League’s forty-six Member States met in Geneva to formally dissolve it. In many respects, a *de facto* merger followed:

[T]he League’s headquarters in Geneva, the Palais des Nations [] were transferred to the UN. In some cases, activities managed by the League were also taken over by the United Nations or by organs part of the UN system. For instance, the work of the League in fields such as the protection of refugees, global health, the fight against drug trafficking, intellectual cooperation, and social and economic development paved way for the activities of the United Nations. Not surprisingly, some former League staff and diplomats who worked with the League played a significant role in the formative years of the United Nations.<sup>348</sup>

<sup>346</sup> *Id.*

<sup>347</sup> See *African Rights Commission’s Work More Important Than Ever*, HUM. RTS. WATCH (Nov. 2, 2022, 12:00 AM), <https://www.hrw.org/news/2022/11/02/african-rights-commissions-work-more-important-ever> [https://perma.cc/4CEG-G6MA] (detailing the “quasi-judicial mechanism’s” success in issuing “critical decisions . . . that have expanded standards and understanding on human rights in Africa and the rest of the world, including on the right to development, Indigenous peoples’ rights, women’s rights, children’s rights, media freedoms, and rights-focused government responses to the Covid-19 pandemic.”).

<sup>348</sup> *Transition to the United Nations*, THE UNITED NATIONS OFF. AT GENEVA, <https://www.ungeneva.org/en/about/league-of-nations/transition#:~:text=When%20the%20UN%20Charter%20came,the%20dissolution%20of%20the%20League> [https://perma.cc/8RCD-QF7C] (last visited Oct. 12, 2024). That said, the “United Nations officially has no connection with the League of Nations.” *Id.*

Although there may be no exact analogy of an existing organization like the TFV being integrated into a much larger entity such as the UN, the analogous mergers suggest the prospects for success are not farfetched. That said, the devil is often in the details and certain issues arising from the unique nature of the TFV and its former placement in the ICC could still give pause. For example, there would be the loss of efficiency and economies of scale that the TFV currently enjoys being under the ICC tent, arguably a better and more developed internal relationship with the OTP, VPRS, OPVC and other relevant ICC organs that would permit superior coordination and use of resources in certain situations/contexts.

b. Overlap, Repetition and Waste?

In this regard, might there be overlap, repetition and waste in terms of TFV personnel tracking ICC proceedings and VPRS personnel fulfilling its liaison function between the ICC and the TFV? For example, it might make sense for the TFV to monitor ICC pre-trial and trial proceedings with its own observers in the courtroom. If that were the case, what would be the role of the VPRS (or even the OPCV) in terms of being the connecting point between the ICC and the TFV? Would there be too much duplication of effort and, in some cases, confusion about respective roles? Could this possibly harm victim interests? This is possible; however, Ben Ferencz's experience coordinating institutionally distinct prosecution and reparations efforts augurs well for the new TFV envisaged by the Proposal.

c. Overstretched?

Similarly, might the TFV be overstretched in terms of capacity if it were to handle non-ICC matters? Would the TFV's new rules/regulations require that any victim assistance/reparations be at least geographically or transactionally connected to an ICC matter? How close would the connection need to be? Ben Ferencz's financial success working in reparations organizations not connected with prosecution offices strongly indicates that a more independent TFV will be better able to pay for robust versions of its two mandates. But only time would tell how much more the TFV could take on. It has fallen down on the job trying to satisfy its mandates with respect to ICC matters alone—perhaps, from a resources perspective, it would



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have to demonstrate its ability to successfully handle victims from those cases/situations first before taking on non-ICC matters.

d. Poor Institutional Placement?

Finally, would placing the TFV/AVRT under the aegis of the UN Secretary General and UN Office of Administration of Justice and attached to the UN Dispute/Appeals Tribunal be a good institutional fit? The UNDT/UNAT are essentially administrative tribunals set up to adjudicate work disputes within the UN system. While it is true that the judicial infrastructure would confer on the TFV/AVRT many logistical advantages, perhaps it would be an awkward fit, given that the TFV/AVRT would not be dealing with internal UN justice matters. That said, it is worth noting that both Rowan Downing and Agnieszka Klonowiecka-Milart have served on the UNDT after having been judges at the Extraordinary Chambers in the Courts of Cambodia (ECCC),<sup>349</sup> which adjudicated international crimes with a heavy emphasis on justice for victims.<sup>350</sup>

Alternatively, would the UNODC be a better institutional fit for the newly liberated TFV/AVRT? That UN agency is already the home of the Trafficking Victims Trust Fund (TVTF). Would the TFV/AVRT fuse more seamlessly with the TVTF under the auspices of the UNODC given that the former deals with criminal law issues (as opposed to the UNDT/UNAT, which strictly handles civil matters) and the latter is a trust fund helping victims of crimes that, to a certain extent, dovetail with ICC crimes?<sup>351</sup> That said, the UNODC/TVTF does not have a built-in judicial apparatus, which would need to be created. Does that create too high of a cost barrier for TFV/AVRT

<sup>349</sup> See Gloria Nwabugu, *So What Does Judge Downing Think?*, U.N. SPECIAL, Nov. 2017, at 10, <https://untoday.org/wp-content/uploads/2023/06/UN-Special-774-2017-11.pdf> [<https://perma.cc/QK3W-LYN8>]; *Justice Rowan Downing KC*, ANVAY, <https://www.anvayglobal.com/speaker/justice-rowan-downing-kc/> [<https://perma.cc/6VRY-95CZ>] (last visited June 23, 2025).

<sup>350</sup> See Gregory S. Gordon, *Transnational Atrocity Victim Networking: A New Paradigm for International Accountability Mechanisms*, 35 CRIM. L. FORUM 39, 54 (2024) [hereinafter *Victim Networking*] (“Like the ICC, the ECCC has perceived justice for victims as a core part of its mandate.”).

<sup>351</sup> For example, human trafficking is covered by Article 7(1)(c) of the Rome Statute (titled “Enslavement as a Crime against Humanity”). Rome Statute, *supra* note 6, art. 7, ¶ 1(c). Article 7(2)(c) then states: “‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of *trafficking in persons*, in particular women and children.” *Id.* art. 7, ¶ 2(c) (emphasis added).

relocation? Moreover, perhaps being under the aegis of the Secretary General would give the proposed TFV/AVRT more prominence within the UN and better budgetary consideration.<sup>352</sup>

Alternatively, over time, if better finances permit, perhaps the TFV/AVRT could opt for being an entirely independent organization. In this regard, it might end up looking like the Transnational Victim Advocacy Council network I proposed in my article *Transnational Atrocity Victim Networking: A New Paradigm for International Accountability Mechanisms*.<sup>353</sup> This is envisaged as an organization akin to the International Committee for the Red Cross that would help empower victims during the pendency of international criminal law proceedings and beyond.<sup>354</sup> It would have a global hub and regional offices, much as has been proposed for the TFV/AVRT.<sup>355</sup> For now, the proposal to place the TFV/AVRT within the UN seems sound. Over time, however, it might be more effective for it to be entirely independent. The point is that the international community will never know unless it tries something different from the current failed system. The Proposal herein provides that opportunity.

## V. CONCLUSION

Incorporating victims' restorative interests into ICL's juridical fabric is a relatively recent phenomenon which, in many respects, is still in an experimental phase. In effect, the ICC has been serving as its testing lab, and, unfortunately, two decades of trial and error have mostly been about error. Within the justice crucible of a predominantly retributive mechanism, the dual assistance/reparation fiduciary duties of the TFV, the key restorative agent in this framework, have not been adequately discharged. Sporting the institutional mantle of the punitive-focused ICC, while in the company of retributive-minded OTP personnel, the TFV, this Article has argued, cannot effectively communicate its restorative mission to victims on the ground. Moreover, its restorative projects are stymied not only by guilt-focused OTP investigators, but also by the retributive

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<sup>352</sup> See *The Role of the UN Secretary General*, COUNCIL ON FOREIGN RELS. (Aug. 29, 2024), <https://www.cfr.org/background/role-un-secretary-general> [<https://perma.cc/DXA8-PCZY>] (noting that, "as the United Nations' top leadership position," the UNSG's office "has broad authority to steer the organization's agenda" with generous funding for a staff of more than thirty-six thousand").

<sup>353</sup> *Victim Networking*, *supra* note 350, at 81.

<sup>354</sup> *Id.* at 70-71.

<sup>355</sup> *Id.* at 71-72.

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criminal-law-culture of the ICC administrative colleagues the TFV must work with to operationalize its mandates. And, within these unfriendly confines, the TFV always comes out on the short end of the stick when it comes to distribution of limited resources.

But if ICL is still in the experimental phase of integrating victims within its framework, why not study and learn from what is arguably history's most successful criminal/restorative justice program, and its first one—the whole gamut of Holocaust investigations, prosecutions and reparations? It is true that its three key phases—i.e., probing the Nazi crime scenes, bringing the perpetrators to trial, and providing compensation to survivors—took place sequentially because the authorities were operating reactively as history unfolded. However, in retrospect, perhaps there is more to the sequencing than mere historical accident. As this Article has demonstrated, handling investigations, prosecutions, and reparations sequentially via different organizations may have yielded superior results because it happened to represent a superior systemic design.

Indeed, Ben Ferencz's trajectory and success as a Holocaust justice pioneer evinces this amply. The wide operational berth given to him as an army investigator permitted creative material and human resource acquisition that made for effective probes informed by restorative efforts vis-à-vis victims. Then, after his siloed prosecution efforts at Nuremberg, which allowed for an exclusively retributive mission that ended in the swift and efficient conviction of all the defendants in the dock at the *Einsatzgruppen* trial, he was given a free hand to run the JRSO and the URO and practice as a reparations lawyer, in no way hemmed in by any competing mandates of his prior prosecutor's job. And he pursued reparations claims before adjudicators entirely separate from the courts he appeared before as a prosecutor in Nuremberg. Once again, with such institutional independence, in an entirely different setting, he found numerous creative ways to accomplish his reparative tasks, including borrowing funds, materials, and personnel, accessing frozen assets, and negotiating bilateral treaties.

The Proposal herein envisages a rough replication of that institutional set-up and sequencing, with the idea that it would yield reasonable prospects for similar success. It centers on removing the TFV from the ICC. And it posits that then placing the TFV under the aegis of the UN, as the early Rome Statute framers contemplated, would endow the Trust Fund with philosophical and mission coherence, empower it to seek resources and funds creatively, open it

to providing assistance and reparations to victims outside of the ICC's jurisdiction, and spare it from possibly tainting the perception of ICC justice with the specter of victim-witness conflicts of interest and the erosion of the presumption of innocence.

At the same time, unlike the proposal of Judge Christine Van den Wyngaert, which, while creating a separate reparations commission, would also sever the victim participation feature from ICC proceedings, the Proposal herein would not modify the Court's victim participation schema. This is the approach endorsed by one of the foremost experts in the field, Luke Moffet:

Others have advocated for such a separate reparations chamber or commission, due to the challenges currently facing the ICC reparations regime. This author has been reluctant to advocate for a separate chamber, given that those who have done so before have intended it to remove victims from participating in trial proceedings at the Court. Victims participating at the ICC play an important part in ensuring the transparency of trial proceedings and to effectively protect their interests. A reparations chamber as suggested here would not remove victims from participating in ICC criminal proceedings . . . .<sup>356</sup>

The Proposal is in accord with Moffett's vision. But it arguably goes even further – the envisaged chamber, the AVRT (in accord with Ben Ferencz's experience, different from the criminal court deciding the guilt of the perpetrators at issue) –would also allow victims, whose direct and actual voices were not heard during the ICC proceedings, to be heard before the AVRT. The details as to who would be eligible to testify this way, of course, would have to be worked out based on time and resource considerations.

But that is true about much of the Proposal. Looking at the career of Ben Ferencz as a guide and considering the realities of modern ICL, this Article has made the argument for a TFV-ICC divorce and set out the large conceptual parameters needed to envisage and operationalize it. But certainly, further scholarship is needed to flesh out the particulars and work carefully through the potential institutional

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<sup>356</sup> *New Way Forward*, *supra* note 245, at 1216.

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snags. That said, we can now conceive of a victim justice trajectory that would take us from fusion-confusion to separation-harmonization. For the sake of atrocity survivors, whose voices have been stifled and whose wounds still need binding up, let us hope the international community will soon be ready to begin that journey.