

# **REDRESS**

*Seeking Reparation for Torture Survivors*

## **ENSURING THE RIGHTS OF VICTIMS IN THE ICC**

SPECIFIC CONCERNS AND RECOMMENDATIONS RELATING TO  
**THE TRUST FUND FOR VICTIMS**

PREPARED FOR THE 8<sup>TH</sup> PREPARATORY COMMISSION OF THE ICC  
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## **KEY RECOMMENDATIONS**

1. The Preparatory Commission should recommend to the Assembly of State Parties criteria for the operation of the Trust Fund for Victims (TFV)
2. The Assembly of State Parties should establish a subsidiary body responsible for the proper administration of the TFV.
3. The Fund should be under the general authority of the Assembly of State Parties, subject to an Advisory Board.
4. The operational guidelines and procedures of the TFV should be designed to optimize its capacity to respond to the needs of victims.
5. First priorities include: (i) operating and management procedures regarding the functions of the Advisory Board (quorum; frequency of meetings; responsibilities; secretariat); (ii) audit procedures and stringent monitoring mechanisms for grant recipients and implementing partners; (iii) criteria and rules regarding interim relief (decision-making in between sessions); and (iv) rules regarding priorities and modalities for distribution of funds.
6. The cost for administering the TFV should be borne by the Court
7. Restrict earmarking of voluntary contributions to tackle imbalances in areas of victim support.
8. 10% of estimated annual expenditures to be earmarked as a reserve for the following year.
9. For victims to benefit from general funds of the TFV, the Pre-trial Chamber must have authorized the commencement of an investigation in accordance with Article 15(4) of the Statute.
10. The Order of the Court transferring fines and forfeitures to the TFV should specify how the funds are to be used. It is suggested that these funds be used, in the first instance to supplement reparations orders.
11. If the TFV is required to institute claims procedures to facilitate the distribution of mass reparations orders, these procedures should be simple, and distribution procedures should allow for payments in installments and pro-rata payments.
12. The TFV should actively seek input of victims to determine needs and wants of victims. Awards should include such components as restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.
13. General assistance to victims should ideally be temporary. The TFV should not attempt to cover the full range of humanitarian needs of victims.

## INDEX

<b>I.</b>	<b>PrepCom should make recommendation to ASP</b>	<b>4</b>
<b>II.</b>	<b>Objectives of the TFV</b>	<b>4</b>
<b>III.</b>	<b>Establishment and Management of the TFV</b>	<b>5</b>
<b>IV.</b>	<b>Sources of Funds</b>	<b>10</b>
<b>V.</b>	<b>Criteria for Acceptance of Voluntary Contributions</b>	<b>11</b>
<b>VI.</b>	<b>Beneficiaries of General Assistance</b>	<b>13</b>
<b>VII.</b>	<b>Fines and/or Forfeitures</b>	<b>14</b>
<b>VIII.</b>	<b>Individual Reparations of Massive Scale</b>	<b>15</b>
<b>IX.</b>	<b>Collective Reparation</b>	<b>18</b>
<b>X.</b>	<b>Assistance to Victims</b>	<b>20</b>

## **I. THE PREPCOM SHOULD RECOMMEND TO THE ASSEMBLY OF STATE PARTIES CRITERIA FOR THE OPERATION OF THE TRUST FUND FOR VICTIMS (TFV)**

Much confusion remains as to what the TFV is, how it will function, whom specifically it is supposed to benefit, and how it will relate to the Court. The Rome Statute specifically provides that it is the Assembly of State Parties who shall determine the criteria for the management of the TFV.<sup>1</sup> Nevertheless it is recommended that the Preparatory Commission consider these issues in detail. This will facilitate discussions on the Financial Regulations and Rules, and will accelerate the work of the Assembly of State Parties, thereby ensuring that the TFV is made operational as quickly as possible.

REDRESS prepared this document to contribute to the debate on the TFV, and to stress to delegations the complexities that are involved.

***IF THE TRUST FUND FOR VICTIMS IS TO BE AN EFFECTIVE TOOL, ADEQUATE PLANNING AND PREPARATION ARE REQUIRED AT A VERY EARLY STAGE.***

## **II. OBJECTIVES OF THE TFV**

Article 79(1) of the Rome Statute has broadly characterised the purpose of the TFV as “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.”

The following uses have been identified:

- A vehicle of the Court to transfer money or other property collected through fines and forfeiture proceedings [Article 79(2)]
- A mechanism to channel awards for reparation which the Court decides to make through the trust fund [rule 98(2)-(4)]

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<sup>1</sup> Article 79(3).

- A tool to channel resources for the benefit of victims [rule 98(5)]

### **III. ESTABLISHMENT AND MANAGEMENT OF THE TFV**

Article 79(3) of the Rome Statute provides that the Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

France has proposed that: "The Assembly of State Parties shall establish, pursuant to article 112 paragraph 4 of the Statute, a subsidiary body responsible for the proper administration of this fund."<sup>2</sup> Other proposals included management by the UN (under the UN Secretary General's management, or through UNDP) or by the Registrar of the ICC (as a component of work undertaken by the Registry on victims issues). REDRESS believes that it is important for the fund to retain a distinct identity from the UN, as it is believed that this will maximise its independence and impartiality. However, it is equally important for the fund to maintain a unique management structure – separate from that of the Court and the Registry. While close collaboration with the Victims and Witnesses Unit will be critical, it is important that the Fund retains its autonomy in relation to its mandate.

REDRESS believes that management by the Assembly of State Parties would take into account the need for this fund to be connected to the structure of the ICC, while maintaining a distinct identity and administration. Under this model, the Fund would be under the general authority of the Assembly of State Parties, subject to an Advisory Board, which should be composed of persons with relevant experience of working with victims of the types of crimes which could fall within the jurisdiction of the Court, who should serve in their personal capacity, appointed for a renewable term, with due regard to equitable geographical distribution.<sup>3</sup>

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<sup>2</sup> Informal proposal by France on the Trust Fund for Victims, July 2 2001, Working Group on Financial Regulations and Rules, replacing PCNICC/2000/WGFIRR/DP.33.

<sup>3</sup> For example, the Chairman and other members of the Board of the UN Voluntary Fund for Victims of Torture are appointed for a renewable 3 year term. See also the United Nations Trust Fund on Contemporary Forms of Slavery Distr. GENERAL E/CN.4/1993/59 16 December 1992.

In order to clarify the distinctive role the TFV shall play vis-à-vis the Court, it would be advisable that the Trust Fund manager<sup>4</sup> be independent from the management structure of the Registry, though a delegate of the Registry should be attached to the Trust Fund, as a liaison to the Advisory Board.

***RULE 6.8: AS PROVIDED FOR IN ARTICLE 79 OF THE STATUTE, A TRUST FUND SHALL BE ESTABLISHED BY DECISION OF THE ASSEMBLY OF STATE PARTIES FOR THE BENEFIT OF VICTIMS OF CRIMES WITHIN THE JURISDICTION OF THE COURT.<sup>5</sup>***

## **Operation Guidelines and Procedures**

The operational guidelines and procedures of the TFV should be designed to optimise its capacity to respond to the needs of victims. The TFV will require great flexibility to respond to the varied needs of victims and their families, which will depend not only on the nature of the crimes and the context in which they were perpetrated, but also on other factors such as age, gender, disabilities, amongst other factors. Additionally, the TFV should have the operational capacity to respond quickly and efficiently to urgent needs as they arise.

The scenarios that the TFV may be faced with fall broadly into two categories: awarding reparation to victims, either individually or collectively;<sup>6</sup> and providing assistance to victims.<sup>7</sup> Clearly these categories overlap and in some instances they will prove to be

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<sup>4</sup> The Trust Fund Manager's sole responsibility should be the management of this particular fund.

<sup>5</sup> Informal proposal by France on the Trust Fund for Victims.

<sup>6</sup> Rule 98 (1) – (4) of the Finalised draft Rules and Regulations provides: (1) Individual awards for reparations shall be made directly against a convicted person. (2) The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible. (3) The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate. (4) Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.

<sup>7</sup> Rule 98 (5): "Other resources of the Trust Fund may be used for the benefit of victims subject

identical. Even so, they must be analysed separately, as there are different considerations which must be brought to bear for each category. For instance, it is likely that the source of funds for these categories will differ,<sup>8</sup> and it may be the range of who can be considered a beneficiary will shift, depending on the initial classification, and whether the victim appeared before the court as a witness, as *partie civile*, or otherwise.<sup>9</sup> The task of the TFV is further complicated by the fact that it will, at any given time, be working on a multitude of cases involving victims in different parts of the world with varying needs. The needs of victims will not always coincide with the timeframes or emphases of prosecutions. The needs of victims will not always be obvious or knowable to the Advisory Board, and these needs may change rapidly.

Each of these factors will present a challenge to the TFV. The standard operating procedures of most of the Trust Funds under the authority of the UN Secretary General would not be appropriate for the TFV for all of these reasons. Most of these trust funds meet in annual or semi-annual sessions, review grant applications according to set criteria, and issue decisions on allocations.<sup>10</sup> While some trust funds do have procedures

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to the provisions of article 79.”

<sup>8</sup> Rule 98(1) specifies that the primary source of funds for individual awards for reparation are convicted persons. It may be decided that this can be supplemented by proceeds from fines and forfeitures. Rule 98(2) specifies that awards for reparations are to be separated from other funds of the trust fund and to be forwarded to each victim. It might be the case that the general pool of funds in the TFV could be used to supplement awards for reparation when there were insufficient funds forwarded to the Court.

<sup>9</sup> For instance, the TFV may wish to assist certain victims in accordance with r. 98(5) at a very early stage – such assistance should not be dependant on the identification, charge or conviction of a specific perpetrator. The perpetrator may have died or not be otherwise accessible to the Court, and this should not impact on the victims status qua victim or his/her entitlement to assistance, though it may well impact on the victims’ capacity to receive reparations in accordance with Rule 98(1)-(4). Additionally, victims appearing before the Court would be entitled to receive ‘general assistance’ interim or otherwise through the Victims and Witnesses Unit and therefore it would not be encumbant on the TFV to meet these needs.

<sup>10</sup> For example, the UN Voluntary Fund for Victims of Torture meets in an annual session each May, the Board reviews the narrative and financial reports on the use of previous grants, adopts recommendations on applications for new grants, hears project leaders, meets with donors, consults with the Special Rapporteur on Torture and the Committee against Torture and adopts other relevant recommendations to the Secretary-General on the activities of the Fund. Applications for grants and satisfactory narrative and financial reports on the use of previous grants must now be submitted by 30 November each year for analysis by the Secretariat of the Fund. Admissible applications are examined by the Board of Trustees at its annual session in May. All applicants are informed of the decisions by mid-July. The grants are paid at the end of July/beginning of August.

in place for urgent or extraordinary applications,<sup>11</sup> they are of an exceptional nature and are not set up in such a way as to deal with urgent needs of a large scale.

**The general activities of the Advisory Board of the TFV could be characterised as follows:**

1. Providing operational management and oversight over all activities of the TFV
2. Actively promoting the TFV including solicitation of funds from different donor sources and liaising with development agencies and organisations on meeting the general needs of victims
3. Reviewing narrative and financial reports regarding transfers of funds and corresponding orders from the Court;
4. Directing the funds to general and/or earmarked accounts, or restricted accounts to benefit specific victims or classes of victims in line with reparation orders;
5. On the preliminary determination by the Pre-Trial Chamber that a particular 'situation' falls within the jurisdiction of the Court, the TFV would conduct a needs assessment and embark on a consultation process to determine the context and the needs and wants of affected victims, and shall, as appropriate, respond to urgent needs if and how they arise, and/or provide general assistance through its general funds.<sup>12</sup>
6. Once judgments are rendered by the Court, the TFV shall, depending on how reparation is dealt with by the Court, develop detailed plans for the distribution of such funds to individual victims and/or in the form of collective reparation.
7. In the case of large-scale reparations orders implemented through the TFV, the Advisory Board of the TFV could become the task manager of a complex mass disbursement process which may involve hundreds of thousands of awards to victims.
8. The Advisory Board would need to determine whether or not it would be appropriate in any given case to contribute a portion of its general funds to the

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<sup>11</sup> For example, the UN Voluntary Fund for Victims of Torture allows individual victims of torture to apply for emergency assistance at anytime, on an exceptional basis

<sup>12</sup> The TFV should only consider providing interim relief to those who would not qualify to apply to the Victims and Witnesses Unit for same.



other sources of funds for the reparations orders, where those sources are deemed to be insufficient.

9. In respect of collective forms of reparation and/or general assistance to victims, the Advisory Board will also need to set in place schemes for collective reparation and ensure that calls for proposals for implementing partners specify the specific aims of the reparations scheme.
10. It shall review reports on the use of previous grants, and adopt recommendations on applications for new grants.

**It is recommended that the following issues be addressed as a matter of priority to enable the TFV to begin to function:**

- General operating and management procedures regarding the functions of the Advisory Board: ie how frequently to meet; quorum; responsibilities; establishment of a secretariat, etc. These procedures would arguably need to be more rigorous than what is typical for Boards of Trust Funds, who meet generally once or twice a year to review grant proposals.
- Detailed procedures to ensure the transparency of the TFV, such as rules for annual auditing of TFV accounts; and stringent monitoring mechanisms for grant recipients and implementing partners.<sup>13</sup>
- Detailed criteria regarding the provision of interim relief, which should include provisions for decision-making in between sessions, including inter-sessional meetings either in person or via other means of communication, or provision for the delegation of authority, as appropriate.<sup>14</sup>
- Detailed rules regarding priorities and modalities for distribution of funds. The TFV will be in the unenviable situation of having limited funds at any given time. There will be pressure to use available funds to meet needs that are immediately knowable. However, if general funds are used irresponsibly, there might be inadequate funds for future victims, and adequate planning to avoid this is crucial.<sup>15</sup> **Additionally, it is**

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<sup>13</sup> The UN Voluntary Fund for Victims of Torture has established relevant criteria in this regard.

<sup>14</sup> For example, the practice of the UN Voluntary Fund for Victims of Torture has been to set aside a portion of available funds for emergency grants that the secretariat might make if needed before the next annual session of the Board.

<sup>15</sup> Clearly there will be a need to maintain fundraising to replenish funds though it is

**submitted that an appropriate prioritisation of funding would be reparation to victims** (ensuring that when there are insufficient funds from other sources to make adequate reparations awards, the general funds of the TFV are applied to supplement these). One would need to take steps (such as % caps on spending prior to judgment) to avoid the situation of using up all available general funds on interim urgent needs, only to find that on conviction of the perpetrator that he/she is judgment-proof, and that reparation orders are not payable.

#### **IV. SOURCES OF FUNDS**

Para. 1 of the French proposal provides (Rule 6.8):

1. As provided for in Article 79 of the Statute, a trust fund shall be established by decision of the Assembly of State Parties for the benefit of victims of crimes within the jurisdiction of the Court. This fund shall, *inter alia*, be funded by:
  - a) Resources collected through fines and transferred to the trust fund by order of the Court pursuant to article 79(2) of the Statute;
  - b) Resources collected through awards for reparations by order of the Court pursuant to Rule 98 of the Rules of Procedure and Evidence;
  - c) Voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of State Parties;
  - d) A portion of the Court's financial resources that the Assembly of State Parties may allocate to the fund on a regular basis.

It must be recognized that the funds collected through Article 1 (a) and (b) will be relatively small and insignificant if the experience of the defendants of the ad hoc tribunals is a good indication, and funds from (b) would be for the benefit of specific victims and would therefore not have an impact on general uses of the fund. Voluntary contributions, are subject to serious fluctuations and will be difficult to be maintained year after year. Article 1(d) provides for financing through the Court, though the Court will itself be in a poor financial position, and it is therefore not likely that the Assembly of State Parties will allocate funds to the Trust Fund on a regular basis, though it should be allowed to do so.

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recommended that a certain reserve be maintained for emergencies.

In recognition of the fact that the sources of funds may not be adequate to meet the needs of victims, REDRESS makes the following recommendation regarding the costs for administering the TFV.

**THE COSTS FOR ADMINISTERING THE TFV [AS EXPENSES OF A SUBSIDIARY BODY OF THE ASSEMBLY OF STATE PARTIES] SHALL BE BORNE BY THE COURT IN ACCORDANCE WITH ARTICLE 114 OF THE STATUTE.<sup>16</sup>**

This option is preferable, as taking the costs for the administration of the TFV from the general funds of the TFV will obviously limit the resources of the fund and the amount to be spent on victims, but also it may make donors reluctant to make voluntary contributions, which will be the primary source of funds for the TFV. The majority of the funds are likely to come from voluntary contributions because many of the other identified sources (fines and forfeitures, reparations) will not necessarily be significant amounts, and nevertheless they will be targeted to specific victims and kept separate from the rest of the funds of the TFV.

Donors making voluntary contributions would be reluctant to contribute without special guarantees limiting the percentage which could be applied to administrative costs. If it is decided that the Trust Fund shall be responsible for the costs of its administration, it is suggested that a clause be inserted at the end of the proposed Rule 6.8(3), as follows:

***A maximum of [5]% of any of those voluntary contributions can be used by the subsidiary body of the Assembly of State Parties for expenses of administering the Trust Fund for Victims.***

## **V. CRITERIA FOR ACCEPTANCE OF VOLUNTARY CONTRIBUTIONS**

For the Trust Fund to be a success, voluntary contributions need to be encouraged and solicited. The criteria for the acceptance of voluntary contributions must be as wide as

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<sup>16</sup> . Article 114 provides that the: "Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court."

reasonably possible,<sup>17</sup> and might arguably be wider than those in place for the Court, given that the Trust Fund will not be exercising the same judicial function.

As a general principle, however, the sources of funds cannot affect the policies or aims of the fund. Earmarking contribution may inadvertently affect the neutrality of the fund by differentiating the level of funds available to support certain categories of victims. More and more donors insist on earmarking contributions on the basis that it provides them with a more concrete insight into how the grants were used. Certain procedures could be put in place to tackle possible imbalances – by providing donors interested in contributing funds with a list of specific projects or areas of victim support which are currently underfunded, and by encouraging contributions to underfunded areas.

The French delegation has proposed that:

- 3.a) Voluntary contributions as referred to in paragraph 1(c) shall be subject to the approval of the subsidiary body responsible for the proper administration of this fund;*
- b) Those voluntary contributions shall be consistent with the policies, aims and activities of this fund;*
- c) Those voluntary contributions can be accepted for a specific project or purpose up to 50% of the contribution; however, the subsidiary body responsible for the proper administration of this fund may waive this limitation by a motivated decision.<sup>18</sup>*

REDRESS believes that this proposal does put forward acceptable criteria, while maintaining sufficient flexibility to take into account new situations which might arise.

An additional factor to consider would be the need to insert sufficient safeguards to ensure the continuity of the fund. It will be difficult to maintain a constant level of voluntary contributions year after year.

One approach to deal with this problem is to earmark a portion of estimated annual expenditures as a reserve for the following year:<sup>19</sup> Another approach would be to

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<sup>17</sup> The Financial Regulations and Rules of the UN provide some guidance on this issue, specifying that: “No voluntary contribution, gift or donation for a specific purpose may be accepted if the purpose is inconsistent with the policies and aims of the UN” [Rule 107.6] and that “Voluntary contributions, whether or not in cash, may be accepted by the SG provided that the purposes for which the contributions are made are consistent with the policies, aims and activities of the Organisation, and provided that the acceptance of such contributions which directly or indirectly involve additional financial liability for the Organisation shall require the consent of the appropriate authority.” [Reg. 7.2]

<sup>18</sup> Informal proposal by France on the Trust Fund for Victims, draft Rule 6.8 (3).

ensure a specified amount of capital prior to the making of any expenditures maintaining the principal and expending only the accrued interest.

**6.8 (3) d): 10% of estimated annual expenditures shall be earmarked as a reserve for the following year.**

## **VI. BENEFICIARIES OF GENERAL ASSISTANCE UNDER 98(5)**

Article 79 of the Rome Statute provides that the TFV is “for the benefit of victims of crimes within the jurisdiction of the Court, and families of such victims.” Rule 85 of the finalised draft Rules of Procedure and Evidence defines victims as:

*(a) victims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;*

*(b) victims may include organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”*

A “crime within the jurisdiction of the Court” would arguably refer to any crime listed in Article 5 of the Statute, entitled “Crimes within the Jurisdiction of the Court”, and listing: the crime of genocide; crimes against humanity; war crimes; and the crime of aggression. There is significant debate concerning the reach of scope of “crimes within the jurisdiction of the Court”

- is it restricted to crimes being actively investigated by the Court,
- would it apply only to victims appearing before the Court,
- or is it much broader, encompassing victims of any crime listed in Article 5 of the Statute, irrespective of whether or not jurisdiction was seized?

This question is relevant to the activities of the TFV undertaken pursuant to Rule 98(5) which provides that: “Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.” In other words, who can benefit from the

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<sup>19</sup> This is the approach taken by the UN Voluntary Fund for Victims of Torture, where 15% of estimated annual expenditures is earmarked as a reserve for the following year.

general funds of the TFV (those that are not earmarked for individual or collective reparation to specific victims or classes of victims)<sup>20</sup>?

***REDRESS AGREES WITH THE SUGGESTION OF CERTAIN DELEGATES AND NGO REPRESENTATIVES THAT ARTICLE 15(4)<sup>21</sup> WOULD SERVE AS AN APPROPRIATE TRIGGER FOR BENEFICIARIES OF GENERAL FUNDS OF THE TFV, FOR THE FOLLOWING REASONS:***

- A minimal degree of connection with the processes of the Court should be required: the definitions in Article 5 are legal definitions, and mere allegations by victims that what they have been subjected to amounts to one of the enumerated crimes would put the TFV in the odd position of having to determine whether or not the events in question corresponded to those legal definitions.
- The general funds of the TFV are for the benefit of victims of crimes and their families, which is far broader than reparation – A person’s status as "a victim" should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.<sup>22</sup>

## **VII. FINES AND/OR FORFEITURES**

Article 79(2) of the Rome Statute provides that “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.” There are no guidelines in the finalised draft rules and regulations as to how these funds are to be used. In the absence of specific

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<sup>20</sup> Individual or collective reparations would necessarily be tied to proceedings before the Court.

<sup>21</sup> Article 15(4) of the Statute provides that: “If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.”

<sup>22</sup> Basic Principles.

directions by the Court, the Advisory Board will need to determine how such money and/or other property should be allocated. Guidelines for the use of such funds would be necessary to assist the Advisory Board with this task.

**REDRESS proposes that the Order of the Court transferring such proceeds to the trust fund should specify in general terms how the funds are to be used.<sup>23</sup>**

For example, should the proceeds of fines and forfeitures derived from a perpetrator be directed towards:

- Reparations orders pursuant to Article 75(2) of the Statute<sup>24</sup> aimed at those victims who suffered harm as a result of the specific actions of the perpetrator;
- Collective reparation to victims in accordance with Rule 98(3) and (4) of the draft Rules and Regulations;<sup>25</sup>
- The general resources of the TFV for the benefit of all victims of crimes before the jurisdiction of the Court in accordance with Rule 98(5)?

The Advisory Board should determine the specific allocation procedure based on the initial Order of the Court accompanying the transfer of proceeds. In the absence of such an order, as part of the general operating principles of the TFV, it is suggested that these proceeds be used in the first instance to supplement reparations orders, both individual and collective, which relate to those victims who suffered as a result of the actions of the perpetrator whose assets were seized.

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<sup>23</sup> This would be consistent with Rule 97 of the draft Rules and Regulations, which places responsibility for determining the nature and scope of reparations squarely with the Court.

<sup>24</sup> Article 75(2) of the Rome Statute provides that "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79."

<sup>25</sup> Rule 98(3): "The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.". Rule 98(4): "Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund."

## **VIII. INDIVIDUAL REPARATIONS OF MASSIVE SCALE**

The TFV might be used as a vehicle to disburse the individual reparations orders of the Court. In some instances, this might be for mere administrative efficiency – the Court might specify the exact amount of monetary reparation owing to individual victims, specifying the exact number, names and locations of the intended recipients. In other instances, however, the Court may not be in a position to know the exact numbers of victims who would qualify for reparations orders. It might order that the award for reparations be made through the Trust Fund in accordance with Article 75(2) of the Statute, leaving some of these details to the Trust Fund.

Rule 98(2) specifies that “Where the Court has ordered that an award for reparations against a convicted person be deposited with the Trust Fund, where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.” There may be instances where the award for reparation set aside in the Trust Fund may not be sufficient, and it should be open to the Advisory Board of the TFV to supplement the award with funds from the general resources of the TFV if deemed appropriate.

### **Rule 97 of the Finalised Draft Rules and Regulations provides:**

1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.
3. In all cases, the Court shall respect the rights of victims and the convicted person.

While rule 97 makes it clear that it is for the Court to determine the basic framework for reparations, the TFV will have a major role in the allocation and distribution process in those instances where reparation orders are made through the TFV, and especially when there are mass victims. It would be burdensome and undesirable for the Court to involve itself in the details of administering individual



reparations of massive scale. It should oversee these processes and determine the basic framework for awards in accordance with Rule 97, but the detailed allocation and dispersal of mass claims will need to be delegated to another body, most likely the TFV. These processes will be cumbersome and complex, and will require appropriate staffing and administration.

If one looks at the handling of the class action lawsuits that were filed in the United States District Court for the Eastern District of New York against certain Swiss banks, on behalf of "Victims of Nazi persecution," the Court appointed a neutral third party to assess the options and to make a recommendation regarding the allocation and distribution of the US\$1.25 billion settlement fund. The Special Master met with individual victims and reviewed hundreds of written proposals submitted by interested persons representing each of the five "Victim or Target" groups. He also conducted extensive research and prepared a plan for allocation and distribution of settlements. In the plan the US \$1.25 billion Settlement Fund was allocated amongst different classes of victims, and different organisations were assigned the task of processing claims.<sup>26</sup> While the plan for allocation and distribution specified the specific amounts individual victims in each of the specified classes of victims should receive, and set out rules governing the different classes of claims, the organisations were granted certain flexibility to carry out their responsibilities, under the overall supervision of the Court.

Similarly, the UN Security Council established a fund to pay compensation for claims for losses resulting from Iraq's invasion and occupation of Kuwait and established the UN Compensation Commission to administer the fund.<sup>27</sup> The UNCC is a claims resolution body that examines claims, evaluates losses, assesses payments and resolves disputed claims. It developed its own criteria regarding the processing of claims, rules regarding priorities of payment, etc.

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<sup>26</sup> Organizations participating in the implementation of the Settlement Agreement include: the Conference on Jewish Material Claims Against Germany (JCC), the International Organisation of Migration, and the Claims Resolution Tribunal.

<sup>27</sup> S/RES/687 (1991) adopted 3 April 1991.

It might be the case that in respect of certain reparations orders of the Court, the TFV will need to develop claims procedures to fulfil its mandate. These claims procedures should be as simple as possible, along the following principles:

- Clear rules governing classes of claims
- Clearly defined procedures regarding registration of claims, assessment of evidence and adjudication of claims
- Rules regarding the standards of proof shall be sufficiently flexible to take into account the information claimants are able to provide, and what information is available to the adjudicating body.<sup>28</sup>
- Principles regarding distribution of awards to individual claimants must take into account the needs of victims and the available resources of the TVF, which should include principles for payments in instalments and pro-rata payments.<sup>29</sup>

## IX. COLLECTIVE REPARATION

Collective reparation has become an important feature of reparation awards, particularly in scenarios of mass claims, where individualised awards may be difficult if not impossible to administer, and/or have less impact on individual victims. Rule 98(3) of the finalised draft Rules and Regulations specifically provide for collective reparations:

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<sup>28</sup> . For example, the Claims Resolution Tribunal for dormant accounts in Switzerland will approve claims that are plausible in the light of all circumstances.

<sup>29</sup> The award should not be limited based on the current assets of the fund. Many claims assessment bodies have introduced multiple-tiered procedures to ensure that claimants can collect at least a portion of their funds without delay. This is a particularly important consideration for elderly victims and for victims who have immediate humanitarian needs which could be met by the awards. At the first stage, claimants would be eligible for a first tranche of the award by supplying only cursory proof, or certain presumptions of qualifications may be employed to fast-track procedures. Detailed evidence would only be required at a second stage. See the decision of the Governing Council of the UNCC on Criteria for Expedited Processing of Urgent Claims, S/AC.26/1991/1 of 2 August 1991. Additionally, the governing council of the UN Claims Commission devised a mechanism for the allocation of available funds to successful claimants that gave priority to three urgent categories of claims and which, within each category, would give equal treatment to similarly situated claims. Only when each successful claimant in categories "A", "B" and "C" had been paid an initial amount up to US\$2,500 would payments commence for claims in other categories. A similar procedure was put in place in respect of reparations proceedings before the Truth and Reconciliation Commission in South Africa. Specifically, two stages are provided for in the process of Reparation and Rehabilitation: Interim Reparation and Final Reparation Measures. **Interim Reparation** is reserved for victims who are in urgent need of reparation because of the gross human rights violations they suffered. The **Final Reparation Measures** will be included in the Report which goes to the President once the Commission has completed its work. They will be put in place by Parliament after there is agreement on them. The most important focus of the Final Reparation Measures is restoring the dignity of victims and survivors.

3. *The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.*

While the Court may provide guidance to the Trust Fund in respect of certain collective awards in accordance with Rule 97 of the finalised draft rules and regulations, the TFV may well have a large role in identifying appropriate channels for such awards. This will be a complex process. The following criteria may assist in developing appropriate criteria for collective reparation awards:

- Projects or activities to be subsidised should support the goals of the Fund and benefit victims as defined in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of the UN (A/40/53 /1985)
- Subject to guidelines developed by the Court, the TFV should undertake at the very earliest opportunity, an assessment of the needs and wants of victims. A collective reparations regime which takes into account these needs and wants, and reflects the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*<sup>30</sup> and includes such components as restitution,<sup>31</sup> compensation,<sup>32</sup> rehabilitation,<sup>33</sup> and satisfaction and guarantees of non-repetition.<sup>34</sup> should be outlined by the TFV. Types of collective reparation which might be particularly relevant would include:

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<sup>30</sup> E/CN.4/2000/62 of 18 January 2000.

<sup>31</sup> Basic Principles, *ibid.* "Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property."

<sup>32</sup> *Ibid.* "Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as: (a) Physical or mental harm, including pain, suffering and emotional distress; (b) Lost opportunities, including education; (c) Material damages and loss of earnings, including loss of earning potential; (d) Harm to reputation or dignity; and (e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services."

<sup>33</sup> *Ibid.* "Rehabilitation should include medical and psychological care as well as legal and social services."

<sup>34</sup> *Ibid.* "Satisfaction and guarantees of non-repetition should include, where applicable, any or all of the following: (a) Cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others; (c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim; (e) Apology,

- Reform of discriminatory legislation or other legislation which impinges on the rights of victims;
  - Establishment of medical treatment facilities centres to treat the injuries of victims;
  - Rebuilding of community or religious centres used by the victim population;
  - Establishing projects which contribute to an independent record of the truth of what occurred, such as the establishment of public sites for the preservation of materials or documentation related to the crime;
  - Assistance in the reburial of the dead and official commemoration by plaques, monuments and ceremonies dedicated to those who perished.
  - Official apology.
- Calls for proposals to possible implementing partners should be circulated which specify the specific components of the reparations regime. The Advisory Board of the TFV shall review grant proposals and select those projects which fit within the criteria of the reparations plan.

## **X. ASSISTANCE TO VICTIMS**

The TFV has a broad scope for providing assistance to victims of crimes under the jurisdiction of the Court. The types of assistance to be provided should depend on the needs of victims and should retain sufficient flexibility to meet these needs. In evaluating those needs, due regard should be had to existing or expected programmes of assistance external to the TFV. The general resources of the TFV will be small and should not attempt to cover the full range of humanitarian needs of victims. Longstanding channels

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including public acknowledgement of the facts and acceptance of responsibility; (f) Judicial or administrative sanctions against persons responsible for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels; (i) Preventing the recurrence of violations by such means as: Ensuring effective civilian control of military and security forces; Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces; Strengthening the independence of the judiciary; Protecting persons in the legal, media and other related professions and human rights defenders; Conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials; Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises; Creating mechanisms for monitoring conflict resolution and preventive intervention.”

of assistance well versed in emergency assistance should have the primary role. In addition, under other provisions of the Statute and Rules, the Victims and Witnesses Unit will already be tasked with meeting some of the needs of victims and witnesses appearing before the Court and duplication should be avoided.

As such, the TFV should be used to support those needs of victims which are not otherwise adequately covered by the Court or other humanitarian agencies. Priorities will need to be set for the types of assistance to be provided, such as supplementing reparations orders deemed to be insufficient, and/or urgent interim assistance (psycho-social support, medical care, food, shelter...) on the application to the TFV by individual victims or their families, organisations representing their interests, or non-governmental organisations or other agencies implementing projects to provide emergency assistance to groups of victims. It will equally be necessary to establish rules on how such assistance can be allocated, having in mind the need to ensure a fine balance of disbursements for the TFV.

Assistance to victims by the TFV should ideally be temporary assistance. The staff of the TFV should liaise with humanitarian aid organisations and other networks to encourage them to take over the financing of projects funded by the TFV where needs are of longer-term.