



# **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***

### **DISCUSSION DOCUMENT**

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## **FOREWORD**

*This report represents an important building block toward the creation of the Trust Fund for Victims, the International Criminal Court's unique beacon of reparative justice. It summarizes existing expertise and experience in primarily collective, financial reparation processes, and begins to provide concrete suggestions to the Board of Directors in their task of developing the criteria for some of the Trust Fund's operations.*

*In preparing the report, REDRESS and Forensic Risk Alliance furthered the necessary work for the meaningful realization of the Trust Fund's mission.*

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Furthermore, we would like to acknowledge especially the role Dr. Yael Danieli played in advocating tirelessly for the fulfilment of the vision of the Trust Fund, and in particular, for her perseverance in calling successfully for Board members of the highest stature. The Assembly of States Parties of the International Criminal Court elected Her Majesty Queen Rania Al-Abdullah of Jordan; His Excellency Mr. Oscar Arias Sánchez, former President of Costa Rica; His Excellency Mr. Tadeusz Mazowiecki, former Prime Minister of Poland; Mme. Simone Veil, former Minister of Health of France and former President of the European Parliament; and Archbishop Desmond Tutu, former Chairman of the Truth and Reconciliation Commission of South Africa, to serve on this Board. The election of the Board of Directors was welcomed and celebrated by the Victims Rights Working Group of the NGO Coalition for the International Criminal Court and the Coalition as a whole.



# INDEX

<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. THE OBJECTIVE OF THIS REPORT.....</b>	<b>2</b>
<b>III. THE FUNCTIONING OF THE BOARD.....</b>	<b>4</b>
A. The Election of a President/Chair of the Board of Directors.....	4
B. Decisions of the Board of Directors .....	5
C. Development of Internal Regulations.....	6
D. Conflicts of Interest .....	8
E. The Costs/Expenses of Members of the Board and of the Secretariat .....	8
F. Meetings of the Board of Directors .....	11
G. The Capacity to Delegate to a Functioning Trust Fund Secretariat.....	12
<b>IV. THE SECRETARIAT OF THE BOARD .....</b>	<b>15</b>
A. Location of the Secretariat.....	15
B. Degree of Connection with the Various Organs of the Court .....	15
<b>V. MANAGEMENT OF CONTRIBUTIONS TO THE FUND .....</b>	<b>19</b>
A. Solicitation of Funds.....	19
B. Receipt of Funds.....	20
C. Management of Fund Balances .....	21
<b>VI. THE ACTIVITIES AND PROJECTS OF THE TRUST FUND ...</b>	<b>22</b>
A. Basic Principles.....	22
B. Decision-Making Processes .....	26
C. Specific Scenarios for the Trust Fund.....	31
D. Who are the Victims Subject to the Provisions of Article 79?.....	36
E. Disbursement of Awards .....	37
<b>VII. FINANCIAL OVERSIGHT/AUDIT .....</b>	<b>39</b>
A. General Principles Relating to Financial Oversight.....	39



## I. INTRODUCTION

“[I]n honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith and human solidarity with victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law”<sup>1</sup>

The acknowledgement of the rights of victims and the inclusion of a central restorative mandate are key achievements of the Rome Statute. This is a significant departure from other international criminal tribunals, and one that is likely to have a major impact on the course of justice before the Court. The Statute recognises the right of victims to participate in proceedings, not only as witnesses of the crimes within the jurisdiction of the Court, but also as persons with a valid interest in the outcome. It equally makes it possible for the Court to order reparations, including restitution, compensation and rehabilitation, to or in respect of victims. Reparation impacts not only on the individual victim, but on his or her family and community and the wider societies affected by contributing to the rebuilding of war-torn societies, by advancing truth and by acknowledging the gravity of the crimes committed.

Article 79 of the Rome Statute provides for the establishment of a Trust Fund “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.” The resolution on the establishment of the Trust Fund<sup>2</sup> provides that a Board of Directors will be instituted, with five members, each of whom must be of high moral character, impartiality and integrity and with competence in the assistance to victims of serious crimes and of different nationality with equitable geographical distribution. They are to serve voluntarily in their individual capacity and are elected for a three-year term.

The Assembly of States Parties’ resolution establishing the Trust Fund provides very little information on how the Trust Fund will operate in practice. It sets out that the Board shall meet at the seat of the Court at least once a year, and that the Registrar of the Court is responsible for providing the necessary assistance for the proper functioning of the Board in carrying out its tasks. If and when the workload of the Trust Fund increases, the Assembly of States Parties may, on the recommendation of the Board, consider the creation of an expanded capacity, including the appointment of an Executive Director either within or outside the Registry as appropriate. Paragraph 7 of the resolution provides that:

“[t]he Board shall, in accordance with the provisions of the Rome Statute, the Rules of Procedure and Evidence and the criteria to be determined by the Assembly of States Parties, establish and direct the activities and projects of the Trust Fund and the

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<sup>1</sup> Preamble, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms - Final report of the Special Rapporteur, M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, 18 January 2000, E/CN.4/2000/62.

<sup>2</sup> ICC/ASP/1/Res.6 adopted on 9 September 2002 by consensus.

allocation of the property and money available to it, bearing in mind available resources and subject to the decisions taken by the Court. Before establishing and directing the activities and projects of the Trust Fund, the Board shall consult, as far as possible, victims and their families or their legal representatives and may consult any competent expert or organization.”

The resolution also provides preliminary guidance on the receipt of voluntary contributions, reporting obligations and financial accountability of the Trust Fund. Considering the many detailed questions that would need to be resolved for the Trust Fund to work fairly, efficiently and transparently, the Resolution also requests that the Board of Directors develops suggestions for further criteria for the management of the Trust Fund as soon as possible for consideration and adoption of the Assembly of States Parties.

## **II. THE OBJECTIVE OF THIS REPORT**

The objective of this Report is to provide background information and analysis to the Board of Directors elected on 12 September 2003 at the second resumed session of the Assembly of States Parties, and to staff persons at the Court in order to assist them in the development of suggestions for further criteria for the management of the Trust Fund. It presents a series of options based on the experience and best practice of other trust funds, claims bodies and relevant procedures.

While there is much to learn from the practice of other bodies, these have been established in very different contexts and with slightly different aims in mind. Many claims bodies have been established pursuant to international settlement agreements or arbitral processes where liability has been agreed, and/or where clear sources for the payment of financial awards have been identified. Also, most of the practice that exists is in the enforcement of reparations orders as against governments and/or corporations,<sup>3</sup> and not against individual perpetrators, as will be the case with the International Criminal Court (ICC).

The ICC Trust Fund for Victims has several unique aspects that will require new and creative approaches. Article 79(1) of the Rome Statute has broadly characterised the purpose of the Trust Fund as “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims,” though the possible uses of the Trust Fund range from a mechanism to channel resources ‘for the benefit of victims’ generally,<sup>4</sup> to other uses more closely connected with the work of the Court.<sup>5</sup> The possible uses of the Trust Fund are

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<sup>3</sup> There is a long history of product liability class action cases that have used mass claims techniques to facilitate the processing and disbursement of payments.

<sup>4</sup> Rule 98(5) of the Rules of Procedure and Evidence.

<sup>5</sup> E.g., a vehicle of the Court to transfer money or other property collected through fines and forfeiture procedures in accordance with Article 79(2) of the Rome Statute; A mechanism to channel awards for reparation which the Court decides to make *through* the Trust Fund in accordance with Rule 98 (2)-(4) of the Rules of Procedure and Evidence. [emphasis added]

described in fuller detail in Part VI of this Report: the Activities and Projects of the Trust Fund.

Careful consideration will have to be given to the relationship between the reparation orders of the Court and the mandate of the Trust Fund, and to the role of the Trust Fund, if any, in processing collective and non-monetary reparations awards. Also, the criteria for the management of the Trust Fund will have to take into account that the crimes that will come within the jurisdiction of the Court are likely to relate to hundreds of thousands of victims from different parts of the world – with various contexts and needs. There may not be sufficient funds to meet the range of needs in all, or even most, cases. The Court and, in some instances, the Trust Fund, will therefore need to develop policies which are sufficiently flexible and scalable, and at the same time equitable among groups of victims.

It is difficult to predict every possible scenario that the Trust Fund will be called upon to deal with. Criteria should be meaningful in context, equitable and accessible, without appearing arbitrary to potential beneficiaries. There is thus a need to find a balance between sufficiently detailed criteria to ensure that the actions of the Board and the Trust Fund's Secretariat are transparent and well defined, and leaving enough flexibility for unknown situations.

The management criteria and procedures should be designed to optimise the capacity of the Trust Fund to respond to the needs of victims, 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 the age, gender and particular injuries and disabilities of victims. The criteria should also reflect the fact that the Trust Fund will be working at the same time on a multitude of cases involving victims in different parts of the world whose needs will not always coincide with the timeframes or emphases of prosecutions.

The sheer number of victims and the scale of harm may militate against a purely compensatory approach, particularly one that would require a high level of individual claims processing. As noted in discussions regarding the establishment of a national victim compensation scheme for violent domestic crime in South Africa, "the scale of the problem of violent crime stands in the way of setting up an affordable mechanism that does not simply make token payments to victims. If eligible victims were to obtain compensation, then the amount paid to each may be so low as to render the whole process somewhat counter-productive..."<sup>6</sup>

However, when deciding on the viability of a mass compensatory approach, the socio-economic context of the compensation needs to be taken into account, e.g., how meaningful is an amount of money to potential recipients taking into account their particular set(s) of circumstances.<sup>7</sup> There will be many instances

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<sup>6</sup> South African Law Commission, Consultation Paper (Project 82) July 1997.

<sup>7</sup> Danieli, Y. (1992). Preliminary reflections from a psychological perspective. In T.C. van Boven, C. Flinterman, F. Grunfeld & I. Westendorp (Eds.) *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. Netherlands Institute of Human Rights [Studie-en Informatiecentrum Mensenrechten], Special issue No. 12 (pp. 196-213). Also published in N.J. Kritz (Ed.) (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Vol. 1 (pp. 572-582). Washington, D.C.: United States Institute of Peace.

when individualised monetary awards will be the best way to restore dignity to victims.<sup>8</sup> The use of technology to reveal commonalities among certain claim types could offer a cost effective and time efficient approach to some large-scale initiatives.

### **III. THE FUNCTIONING OF THE BOARD**

The Board of Directors needs to adopt rules and procedures for internal decision-making. While it may be desirable for the Board to decide in consensus, this will not always be feasible or practical. It would therefore be appropriate for the Board to consider how it shall take substantive and procedural decisions:

#### **A. The Election of a President/Chair of the Board of Directors**

The Board of Directors may wish to consider electing a President/Chair to facilitate decision-making and/or to lead the Board's work. There are several models that may be employed for such an appointment:

**- The President/Chair could be elected by the consensus of the Board of Directors and, where no consensus exists, by absolute majority of the Board**

Perhaps the most desirable approach, consensus models have been employed elsewhere in the Court, for example, for the election of the Presidency and the First and Second Vice Presidents.<sup>9</sup> Additionally, the Assembly of States Parties is mandated to elect by absolute majority the Prosecutor,<sup>10</sup> the Registrar,<sup>11</sup> as well as its own Bureau, consisting of a President, two Vice-Presidents and 18 members.<sup>12</sup> In most instances, with the exception of the election of the Registrar and Deputy Prosecutor, it was possible to appoint by consensus, without having to resort to absolute majorities. This approach has also been used by the Governing Council of the UN Compensation Commission to elect its own president and two vice-presidents.

**- The President/Chair of the first panel could be designated by a body external to the Board (e.g., the President of the Assembly of States parties)**

This is the model that has been employed by the Housing and Property Directorate and Claims Commission in Kosovo (HPD-CC). Regulation 17.2 provides that "the Chairperson of the Commission shall be designated by the Special Representative of the Secretary-General from among members of the Commission. If the Chairperson of the Commission resigns, is removed or is not

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<sup>8</sup> Ibid.

<sup>9</sup> Article 38(1) of the Rome Statute.

<sup>10</sup> Articles 29 and 30 of the Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutor of the International Criminal Court, ICC-ASP/1/Res.2.

<sup>11</sup> Article 43(4) of the Rome Statute.

<sup>12</sup> Article 112(3)(a) of the Rome Statute.

re-appointed, the longest-serving Panel Chairperson shall be the Acting Chairperson of the Commission pending the designation of the Chairperson by the Special Representative of the Secretary-General. For Panels established subsequent to the first Panel, the Chairperson shall be designated by the Chairperson of the Commission after consultation with the members of the Panel.”

## **B. Decisions of the Board of Directors**

The Board of Directors will need to determine the rules for decision-making, in particular, the quorum, and whether decisions may be taken only by consensus or by some form of majority.

In most other cases at the ICC, there is a preference for unanimity, though measures have been put in place should consensus not be possible. For example, the ICC Statute provides in Article 74 Paragraph 3 in respect of standards used in the determination of guilt, that: “the judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.” Further, Rule 4(4) of the Rules of Procedure and Evidence notes that: “Unless otherwise provided in the Statute or the Rules, the decisions of the plenary sessions shall be taken by the majority of the judges present. In the event of an equality of votes, the President, or the judge acting in the place of the President, shall have a casting vote.” Article 112 Paragraph 7 of the Statute, relating to the procedures of the Assembly of States Parties, notes that: “Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute: (a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting; (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.” These provisions are also reflected in the Rules of Procedure of the Assembly of States Parties,<sup>13</sup> and Rule 84 of same specifies, in relation to subsidiary bodies of the Assembly of States Parties, that “unless otherwise decided by the Assembly, these rules shall apply, *mutatis mutandis*, to the proceedings of subsidiary bodies, except that: (a) the presiding officer of a subsidiary body may exercise the right of vote; (b) the presence of representatives of a majority of the members of a subsidiary body shall be required for any decision to be taken.”

In other bodies such as the UN Claims Commission, Governing Council decisions are taken by a majority of at least nine of its members [out of 15], and there is no right of veto. To date, however, the Governing Council has adopted all of its decisions by consensus.

### **Quorum for decision-making**

The Rules of Procedure of the Assembly of States Parties provide, in relation to subsidiary bodies that “the presence of representatives of a majority of the

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<sup>13</sup> Rules 61 and 63-65 of the Rules of Procedure of the Assembly of States Parties, ICC/ASP/1/3.

members of a subsidiary body shall be required for any decision to be taken.”<sup>14</sup> Elsewhere at Rule 44 (1), the rules provide that the President may declare a meeting open and permit the debate to proceed when at least one third of the States Parties participating in the session are present and the presence of an absolute majority of the States Parties constitutes the quorum for voting on matters of substance. The ICC Rules of Procedure and Evidence provide in Rule 4(3) that “The quorum for each plenary session shall be two-thirds of the judges.”

### C. Development of Internal Regulations

Following the suggestions of the Board of Directors, the Assembly of States Parties is competent to adopt further criteria for the management and operation of the Trust Fund.<sup>15</sup> It is likely that even further internal regulations will be required to assist the Board and its staff with its operations,<sup>16</sup> as the work of the Trust Fund develops.

It may be useful for the Assembly of States Parties to extend to the Board a certain leeway to elaborate further operational regulations as required, consistent with the criteria for the management and operation of the Fund. This is how the UN Claims Commission has operated, where the claims processing procedures were prescribed by the Security Council and were further elaborated by the Governing Council in a number of its decisions, which have been implemented by the panels of Commissioners. The Governing Council was provided with the authority to establish guidelines on all policy matters, in particular, those relating to the administration and financing of the fund, the organisation of the work of the Commission, and the procedures to be applied to the processing of claims and to the settlement of disputed claims, as well as to the payments to be made from the fund.<sup>17</sup> In the Swiss Banks Settlement, the Settlement Agreement provided for the appointment of a Special Masters to “develop a proposed plan of allocation and distribution of the Settlement Fund,”<sup>18</sup> and the Court maintained “judicial control over the procedural and substantive rules, all amendments thereto and the appointment of personnel and staff”.<sup>19</sup> The Memorandum and Order specified that the “Claims Resolution Tribunal will operate under guidelines and criteria established with [Chief Justice Korman’s] approval, in consultation with the Volcker Committee”,<sup>20</sup> and the rules

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<sup>14</sup> Rule 84 (b), supra.

<sup>15</sup> Paragraph 3, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, ICC-ASP/1/Res.6.

<sup>16</sup> Ibid., Paragraph 7 of the Annex provides that the Board “... shall establish and direct the activities and projects of the Trust Fund and the allocation of the property and money available to it.”

<sup>17</sup> Para 10 SG Report S/22559.

<sup>18</sup> Article 7.1 of the Settlement Agreement, [http://www.swissbankclaims.com/PDFs\\_Eng/exhibit1toPlanofAllocation.pdf](http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf).

<sup>19</sup> Article 7.9 of the Settlement Agreement, available at: [http://www.swissbankclaims.com/PDFs\\_Eng/exhibit1toPlanofAllocation.pdf](http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf). [http://www.swissbankclaims.com/PDFs\\_Eng/Amendment2.pdf](http://www.swissbankclaims.com/PDFs_Eng/Amendment2.pdf).

<sup>20</sup> Section III-C of the Corrected Memorandum & Order, [http://www.swissbankclaims.com/PDFs\\_Eng/MemorandumOrder.pdf](http://www.swissbankclaims.com/PDFs_Eng/MemorandumOrder.pdf).

“may be amended by the Special Masters with the approval of the Court”.<sup>21</sup> The Chairperson of the Tribunal “may promulgate guidelines and procedures [...] subject to prior consultation with the Special Masters.”<sup>22</sup>

It may also be advisable to ensure that in order to reflect better the practicalities of the work, the Secretariat may make recommendations to the Board on the adaptation or revision of guidelines and procedures.

With perhaps even more flexibility, the German law establishing the Foundation “Remembrance, Responsibility and Future” authorised the Board of Trustees of the Foundation to establish its own rules of procedure.<sup>23</sup> This ensured that the partner organisations which in part formed the Board of Trustees had the ability to shape rules of procedure and amend them to reflect practical experience. Members of the Board were thus able to learn by exchange of information how best to resolve procedural issues as they arose and ensure that procedures and guidelines were drafted in the context of a “practical” environment. Similarly, Article 5(7) of the Agreement establishing the Eritrea - Ethiopia Claims Commission provides that “The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States.” The Claims Commission may modify the rules “after consultation with the Parties.”<sup>24</sup> Also, the General Framework Agreement for Peace in Bosnia and Herzegovina established the basic parameters for the work of the Commission on Real Property Claims, but provided the Commission with extensive flexibility and control to promulgate such rules and regulations as are necessary to carry out its functions.<sup>25</sup>

The Board of Trustees of the UN Voluntary Fund for Victims of Torture has drafted Guidelines<sup>26</sup> for use by applicants, as has the UN Voluntary Fund for Indigenous Populations,<sup>27</sup> that have been approved by the Secretary-General, the Commission on Human Rights and the General Assembly.

In most cases, the promulgation or amendment of rules would require agreement of the plenary<sup>28</sup> though, in some cases, these types of decisions

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<sup>21</sup> Article 49 Governing Rules, [http://www.crt-ii.org/pdf/governing\\_rules\\_en.pdf](http://www.crt-ii.org/pdf/governing_rules_en.pdf).

<sup>22</sup> Article 10(2) Governing Rules, [http://www.crt-ii.org/pdf/governing\\_rules\\_en.pdf](http://www.crt-ii.org/pdf/governing_rules_en.pdf).

<sup>23</sup> The Law on the Creation of a Foundation "Remembrance, Responsibility and Future" of 2 August 2000 (Federal Law Gazette I 1263), as amended by the Law of 4 August 2001 (Federal Law Gazette I 2036) as well as by the Law of 21 August 2002, (Federal Law Gazette I 3347).

<sup>24</sup> Article 1(2), Eritrea- Ethiopia Claims Commission, Rules of Procedure.

<sup>25</sup> Article XV of Annex 7 of the General Framework Agreement.

<sup>26</sup> <http://www.unhchr.ch/html/menu2/9/apply.htm#guidelines>.

<sup>27</sup> Annex 1 to the Report of the Secretary-General, A/55/202, accessible at: [http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/be53e1fdff7ebafc1256969002f09aa/\\$FILE/0058636e.doc](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/be53e1fdff7ebafc1256969002f09aa/$FILE/0058636e.doc).

<sup>28</sup> See, for example, section 18.1 of the HPD-CC Rules, which provides that “the Commission shall decide, in plenary session, on additional rules of procedure and evidence in accordance with section 26, and on such issues that may be referred to it in accordance with section 20.4. See also, Article X of Annex 7 that provides as follows: “The Commission may sit in panels, as provided in its rules and regulations. References in this Annex to the Commission shall include, as appropriate, such panels, except that the power to promulgate rules and regulations is vested only in the Commission as a whole.”

would need to be taken by a specified majority<sup>29</sup> and in other limited circumstances the Chairperson is entitled to promulgate such rules.<sup>30</sup>

#### **D. Conflicts of Interest**

It is recommended that the Board of Directors determine how they will respond to conflicts of interest. These conflicts may arise, for example, if/when Board members are dealing with matters relating to their countries of origin or relating to matters they have treated substantively in their prior work. Elsewhere, in Article 40(4) of the ICC Statute, relating to judges, it is determined that a question relating to the independence of the judiciary must be determined by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision. Furthermore, any question regarding the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.<sup>31</sup>

#### **E. The Costs/Expenses of Members of the Board and of the Secretariat**

Members of the Board act in their personal capacity on a *pro bono* basis.<sup>32</sup> Article 114 of the Rome Statute provides that "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." The budget included a provision for a three day meeting of the Board of Directors in the Hague in 2003 entailing travel and daily subsistence allowance (26,100 euro) as well as a staff person in the registry to deal exclusively with the trust fund (48,000 euro).<sup>33</sup> For the budget of the second financial year, the Court proposed the creation of a Trust Fund Unit within the Victims Participation and Reparations Section,<sup>34</sup> which would be staffed by a Trust Fund officer, with 53,300 euro set aside for meetings of the Board.<sup>35</sup> In its review of the Court's proposed budget, in particular in respect of witness protection and victims participation issues (including the Trust Fund), the Assembly of States Parties' Committee on Budget and Finance emphasised the need for the Court to proceed carefully and in consultation with the Assembly of States Parties, given the potential for these areas to become costly. The Committee recommended that the Court provide a separate report to the Assembly, through the Committee, on its plans for participation of and reparations to victims, which should clearly delineate the resources dedicated to

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<sup>29</sup> For example, section 7 of the German Foundation law provides that the "Board of Trustees shall adopt a set of by-laws by a two-thirds majority vote. If a set of by-laws has still not been adopted within three months of the initial meeting of the Board of Trustees, the chairman shall propose a set of by-laws that will be passed by a simple majority. The Board of Trustees may amend the by-laws on the basis of a two-thirds majority."

<sup>30</sup> Article 10(2) of the CRT-II Rules provides that: "The Chairperson may promulgate guidelines and procedures, which are deemed necessary for the fair and expeditious functioning of the Tribunal and which are consistent with these Rules, subject to prior consultation with the Special masters".

<sup>31</sup> Article 42(2)(c) of the ICC Statute. See also rules 34 and 35 of the Rules of Procedure and Evidence.

<sup>32</sup> ICC-ASP/1/Res.6, Annex, para. 2.

<sup>33</sup> Budget for the first financial period of the Court, ICC-ASP/1/3, paras. 33 and 91.

<sup>34</sup> ICC-ASP/2/2, para. 175 (c).

<sup>35</sup> ICC-ASP/2/2, paras. 290 and 292.

such reparations work, and the administrative costs of assistance to the Victims Trust Fund.<sup>36</sup> This was endorsed by the Working Group on the Programme Budget for 2004.<sup>37</sup>

There is a question as to whether the expenses of the members of the Board should be treated distinctly from the expenses of the Trust Fund Secretariat (the running costs of the Fund). The Resolution establishing the Trust Fund for Victims is not clear on this point. Para 6 of the Annex to the resolution establishing the Trust Fund provides: "The Assembly of States Parties may, as and when the workload of the Trust Fund increases, consider, on the recommendation of the Board, and after consulting with the Registrar as required, the creation of an expanded capacity, including the appointment of an Executive Director, either within or outside of the Registry as appropriate, to provide further assistance with the proper and effective functioning of the Trust Fund. *The Assembly of States Parties shall, after consulting with the Board and the Registrar, consider the payment of expenses of the Trust Fund from the voluntary contributions accruing to it.*"<sup>38</sup> [emphasis added]

This presumably means that, should the Trust Fund grow to a size where it requires an expanded administrative capacity, this expanded administrative capacity could be funded by a portion of the funds accumulated by the Trust Fund. The core capacity of the Trust Fund (both the costs/expenses of members of the Board of Directors and key support staff located in the Registry or elsewhere) would still be funded by the budget of the Court.<sup>39</sup> It is recommended that these core costs remain within the purview of the Court's budget, in accordance with Article 114 of the Rome Statute.<sup>40</sup>

With respect to the costs of an expanded administrative capacity, that might occur when the trust fund receives resources that merit such an expansion, it may be appropriate to consider using a capped percentage of trust fund resources to finance such an expansion. Donors making voluntary contributions to the Trust Fund may be reluctant to contribute to the Fund without special guarantees limiting the percentage, which could be applied to administrative costs. It would also send the wrong message to potential beneficiaries and the public at large, if a large proportion of the funds collected went to administrative costs. It is therefore suggested that a maximum percentage (e.g. less than 5%)<sup>41</sup> be set to cap administrative costs coming out of the funds collected.<sup>42</sup>

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<sup>36</sup> Report of the Committee on Budget and Finance, ICC-ASP/2/7, 8 August 2003, para. 49.

<sup>37</sup> ICC-ASP/2/WGPB/L.1/Rev.1, para. 13.

<sup>38</sup> Resolution ICC-ASP/1/Res.6, para 6, Annex.

<sup>39</sup> These core functions are covered by the main budget of the Court, see fn 29-33 and accompanying text.

<sup>40</sup> "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."

<sup>41</sup> There are wide divergences in the rate of capped percentages, the United Nations Development Programme trusts funds are examples of modest 3-5% cap for the additional cost incurred by UNDP in administering the contribution.

<sup>42</sup> The recommendation that a modest cap be used, was made by some nongovernmental organisations in the context of discussions predating the adoption of Resolution ICC-ASP/1/Res.6. This was a position taken, for example, by Amnesty International in the context of the discussions at the Preparatory Commission. See also REDRESS, Ensuring the Rights of Victims at the ICC: Specific Concerns and Recommendations Relating to the Trust Fund for Victims, September 2001. Others, for example, the International Society for Traumatic Stress

The practice of expenses borne by the fund itself exists among other claims commissions and trust funds. Most of the funds administered by the United Nations set aside a certain percentage of annual expenditure for programme support costs,<sup>43</sup> though Advisory Group recommendations have encouraged that irregular costs be met by the regular UN budget and/or the extra-budgetary resources of the Office of the High Commissioner for Human Rights.<sup>44</sup> The expenses of the UN Claims Commission are borne by the Fund<sup>45</sup> and governments and international organisations can offset their handling costs by deducting a fee from the amounts paid to claimants.<sup>46</sup> Similarly, Article 7.5 of the Settlement Agreement relating to the Swiss Banks claims provides that reasonable fees and expenses of administering the Settlement Fund may be paid from the Settlement Fund, subject to Court approval,<sup>47</sup> and escrow agents were permitted to authorize disbursements of up to a certain level for payment of certain costs incurred in implementing the Settlement, and were also permitted to authorise additional disbursements from the Escrow Fund for settlement implementation costs, subject to Court approval.<sup>48</sup> This is also the approach of the German Foundation "Remembrance, Responsibility and Future"<sup>49</sup> and the Austrian Fund for Reconciliation, Peace and Cooperation<sup>50</sup> and the Austrian General Settlement Fund for Victims of National Socialism.<sup>51</sup>

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Studies, objected both to the possibility that the administrative costs of the trust fund would not be borne by the Court, as it is the Court's obligation as a reparative instrument to ensure the full operation of the trust fund, and, in principle, all monies of the trust fund should go to victims.

<sup>43</sup> The UN Voluntary Fund for Victims of Torture, as with the UN Voluntary Trust Fund on Contemporary Forms of Slavery, UN Voluntary Fund for Indigenous Populations, UN Trust Fund for the Programme of Action for the Third Decade to Combat Racism and Racial Discrimination, and UN Voluntary Fund for Technical Cooperation in the field of Human Rights, set aside 13% of the estimated annual expenditure for programme support costs in accordance with the UN Rules on humanitarian assistance.

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[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/98b802aec721c15ec1256bdd00515332/\\$FILE/G0213862.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/98b802aec721c15ec1256bdd00515332/$FILE/G0213862.doc)

<sup>45</sup> "The expenses of the [UNCC] will be borne by the Fund." (Para 8 and 29 SG Report S/22559) <http://www.unog.ch/uncc/resolutio/res22559.pdf>.

<sup>46</sup> 1.5% for A, B and C claimants and 3% for other Claimants, S/AC.26/Dec.18 (1994) of 24 March 1994, Para I (1), [http://unog.ch/uncc/decision/dec\\_18.pdf](http://unog.ch/uncc/decision/dec_18.pdf).

<sup>47</sup> [http://www.swissbankclaims.com/PDFs\\_Eng/exhibit1toPlanofAllocation.pdf](http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf) and [http://www.swissbankclaims.com/PDFs\\_Eng/Amendment2.pdf](http://www.swissbankclaims.com/PDFs_Eng/Amendment2.pdf).

<sup>48</sup> Amendment 1 to the Settlement Agreement – see also Section II-D ("Subsequent Amendments to the Settlement Agreement) in Chief Judge Korman's Corrected Memorandum & Order [http://www.swissbankclaims.com/PDFs\\_Eng/MemorandumOrder.pdf](http://www.swissbankclaims.com/PDFs_Eng/MemorandumOrder.pdf).

<sup>49</sup> "Personnel and non-personnel costs shall be paid from the Foundation's funds, insofar as they are not to be assumed by the partner organizations" (Section 9(12) Federal Law); "Members of the Board of Trustees serve in a "pro bono" capacity; necessary expenses will be reimbursed" (Section 5(8) Federal Law), available at [http://www.stiftung-evz.de/fremdsp/englisch/st\\_ges\\_en.html](http://www.stiftung-evz.de/fremdsp/englisch/st_ges_en.html).

<sup>50</sup> Section 6 of the Guidelines provides that "Moneys of the Fund are transferred to partner organisations to cover their appropriate personnel and material expenses, including the cost of publicising the Fund." Section 8(3) of the Federal law also provides that the cost of periodic international business audit of partner organisations is to be borne by the Fund and Section 12(4) notes that the work of the Board of Trustees is on a pro-bono basis – and that necessary expenses are reimbursed by the Fund. [http://www.reconciliationfund.at/download/RL\\_e.pdf](http://www.reconciliationfund.at/download/RL_e.pdf).

<sup>51</sup> Article 2(3) of the General Settlement Fund law provides that "Necessary costs for personnel, material and administration of the Fund, including the costs of the Claims Committee, in so far as these cannot be covered by the budget of the National Fund." This law is available on the website of the US embassy in Vienna: <http://www.usembassy.at/en/download/pdf/gsf.pdf>; <http://www.usembassy.at/en/download/pdf/nflt.pdf>.

By contrast, the regulations regarding other funds require that there be separate funds set aside to cover administrative expenses. This is the approach taken by the South African Presidents' Fund, where Article 46(3) of the 1995 Act establishing the Fund provides that: "The expenses in connection with the exercise of the powers, the performance of the functions and the carrying out of the duties of the [TRC] shall be defrayed out of money appropriated by Parliament for that purpose".<sup>52</sup> This approach was also employed by the Iran-United States Claims Tribunal.<sup>53</sup>

## **F. Meetings of the Board of Directors**

The Assembly of States Parties resolution establishing the Trust Fund for Victims provides that "the Board shall meet at the seat of the Court at least once a year,"<sup>54</sup> and that "they shall serve in an individual capacity on a pro bono basis."<sup>55</sup> While it may be difficult to require Board members with a range of other responsibilities and who are serving in a pro-bono capacity, to meet more than once a year, having a Board that meets this infrequently has a number of substantive implications regarding how it should organise its work.

The examples of trust funds that meet once per year are the UN trust funds, which are essentially humanitarian funds where project money is given to victims through NGOs. Most of the trust funds under the authority of the UN Secretary-General, for example, meet in annual or semi-annual sessions, review grant applications according to set criteria and issue decisions on allocations at the time of their meeting(s).<sup>56</sup>

The mandate of the ICC's Trust Fund for Victims is significantly wider than that of the UN voluntary funds. Only a small portion of the Trust Fund's work could be met if the procedural approach of the UN voluntary funds was adopted, particularly where other resources of the Trust Fund are used for the benefit of victims in accordance with rule 98(5) of the Rules of Procedure and Evidence. However, there are a number of other functions of the Trust Fund that would necessitate a more detailed approach. For example, the Court may order that an award for reparations against a convicted person is 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 will be separated from other

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<sup>52</sup> <http://www.doi.gov.za/trc/legal/act9534.htm>.

<sup>53</sup> The Tribunal decided that both Governments would share liability for bank fees and indemnities associated with maintaining the Security Account. See, *Iran and the United States*, Cases A/1 (Issue I, III and IV), Decision No. DEC 8-A1-FT (3 August 1982), 1 Iran-U.S. Cl. Trib. Rep. 189-97; Article VI (3) of the Claims Settlement Declaration, available at <http://www.iusct.org/claims-settlement.pdf>.

<sup>54</sup> Annex to the Resolution, para. 4.

<sup>55</sup> *Ibid.*, para 2.

<sup>56</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 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 in August.

resources of the Trust Fund and shall be forwarded to each victim as soon as possible.<sup>57</sup> Similarly, a more detailed approach will be required if the Court orders that an award for reparations against a convicted person is 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.<sup>58</sup> Or 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>59</sup>

In order to ensure that maximum benefit is derived from the Board members' time and in the context of their considerable other commitments and the infrequency of meetings, it may be advisable to provide for the Secretariat to supply Board members with periodic reports to keep them fully apprised of developments. These reports could be quarterly, in the vein, for example, of the reports that non-executive directors of corporations receive. Further, it would be of great benefit to information flow for Board members to appoint a person from their own staffs to take responsibility for Trust Fund related matters.

### **G. The Capacity to Delegate to a Functioning Trust Fund Secretariat**

In order for the Trust Fund to have the flexibility and scalability to deal with these eventualities, it must be possible for the Board to meet more frequently, possibly in *ad hoc* or special sessions, and by other means than in person, and/or for the Board to delegate certain authorities to a functioning Trust Fund Secretariat. The degree of delegation (from the Board of Directors to the Secretariat) may depend to a certain extent on the nature of the decision to be taken. The more complex the decision, and the more it relies on discretion, the less feasible it will be for the Trust Fund Secretariat to play a determinative role. It is strongly recommended that the Board of Directors consider the issue of delegation in detail, as it will undoubtedly impact on the efficient running of the Fund.

The operational rules of the Trust Fund need to be as clear and complete as possible to facilitate greater delegation to the Trust Fund Secretariat. All possible areas of the process where rules can be employed need to be identified. This will leave Board members with the task of verifying and/or overseeing the work of the Trust Fund Secretariat and initiating decisions requiring discretion or new analysis or policy, rather than the broader tasks set out in the Assembly of States Parties' resolution: to "establish and direct the activities and projects of the Trust Fund and the allocation of the property and money available to it, bearing in mind available resources and subject to the decisions taken by the Court. Before establishing and directing the activities and projects of the Trust Fund, the Board shall consult, as far as

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<sup>57</sup> Rules of Procedure and Evidence, 98 (2).

<sup>58</sup> Rules of Procedure and Evidence 98 (3).

<sup>59</sup> Rules of Procedure and Evidence 98 (4).

possible, victims and their families or their legal representatives and may consult any competent expert or organization."<sup>60</sup>

By contextualizing the development of rules and procedures in this manner and by drawing on the practical experience of individuals or organizations experienced in previous restitution/compensation initiatives, the operational rules will not only be as practicable as possible but will also lend themselves to a more efficient approach. It will be important to design processes that are transparent (so that equitable and consistent approaches to individual claims and across claim groups are applied and evidenced). Further, the processes should lend themselves to the development of a streamlined claims evaluation system, with the flexibility to assess, individual/one-off (lump-sum), large groups of individual claims as well as group or bundled claims. Clear and practical guidelines will also ensure that, should NGOs or other organizations be mandated with carrying out specific tasks approved by the Board and/or Trust Fund Secretariat in the context of a particular initiative, they reflect the agreed procedures. Reporting requirements should also be provided so that performance can be evaluated and potential problems identified and resolved. For example, the German law which underpinned the Foundation "Remembrance, Responsibility and Future" set out in principle a plan of allocation for slave and forced labour payments, but the guidelines and procedures or "business rules" for claim evaluation were developed by individual partner organizations with direction from experts in Holocaust claims evaluation. Information technology (IT) systems were then designed to provide for a consistent application of these business rules and correct reporting. Business rules continued to be developed and adjusted (as were the requisite systems) to reflect subsequent negotiations with the Foundation by partner organizations, to reflect practical experience as the claimant population was analysed and patterns emerged.

For the more 'substantive' claims commissions, which, it is suggested, may be more appropriate models for the ICC Trust Fund for Victims,<sup>61</sup> the equivalent to the Board of Directors meets more frequently. For example, the Commission for Real Property Claims of Refugees and Displaced Persons (Bosnia and Herzegovina) met in plenary sessions lasting approximately 2 days, every 6-8 weeks (the Commissioners would formally adopt decisions during plenary meetings though most of the decision-making process was dealt with by the Commission's Secretariat; most of the time of the plenary was devoted to legal policy/strategy in terms of substantive questions, which then was translated into directives for Secretariat implementation. The Governing Council of the UN Claims Commission usually holds approximately 4 formal sessions per year, with occasional special sessions to deal with particular issues as they arise. In addition, a number of informal meetings of the Working Group of the Governing Council are held between the formal sessions.

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<sup>60</sup> ICC-ASP/1/Res.6, Annex, para. 7.

<sup>61</sup> While the ICC Trust Fund for Victims may not have the same level of regular funds as, for example, the UNCC, there may be instances where the ICC Trust Fund will have this level of funds, either in its general coffers or through fines and forfeiture proceedings in individual cases. The fact that the Statute and Rules of Procedure and Evidence enable the Court to hand over, in a number of situations, the processing of reparations claims to the Trust Fund, will mean that the Trust Fund operational rules need to be capable of managing such eventualities.

Thus, if the Board is required to meet only once a year, the work of the Trust Fund Secretariat must take this into account.

## **IV. THE SECRETARIAT OF THE BOARD**

### **A. Location of the Secretariat**

The Trust Fund Secretariat should be located at the Seat of the Court in the Hague. This will facilitate interaction with the Court and its processes. If means are available, and in conjunction with ICC field offices that will be established, the staff of the Trust Fund's Secretariat should have the ability to conduct fact-finding missions away from the Seat of the Court, and to establish effective procedures for the collection of claims in different locations.

It will be important to establish procedures that mirror the different environments in which claims are collected and subsequently processed, as well as the different stages of the claims processing exercise. For example, during the initial claims gathering process, procedures must address the protection needs, sensibilities of victims, cultural practices, local needs and existing infrastructure (e.g., legal, financial) in the location where claims are being gathered. During the claims gathering process in the Swiss Banks settlement, procedures were developed which reflected very low literacy levels within certain claimant classes, e.g., Roma and Sinti claimants, so that outreach programmes were developed to those communities to assist in the completion of forms by trained third parties and translators. This was also the practice used by the Commission for Real Property Claims, and many truth commissions operating in Latin America and parts of Africa.

Once the claims gathering exercise has been completed and the relevant information captured, however, it may be more cost effective and efficient to implement centralised claims evaluation systems which are not necessarily "on-site" and which make use of the benefits of IT. For example, the Claims Conference received in excess of 220,000 claims from Jewish former slave and forced labourers that were gathered in over 40 countries. Claimant information was captured in electronic format and migrated into a database system which could be accessed from their three offices in Germany, the US and Israel on a "real-time" basis. Claims evaluation occurred in all three offices which accessed the IT claims evaluation and processing system remotely. The use of technology and of existing staff and locations introduced not only considerable time and cost savings but ensured a consistent approach and real time reporting.

It may not be necessary for the staff of the Trust Fund Secretariat to **process** claims in the field, though it is very likely that the initial **gathering** of data will be done there, at least in large part. Centralising claims processing (as different from claims gathering) may therefore keep costs down and ensure a consistency of approach.

### **B. Degree of Connection with the Various Organs of the Court**

#### **The Registry**

The Resolution establishing the Trust Fund for Victims provides that "The Registrar of the Court shall be responsible for providing such assistance as is

necessary for the proper functioning of the Board in carrying out its tasks and shall participate in meetings of the Board in an advisory capacity.”<sup>62</sup> It also provides in Paragraph 6 of the Annex to the Resolution that “the Assembly of States Parties may, as and when the workload of the Trust Fund increases, consider, on the recommendation of the Board and after consulting with the Registrar as required, the creation of an expanded capacity, including the appointment of an Executive Director, either within or outside the Registry as appropriate, to provide further assistance with the proper and effective functioning of the Trust Fund. The Assembly of States Parties shall, as part of such consideration, after consulting with the Board and the Registrar, consider the payment of expenses of the Trust Fund from the voluntary contributions accruing to it.”

How closely the Trust Fund is aligned with the Registry is related to the scope or level of work of the Trust Fund and the amount of contributions accruing to it, among other factors. Certainly, having the Trust Fund physically located in the Registry will be administratively and cost efficient, particularly in the early stages. The Registry controls the budget of the Court and it will control the growth of the Trust Fund if the budget is confined to allotments from the Court.<sup>63</sup>

The Board of Directors, however, does not form part of the Court structure as such, and certainly does not report to the Registrar, particularly on matters of substance, rather, the Board would report to the Assembly of States Parties first and foremost.<sup>64</sup> Therefore, the placement of the Trust Fund Secretariat within the Registry would need to be designed in such a way that they were ‘sharing space’ as opposed to being within the overall substantive management structure of the Registry. This is important not just in principle but, because of the distinct decision-making function of the Board, it would not be appropriate for the Registry to oversee this function. This is the approach taken by the Sierra Leone Truth and Reconciliation Commission, where “during the course of its operations, the Commission may provide information or recommendations to or regarding the Special Fund for War Victims [...], or otherwise assist the Fund in any manner the Commission considers appropriate *but the Commission shall not exercise any control over the operations or disbursements of that Fund.*”<sup>65</sup> [emphasis added]

## The Chambers

This is not to say that the Trust Fund should be completely separate either. The degree of independence from the Court will probably depend on the type of transaction – whether it relates to the fulfilment of a Court order or direction or is self-initiated. Therefore, it might make sense for the Board of Directors and the Trust Fund Secretariat to agree in principle to certain “stream” procedures

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<sup>62</sup> ICC-ASP/1/Res.6, Annex, para. 5.

<sup>63</sup> See Section III(e) above, on the Costs/Expenses of Members of the Board and of the Secretariat.

<sup>64</sup> In particular, the Resolution establishing the Trust Fund [ICC-ASP/1/Res.6] provides at Paragraph 5 of the Annex that “the Registrar of the Court shall be responsible for providing such assistance as is necessary for the proper functioning of the Board in carrying out its tasks and shall also participate in meetings on the Board *in an advisory capacity.*” [emphasis added].

<sup>65</sup> Article 7 (6) of the Sierra Leone Truth and Reconciliation Commission Act 2000.

and/or to pre-determine, to the extent possible, sample plans of allocation, to reflect reporting lines/procedures/formats – e.g., to the Court or to the Assembly of States Parties, as appropriate. The Board of Directors will have to report back to the Court (the judges) on the implementation of awards, where the Court has referred certain functions relating to reparations to the Trust Fund. It will also have to report back to the Assembly on the entirety of its activities.<sup>66</sup>

## **The Assembly of States Parties**

The Assembly, in its resolution on the establishment of the Trust Fund, determined that the Board of Directors would have competence to “establish and direct” the activities of the Trust Fund. As such, it appears decided that the Board, as opposed to the Assembly, has full competence to take individual decisions regarding the allocation and disbursement of funds. However, the Assembly of States Parties retains competence to determine, on the suggestions of the Board, the further criteria for the management of the Trust Fund, and to decide practices for optimal financial management.<sup>67</sup>

## **Other Models**

Other claims commissions and trust funds have employed a range of organisational structures. In some instances, great autonomy has been granted to the Secretariat of the mechanism to process claims, though the actual decisions are taken by the governing board or commission. For example, the Secretariat of the UN Claims Commission is headed by an Executive Secretary who is appointed by the Secretary-General after consultation with the Governing Council and is composed of 240 staff (lawyers, accountants, cost adjusters, IT specialists) who conduct the bulk of the work,<sup>68</sup> though the Governing Council, in its formal sessions, takes the final decisions.<sup>69</sup> Similarly, at the Commission for Real Property Claims, most of the work, including all claims processing and decision preparation, is conducted by the Secretariat, with final decisions approved by the Commission in plenary.<sup>70</sup> In other models, where a Court has ordered a reparations process, but has designated a separate body to undertake

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<sup>66</sup> “The Board shall report annually to the Assembly of States Parties on the activities and projects of the Trust Fund and on all offered voluntary contributions, regardless of whether they were accepted or refused.” [ICC-ASP/1/Res.6, Annex, para 11]

<sup>67</sup> Resolution ICC-ASP/1/Res.6, Annex, paras. 7, 11 and 12.

<sup>68</sup> <http://www.unog.ch/uncc/secretar.htm>. In addition to the Office of the Executive Secretary, the Secretariat comprises (1) the Claims Processing Division, which includes the Legal Services Branch, made up of various claims sections and units, the Verification and Valuation Support Branch and the Registry; (2) the Support Services Division, which includes the Claims Payment and Compensation Fund Administration, the Executive Office, dealing with general administration, and the Information Systems Section providing computerized systems to support claims processing and payment; and (3) the Governing Council Secretariat.

<sup>69</sup> The Governing Council establishes criteria for the compensability of claims, rules and procedures for processing claims, and procedures for payment of compensation. Its decisions are final and not subject to appeal or review. In its formal sessions, it considers reports from the Secretariat and Commissioners and reviews “the amounts recommended and, where it determines circumstances require, increases or reduces them”. [Article 40 (1) of the Provisional Rules of Claims Procedures, available at: [http://www.unog.ch/uncc/decision/dec\\_10.pdf](http://www.unog.ch/uncc/decision/dec_10.pdf)]

<sup>70</sup> For more information on the work of the Commission, please consult its website: <http://www.crpc.org.ba>.

the claims processing,<sup>71</sup> the Court has retained judicial oversight of the entire external claims and distribution process.<sup>72</sup>

In other cases, Board Members have only been granted authority to make recommendations, with the final decisions taken by the political or administrative oversight body. This is the case with the UN trust funds, particularly those administered by the Secretary-General; the Board of Trustees provide advice to the Secretary-General on the administration and operation of the funds.<sup>73</sup> With respect to those trust funds operating out of the Office of the High Commissioner for Human Rights, the recommendations of the Board of Trustees are approved as a matter of formality by the High Commissioner for Human Rights, on behalf of the Secretary-General.<sup>74</sup> Similarly, under the terms of the South African President's Fund, as part of the Truth and Reconciliation Commission process, the Committee on Reparation and Rehabilitation may make recommendations to the President with regard to the "policy which should be taken with regard to the granting of reparations to victims or to the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims".<sup>75</sup> The President is then authorised to make recommendations to Parliament and to issue regulations to implement Parliament's recommendations.<sup>76</sup>

It is recommended that the structure that is ultimately adopted for the Trust Fund will reflect the nature of the decisions that will need to be taken and the practical realities facing victims and family members. It will be more efficient, for instance, for 'decisions' to be drafted by the Trust Fund Secretariat, and

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<sup>71</sup> This may be very similar to the ICC, where the Court may direct the Trust Fund to undertake certain functions in the fulfillment of reparations orders.

<sup>72</sup> In particular, this method has been employed by the District Court in the consolidated actions known as In re Holocaust Victims Assets, Master Docket CV-96-4849 (E.D.N.Y.) ("Settlement Agreement"), Exhibit to Plan of Allocation, available at [http://www.swissbankclaims.com/PDFs\\_Eng/exhibit1toPlanofAllocation.pdf](http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf), at para 14. The Court remained seized of the entire process of distribution of the monies in the Settlement Fund to the different classes of beneficiaries: (1) Deposited Assets Claims/Insurance Claims: a Special Masters was appointed by Chief Judge Korman (Article 7.1 Settlement Agreement) and a Claims Resolution Tribunal was employed: originally established by the Swiss Bankers Association, the Swiss Federal Banking Commission and the Volcker Committee to arbitrate claims arising from the 1997 publication of 5,570 foreign dormant accounts in Swiss banks; (2) Looted Assets: American Jewish Joint Distribution Committee ("JDC") <http://www.jdc.org> and Conference on Jewish Material Claims Against Germany (the "Claims Conference" <http://www.claimscon.org/>) responsible for distributing monies to this class. (Section I-C2 (b)(i) Summary of Draft Plan of Allocation [http://www.swissbankclaims.com/PDFs\\_Eng/SWBPOADetailSummary.pdf](http://www.swissbankclaims.com/PDFs_Eng/SWBPOADetailSummary.pdf)); (3) Slave Labour I: The Claims Conference and IOM ([http://www.swissbankclaims.iom.int/English/index\\_en.html](http://www.swissbankclaims.iom.int/English/index_en.html)), pursuant to their activities under the German Fund, were made responsible for distributing monies to this class (Section I-C2 (b)(ii) Summary of Draft Plan of Allocation [http://www.swissbankclaims.com/PDFs\\_Eng/SWBPOADetailSummary.pdf](http://www.swissbankclaims.com/PDFs_Eng/SWBPOADetailSummary.pdf)); (4) Slave Labour II: IOM was responsible for distributing monies to this class (Section I-C2 (b)(iii) Summary of Draft Plan of Allocation [http://www.swissbankclaims.com/PDFs\\_Eng/SWBPOADetailSummary.pdf](http://www.swissbankclaims.com/PDFs_Eng/SWBPOADetailSummary.pdf)); (5) Refugee Class: The Claims Conference (for Jewish Class members) and IOM (for Roma, Jehovah's Witnesses, disabled and homosexual class members) were made responsible for distributing monies to this class (Section I-C2 (b)(iv) Summary of Draft Plan of Allocation [http://www.swissbankclaims.com/PDFs\\_Eng/SWBPOADetailSummary.pdf](http://www.swissbankclaims.com/PDFs_Eng/SWBPOADetailSummary.pdf)).

<sup>73</sup> See, for example, Article 1(b) of GA Res. 36/151 on the administration of the UN Voluntary Fund for Victims of Torture (<http://www.un.org/documents/ga/res/36/a36r151.htm>); Article 1(f) of GA Res. 46/122 on the UN Voluntary Trust Fund on Contemporary Forms of Slavery (<http://www.un.org/documents/ga/res/46/a46r122.htm>).

<sup>74</sup> See, for further information on the processes of such funds, <http://www.unhchr.ch/html/menu2/9/vftortur.htm>, <http://www.unhchr.ch/html/menu2/9/vfslaver.htm#grants>; and <http://www.unhchr.ch/html/menu2/9/vfindiqe.htm>.

<sup>75</sup> Article 25(1)(a) of the 1995 Act, available at: <http://www.doj.gov.za/trc/legal/act9534.htm>.

<sup>76</sup> Article 4(f)(i) and 27 of 1995 Act, <http://www.doj.gov.za/trc/legal/act9534.htm>.

approved by the Board Members themselves, rather than for Board decisions to require approval by the Assembly of States Parties, as the latter will only meet once per year and may not have the requisite expertise. The approval process would also need to take into account the infrequency of Board meetings, and put in place procedures for decision-making between Board sessions, via teleconferencing or other means.

## **V. MANAGEMENT OF CONTRIBUTIONS TO THE FUND**

The Resolution establishing the Trust Fund provides that the Trust Fund shall be funded by:

- (a) Voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties;
- (b) Money and other property collected through fines or forfeiture transferred to the Trust Fund if ordered by the Court pursuant to article 79, paragraph 2, of the Statute;
- (c) Resources collected through awards for reparations if ordered by the Court pursuant to rule 98 of the Rules of Procedure and Evidence;
- (d) Such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund.<sup>77</sup>

### **A. Solicitation of Funds**

It is likely that the resources collected from (b) will be relatively small and insignificant if the experience of the defendants of the *ad hoc* tribunals is a good indication,<sup>78</sup> and funds from (c) would be for the benefit of specific victims and would therefore not have an impact on the general uses of the Trust Fund. It is also likely that there will be strict competition for the allocation of funds by the Assembly of States Parties (d), and therefore voluntary contributions (a) may prove to be the most important sources of income for the Trust Fund.

It is therefore recommended that the Board of Directors undertake an active role in raising voluntary contributions, which should be supplemented by the actions of the Trust Fund Secretariat. This was one of the recommendations of the Coalition for an International Criminal Court (CICC)'s Budget and Finance Team; to appoint a fund raising officer to the Trust Fund's Secretariat.<sup>79</sup> Furthermore,

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<sup>77</sup> Resolution ICC-ASP/1/Res.6, para. 2.

<sup>78</sup> Most, if not all, defendants, satisfied the financial criteria for receipt of legal aid.

<sup>79</sup> Coalition for the International Criminal Court's Budget and Finance Team submission to the second session of the Assembly of States Parties (8-12 September 2003). At para. 71, it notes that: "The long-term success of the Trust Fund depends on the amount of funds that it has and especially in its first years it should be given as much support as possible to grow," and recommends, at para. 72 "that a fundraiser for the Trust Fund for Victims should be included in the 2004 budget to work with the Board of Directors and non-governmental organizations to maximize the amount of funds donated to the Trust Fund for Victims in 2004." The report is available at: <http://www.iccnw.org/documents/asp/papersonaspissues.html>.

the Assembly of States Parties should regularly appeal to governments, intergovernmental and non-governmental organisations and others to contribute to the Trust Fund.

There is practice among other trust funds and claims commissions in the solicitation of funds. In particular, the Board of Trustees of the UN Voluntary Fund for Victims of Torture is authorised to “promote and solicit contributions and pledges”,<sup>80</sup> and the General Assembly regularly appeals to all Governments to respond favourably to requests for contributions to the Fund.<sup>81</sup> Similarly, the Secretary-General has “strongly appealed to all Governments, intergovernmental and non-governmental organisations and individuals in a position to do so, to contribute generously to the [UN Trust Fund for the Programme of Action for the Third Decade to Combat Racism and Racial Discrimination]”.<sup>82</sup>

It is also recommended that the Board consider additional strategies to raise funds. The profile of the Board Members provides a unique opportunity to draw greater attention to the plight of victims and family members within the Court’s jurisdiction. This should be put to active use for fundraising. Furthermore, discussions should be entered with States Parties on how best to ensure the charitable tax status of the Fund in national contexts to facilitate contributions from individuals and other charitable trusts.

## **B. Receipt of Funds**

The Resolution establishing the Trust Fund provides, at para. 8 of the Annex, that “Voluntary contributions ... shall be submitted to the Board for approval, in accordance with the criteria laid down in paragraphs 9 and 10.”

9. The Board shall refuse such voluntary contributions envisaged in para 8 that are not consistent with the goals and activities of the Trust Fund.

10. The Board shall also refuse voluntary contributions whose allocation, as requested by the donor, would result in a manifestly inequitable distribution of available funds and property among the different groups of victims.

The Board of Directors will need to develop guidelines and procedures for determining whether potential contributions fall within the criteria set out in paragraphs 9 and 10 above. As a general principle, for the Trust Fund to succeed, voluntary contributions would need to be encouraged and solicited and therefore a narrow reading of Paragraphs 9 and 10 is recommended. Many donors insist on earmarking contributions on the basis that it provides them with a more concrete insight into the use of grants. One could imagine instances when earmarking may be considered wholly appropriate, e.g., a foundation with

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<sup>80</sup> Article 1(e) GA Res. 36/151, <http://www.un.org/documents/qa/res/36/a36r151.htm>.

<sup>81</sup> Article 2 GA Res. 36/151, <http://www.un.org/documents/qa/res/36/a36r151.htm>.

<sup>82</sup> Point 57, Report of the Secretary-General, Document No. A/56/481, available at: [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c13692e4115c657ec1256af6004d8da6/\\$FILE/N0158443.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c13692e4115c657ec1256af6004d8da6/$FILE/N0158443.doc).

a limited mandate to support victims of sexual violence in particular may wish to extend specific support to projects of the Trust Fund that target such victims. However, from another perspective, earmarked contributions may inadvertently affect the neutrality of the Trust Fund by differentiating the level of funds available to support certain categories of victims. If the potential inequalities of funding are tracked and flagged, however, projects requiring funding could be identified so that potential donors could be encouraged to donate to under-funded projects that might meet their criteria.

Certain procedures could be put in place to redress any imbalances, by providing donors interested in contributing earmarked funds with a list of specific projects or areas of victim support that are under-funded, and by encouraging contributions to these areas, or they may choose to outlaw earmarking altogether. This latter approach has been taken by the UN Voluntary Fund for Victims of Torture which, similarly to the ICC Trust Fund, requires that the purpose of all contributions must be consistent with the policies and aims of the UN.<sup>83</sup> This Fund does not allow earmarking for specific projects or classes of victims,<sup>84</sup> and it has been plagued in recent years by a lack of sufficient funds.

One of the ways that earmarking could be made more equitable would be to impose conditions to ensure that some level of general/non-earmarked contributions accompany earmarked contributions. For example, 5% of the total contribution amount would be allocated to administrative costs, 20% to a general non-earmarked fund and the remaining 75% could be donated to an earmarked cause. The key in these situations will be to allow for flexibility depending on the size and nature of the donation.

### **C. Management of Fund Balances**

Through use of an integrated accounting and claims/award management system which will cover all aspects of the Trust Fund's work, it should be possible to budget and manage the funds both according to the overall non-specific activities of the Trust Fund as well as the more specific programme-related activities.

It is recommended that a certain reserve be maintained for emergencies and/or unforeseen situations. This would also act to safeguard the continuity of the Fund, given the difficulty of maintaining a consistent level of voluntary contributions year after year. One option is to earmark a portion of estimated annual expenditures as a reserve for the following year. This is the approach taken by the UN Voluntary Fund for Victims of Torture - in accordance with UN rules governing voluntary contribution funds for humanitarian purposes, 15% of estimated annual expenditures must be earmarked as a reserve for the following year.<sup>85</sup>

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<sup>83</sup> Financial Regulations and Rules of the United Nations (UN Doc. ST/SGB/Financial Rules/1/Rev.3 (1985)).

<sup>84</sup> Annex to SG Report A/56/205, <http://www.un.org/documents/qa/docs/56/a56205.pdf>.

<sup>85</sup> The same approach is taken by the UN Voluntary Trust Fund on Contemporary Forms of Slavery, UN Voluntary Fund for Indigenous Populations, UN Trust Fund for the Programme of Action for the Third Decade to Combat Racism and Racial Discrimination and UN Voluntary Fund for Technical Cooperation in the field of Human Rights.

Similar approaches have been taken with other claims commissions such as the UN Compensation Commission, which retains an adequate operating reserve consisting of an amount sufficient to cover at least one year's operating expenses,<sup>86</sup> and furthermore enables the Governing Council to decide, if there are insufficient funds to make payments, how to distribute the limited funds available.<sup>87</sup> In other cases, decision-makers have ensured a specified amount of capital prior to making any expenditures, with a view to maintaining all or a portion of the principal,<sup>88</sup> have otherwise made special use of accrued interest,<sup>89</sup> or have capped the percentage of funds to be used in settlement administration.<sup>90</sup> With the Iran-United States Claims Tribunal, for example, the United States Government agreed to transfer to a central bank all Iranian deposits and securities located in US banking institutions (with interest) which it had seized – half of this amount was then transferred to a special interest-bearing Security Account, until the balance of the Security Account reached \$1 billion.<sup>91</sup> The funds in the Security Account are used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement and interest goes back into the Fund.<sup>92</sup>

## **VI. THE ACTIVITIES AND PROJECTS OF THE TRUST FUND**

### **A. Basic Principles**

#### **Summary of Key Tasks of the Trust Fund**

The central functions of the Trust Fund, with general management and oversight to be provided by the Board of Directors, could be characterised as follows:

- i. Developing and implementing policies regarding its activities and programmes;
- ii. Actively promoting the Trust Fund, including solicitation of funds from different donor sources and liaising with development agencies and

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<sup>86</sup> Article 7, Priority of Payment and Payment Mechanism Guiding Principles - December 17, available at: [http://www.unog.ch/uncc/decision/dec\\_17.pdf](http://www.unog.ch/uncc/decision/dec_17.pdf). See also, the provisions relating to the National Fund of the Republic of Austria for Victims of National Socialism, where it is provided that "In order to assure equal payments of benefits to all those entitled, a portion of up to 5% of [\$150 million] may be held in reserve. If this portion of the amount was not, or not fully, used within one year after the entry into force of the present Federal Law, the remaining amount shall also be distributed in equal parts to those entitled to benefits" (New Section 2b(6) National Fund Law Amendment, available at <http://www.usembassy-vienna.at/nflt.pdf>).

<sup>87</sup> Article 9, Priority of Payment and Payment Mechanism Guiding Principles – December 17.

<sup>88</sup> For example, the German Foundation "Remembrance, Responsibility and Future" is endowed with a capital fund.

<sup>89</sup> For example, accrued interest to the Swiss Banks Settlement Fund was used to partially defray the cost of the claims process for the deposited assets class.

<sup>90</sup> See section on the expenses of the Board of Directors and the Secretariat, above. For example, the Swiss Banks' Settlement specified that administrative costs for the processing of claims should be capped at 1.5% of the total settlement amount.

<sup>91</sup> Articles 6 and 7 General Declaration, <http://www.iusct.org/general-declaration.pdf>.

<sup>92</sup> *Iran and the United States*, Cases A/1 (Issue II), Decision No. DEC 8-A1-FT (17 May 1982), 1 Iran-U.S. Cl. Trib. Rep. 144, 149-53.

- organisations on meeting the broader needs of victims within the jurisdiction of the Court;
- iii. Preparing narrative and financial reports regarding transfers of funds and corresponding orders from the Court;
  - iv. Directing the funds to general and/or earmarked accounts, or restricted accounts to benefit specific victims or classes of victims in line with reparations orders;
  - v. On the preliminary determination by the Pre-Trial Chamber that a particular situation falls within the jurisdiction of the Court, conducting a needs assessment and embarking on a consultation process to determine the context and the needs of affected victims, and, as appropriate, responding to urgent needs as they arise, and/or providing general assistance through its general funds;<sup>93</sup>
  - vi. Once judgments are rendered by the Court and depending on how reparation is dealt with by the Court, developing detailed plans for the distribution of reparation awards to individual victims and/or in the form of collective reparation;
  - vii. In the case of large-scale reparations orders implemented through the Trust Fund, organising, implementing, tracking, and reporting on a disbursement process which may involve hundreds of thousands of awards to victims;
  - viii. Developing and implementing plans for collective reparation and ensuring that calls for proposals to implementing partners, as appropriate, specify the aims of the particular process;
  - ix. Managing the Trust Fund in a way to achieve maximum income (e.g. fund raising, sensible cash management procedures);
  - x. Creating a comprehensive audit trail.

### **Developing Efficient and Scalable Processes**

It will be important for the Board of Directors to keep in mind some of the limitations that they may face when developing the operating procedures of the Trust Fund. In particular, as mentioned earlier, it would be advisable for Board Members to consider methods of delegating substantial functions to a Trust Fund Secretariat, while exercising sufficient oversight. Given potential funding constraints it may be advisable to structure the Trust Fund Secretariat in such a way that it adds to or reduces resource as funding and project size dictates. It may also be advisable to consider the outsourcing of elements of projects, such as mass claims processing to third parties with the relevant expertise. The use of outsourcing often translates into cost savings and reduces lead-times. Developing in-house expertise when the size and funding available for initiatives is likely to vary often translates into longer commitment to staffing and steep learning curves.

Equally, the Board may wish to consider the large numbers of potential beneficiaries to the Trust Fund, and the probability of large fluctuations in the

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<sup>93</sup> The Board of Directors will need to consider if, and to what extent, victims within the jurisdiction of the Court may be eligible for any form of interim relief. Other trust funds and claims commissions have enabled victims, in certain circumstances, to apply for emergency assistance, though it will be important to ensure that such urgent or extraordinary applications could not have been dealt with in any other way, for example, through the Victims and Witnesses Unit.

resources available. Further, the relationship of the Trust Fund with the criminal and reparations processes of the Court, something which distinguishes this Fund from other known examples, will need to be explored in detail. In particular, it would be important to ensure that the processes of the Trust Fund do not impact negatively or compromise the criminal processes of the Court. This might occur, for example, if the Trust Fund determines that a particular context constitutes a crime within the jurisdiction of the Court before such a determination is made by the Court. It is equally important for the Trust Fund's procedures to complement, and not duplicate or contradict, the reparations function of the Court. Here, it must be stressed that the Court's Statute and Rules of Procedure and Evidence place competence for reparations squarely with the judges. The only competence of the Board in this regard is residual competence that is assigned by the Court. A creative and flexible approach to deal with the specificity of this Fund and the diverse circumstances that it will be called upon to deal with is therefore required.

### **Claims Process**

Individualised claims processes may be required in certain instances, particularly regarding functions relating to the reparations process that may be delegated by the Court. It is extremely important that, whatever processes are employed, are simple and accompanied by adequate and appropriate publicity/awareness building, that they are accessible to potential beneficiaries (regardless of geographical location, education and other demographic factors), with sufficient guidance to enable the applicant to complete and lodge the application form without legal assistance.

These processes have the potential to be costly, particularly when there are a large number of victims and their locations vary widely. However, networking with existing programmes which might serve a victim population and "plugging into" complementary outreach initiatives is useful. Alternatively, if the level of development in the victim group State allows for it, the filing of claims could be undertaken via standardised claim forms that are completed and filed electronically via a web-deliverable solution. In some situations, the claims gathering exercise might not require an individualised claims gathering exercise. It may, for example, be possible to take a US class action approach, i.e., that victims are automatically claimant group members unless they choose to "opt out".

Regardless of the methods used for claim solicitation and gathering, it is important to ensure that application forms are both user friendly and sufficiently comprehensive to allow all potentially relevant information to be captured during a single information gathering exercise – both for the sake of victims and in the interests of keeping costs down. This will allow for the optimal use of data gathered at later stages by providing for the potential to evaluate/process claims in the most cost effective location and to automate elements of the claims processing and reporting. For example, the German slave and forced labour settlement administration involved the gathering of claims from dozens of different countries via several different claim forms, but processing of claims was performed remotely at various centralized locations by partner organisations with the assistance of external consultants.

As mentioned above, the use of technology can radically reduce the cost of processing claims – whether individualised or as part of a group reparations initiative. It also provides other advantages; developing a database system to underpin claims processing enforces a consistency of approach (across locations and claims processors) and allows for sampling of claims, a process used extensively in the UN Claims Commission, and validation criteria to be applied automatically providing time and cost savings. When the Claims Conference’s advisors developed a database system for the evaluation of Jewish slave and forced labour claims, they allowed for the application of non-subjective criteria to be applied to a very large claimant population in order to determine eligibility. Cross referencing to a database of over 7000 eligible internment locations allowed for thousands of claims to be validated automatically in a matter of hours in a way that would have been impossible to achieve manually. The system also allowed for the identification of inconsistencies, inaccuracies and missing information with a high degree of accuracy. Use of IT allowed the Claims Conference to submit over 120,000 potentially eligible claims to the German Foundation in less than a year.

Where particularly complex and/or large volume claims are involved, utilizing a database allows for complex analysis and the identification of common patterns within the claimant population or claim type. For example, during the processing of the banking assets element of the Swiss Banks Settlement by the Claims Resolution Tribunal (ii), a database proved invaluable in identifying potentially linked claims and accounts – so that information validating a claim against one account could be taken into account when evaluating potentially related accounts. Without the use of technology these links would not have been identified. It also allowed for the grouping of claims and awards.

It is very important to take into account the special characteristics defining each claim process. For example, anecdotal evidence may be all that is available for the evaluation of claims and the claims processing system developed would need to be sufficiently flexible to allow for it. Again, for many of the Holocaust related restitution/compensation initiatives the passage of time, the destruction of documentation by war and migration, the sensitivity of the subject matter and the advanced age of the claimants necessitated the acceptance of anecdotal evidence for certain groups of claims. For claims relating to the Swiss banking assets class of the Swiss Banks settlement which were not supported by documentation or other evidence of a connection between the claimant and the depositors of assets/account holders, purely anecdotal evidence was accepted provided it convincingly described a sufficiently strong nexus to a Swiss bank during the Holocaust era.

When developing the claims processing guidelines for the trust fund, consideration should be given to dealing with a group compensation initiative where no individual claims are filed. It may be possible to apply demographic/statistical analysis to determine the group and assess eligibility and then disburse appropriate restitution payments – either to benefit the group or in the form of lump sum payments to group members. Again, this type of analysis can be performed by database/statistical modelling and analysis relatively quickly and cost effectively once the underlying criteria/assumptions have been defined.

It is also important to consider the special characteristics of payments. For example, are they compensatory or restitutional? If compensatory, what factors will apply in deciding the level of damages.

### **Time limitations**

The imposition of an administrative deadline for submitting claims to the Trust Fund has the advantage of reducing delays, and enabling the administrators of the Fund to evaluate and project their workload, and predict available funds. Time limitations would therefore be considered to be beneficial, provided there is some flexibility to extend deadlines and adequate publicity including active outreach to seek out particularly affected individuals,<sup>94</sup> particularly where there are finite resources. Again, technology could be used to “age” claims – automatic time and date stamping to determine when deadlines are about to or have expired. It would allow for the prioritisation of claims based on any number of criteria.

A number of claims processes and trust funds have utilised deadlines to facilitate their work.<sup>95</sup> While deadlines may in certain circumstances increase efficiency, they may sometimes obstruct the reparations process, particularly to the most needy victims.<sup>96</sup>

### **B. Decision-Making Processes**

A variety of methods of decision-making have been employed by other claims processes and trust funds. In the more judicial processes, such as the Iran-United States Claims Tribunal, claims are decided by a 3 member Chambers of the Tribunal or by the Full Tribunal in respect of disputes between the two Governments, as well as important questions referred to it by the Chambers. The UN Claims Commission, which can be characterised as a mixed judicial model, utilises Commissioners, with the support of a Secretariat, to verify and value claims within the criteria established by the Governing Council. The decisions are then reviewed by the Governing Council. With the Swiss Banks Settlement Fund, which resulted from a judicial settlement award, a special master was appointed to establish, organize, and supervise the Claims Resolution Process, a range of tribunals and commissions were utilised to process and determine claims within the purview of the settlement<sup>97</sup> supported by Secretariats.<sup>98</sup>

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<sup>94</sup> See, generally, Danieli, supra. n. 7. See, also, Danieli, Y., Engdahl, B. & Schlenger, W.E. (2003). The psychological aftermath of terrorism. In F. Moghaddam, Marsella, A.J., & Bandura, A. (Eds.) International Terrorism and Terrorists: Psychosocial Perspectives (pp 223-246). Washington, D.C.: American Psychological Association.

<sup>95</sup> For example, the Iran-United States Claims Tribunal required claims to be filed by 19 January 1981; the Commission for Real Property Claims has employed a series of deadlines for receipt of claims regarding socially owned apartments.

<sup>96</sup> Supra., n. 94.

<sup>97</sup> See, for example, [http://www.crt-ii.org/pdf/governing\\_rules\\_en.pdf](http://www.crt-ii.org/pdf/governing_rules_en.pdf); Section I-C2(b)(i) – (iv) of the Summary of Draft Plan of Allocation [http://www.swissbankclaims.com/PDFs\\_Eng/SWBPOADetailSummary.pdf](http://www.swissbankclaims.com/PDFs_Eng/SWBPOADetailSummary.pdf).

<sup>98</sup> [http://www.crt-ii.org/pdf/governing\\_rules\\_en.pdf](http://www.crt-ii.org/pdf/governing_rules_en.pdf).

It will be important, however, to allow sufficient flexibility to streamline decision-making organs in the light of practical experience once the claims evaluation process begins. It is noteworthy that the claims resolution process of the Swiss Banks Settlement was considerably streamlined once it became clear that the claims evaluation process was being slowed as a result of an overly layered approach. Ensuring transparency of the process should allow for potential log jams to be identified and rectified.

In the larger national trust funds, such as the German Foundation Remembrance, Responsibility and Future, the Board of Directors undertakes the day-to-day business of the Foundation and implements the decisions of the Board of Trustees.<sup>99</sup> Partner organizations are responsible to set up commissions to review claims, as well as appeal organs, which should be independent and free of charge.<sup>100</sup> This is similar to the approach taken by the Austrian Fund for Reconciliation, Peace and Cooperation.<sup>101</sup>

The UN Voluntary Fund for Victims of Torture, similarly to some of the other UN voluntary funds administered by the Secretary-General, holds an annual two-week session of the Board and consults with project leaders, the Special Rapporteur on Torture and the Committee against Torture. Recommendations for funding are made by the Board to the Secretary-General on projects it considers relevant and in keeping with the Fund's mandate. Once the grants are approved by the High Commissioner for Human Rights, on behalf of the Secretary-General, the beneficiary organizations are notified of the grants awarded and of any conditions attached to them.<sup>102</sup>

### **Oral Hearings**

The Board of Directors will need to determine whether it will reserve the right to hold oral hearings, either to hear individual claimants, or in any other capacity. The process varies widely among trust funds and claims bodies. Certain national criminal injuries compensation boards, for instance, have provided for oral hearings in limited circumstances. In the United Kingdom, for example, oral hearings are possible in limited circumstances as an appeal after a review of a decision by a single member on the documents by two members of the Authority (para. 24). All parties to a hearing have the right to call, examine and cross-examine witnesses. There is a presenting officer to act on behalf of the Authority which is not bound by formal rules of evidence (para. 75).

In the US-Iran Claims Tribunal, which conducts its business in accordance with the arbitration rules of the United Nations Commission on International Trade

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<sup>99</sup> It is responsible for distributing the resources of the Foundation to the partner organizations and for the management of the Remembrance and Future fund. It oversees the purposeful and prudent expenditure of the Foundation's funds, in particular adherence by the partner organizations to the provisions of this Law and the guidelines established by the Board of Trustees for the use of its funds. The Board of Directors shall represent the Foundation, both in judicial and extrajudicial matters. Section 6(3) of the Federal Law, available at: [http://www.stiftung-evz.de/fremdsp/englisch/st\\_ges\\_en.html](http://www.stiftung-evz.de/fremdsp/englisch/st_ges_en.html).

<sup>100</sup> See for example the work of the IOM Property Claims Commission that is processing claims for payment in particular for property losses, [http://www.stiftung-evz.de/doku/verfahrensregeln/pccrules\\_english.pdf](http://www.stiftung-evz.de/doku/verfahrensregeln/pccrules_english.pdf).

<sup>101</sup> Section 11(1) Federal Law, <http://www.reconciliationfund.at/download/Law.pdf>.

<sup>102</sup> See <http://www.unhchr.ch/html/menu2/9/vftortur.htm> for further information.

Law (UNCITRAL), modified by the Governments and the Tribunal, parties are provided with the right to a hearing if they so choose. If either party requests a hearing at any stage of the proceedings, the Tribunal must hold a hearing for the presentation or evidence or for oral argument. In the absence of such a request the Tribunal may decide whether to hold such a hearing or whether to determine the matter on the documents before it. In other claims bodies such as the Commission on Real Property Claims, the Commission reserved the right to hold oral hearings as required though none were ever convened.

Neither the Swiss Banks Settlement Tribunal nor the German Foundation Remembrance, Responsibility and Future conduct oral hearings, because they inevitably increase costs and the administrative burden.

### **Standard of Proof**

It must be underscored that the Trust Fund is not a criminal court, nor is it a civil court. It is a quasi-judicial institution. The trust fund should therefore not be bound by the same standard of proof as the criminal processes of the Court.

It is suggested that Trust Fund rules regarding the standard of proof should be sufficiently flexible to take into account the information claimants are able to provide, in addition to information accessible to it as well as providing for a variety of types of claims. A number of models are available in this regard.<sup>103</sup> In those instances where the Court has made an order through the Trust Fund, the standard of proof for the receipt and processing of Trust Fund claims may well be pre-determined by the Court in its order, or by its broader reparation policies.

In the Austrian General Settlement Fund for Victims of National Socialism, applicants must demonstrate to the Claims Committee (under relaxed standards of proof), "proof or convincing evidence".<sup>104</sup> In a claims-based process, "claimants must as a rule produce supporting evidence to establish eligibility. If no relevant evidence is available, eligibility for payments may also be made credible in some other way".<sup>105</sup> In some cases "if no contradictory evidence is presented, an affidavit, including a plausible explanation for why this claim was never decided or settled, or why the necessary evidence was inaccessible to the claimant, shall be deemed sufficient."<sup>106</sup> In case the claimant is unable, under the standards of proof of the claims-based process, to document specific claims or make them credible, applications may be submitted to the Claims Committee

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<sup>103</sup> For example, the Claims Resolution Tribunal for dormant accounts in Switzerland will approve claims that are 'plausible in the light of all circumstances.' For the German "Remembrance, Responsibility and Future" fund, "If no relevant evidence is available, the claimant's eligibility can be made credible in some other way" (Section 11(2) Federal Law. [http://www.stiftung-evz.de/fremdsp/englisch/st\\_ges\\_en.html](http://www.stiftung-evz.de/fremdsp/englisch/st_ges_en.html)). See also, for example, the work of the IOM Property Claims Commission which is processing claims for payment in particular for property losses, which has produced its own claims form for use by claimants (Section 8 Property Claims Commission Supplemental Principles and Rules of Procedure, [http://www.stiftung-evz.de/doku/verfahrensregeln/pccrules\\_english.pdf](http://www.stiftung-evz.de/doku/verfahrensregeln/pccrules_english.pdf)); the provisions of the Austrian Fund for Reconciliation, Peace and Cooperation, where applicants must make a credible claim though documentation (Section 4(2) Federal Law, <http://www.reconciliationfund.at/download/Law.pdf>).

<sup>104</sup> Article 15(1) General Settlement Fund Law, <http://www.usembassy-vienna.at/gsf.pdf>.

<sup>105</sup> Article 15(1) General Settlement Fund Law, *ibid*.

<sup>106</sup> Article 15(2).

in the equity-based process for awarding payments".<sup>107</sup> Applicants may file an application before the Arbitration Panel (Article 29), and the applicant must submit a substantiated credible case of the circumstances of persecution.<sup>108</sup>

It is important to ensure from the outset a consistent interpretation of the standards of proof, particularly where more than one body is involved on assessing claims or where more than one claimant group is being evaluated. This is particularly true where guidelines are drafted in more than one language and with references to different legal systems or practices. The law underpinning the German Foundation was drafted in German and translated for the various partner organisations. There was considerable debate over the interpretation of certain legal terms to do with the standards of proof which in German had different nuances from their English equivalent, for example, implying written evidence in German where this did not in English.

In general, standards of proof should take into account, among others, the circumstances surrounding the acts for which reparation is being sought as well as conditions in the relevant places, the wherewithal of claimants and be developed with a high degree of sensitivity to reflect the suffering claimants have already been subjected to. The various Holocaust-related restitution programmes all demonstrated that documentation suffers destruction as a result of conflict and the passage of time and that revisiting suffering caused significant distress for many claimants.

### **Setting Priorities**

Article 79 of the Rome Statute broadly refers to a Trust Fund "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims." The Trust Fund will be in the unenviable situation of having limited funds at any given time. There will be pressure to use what funds are available to meet needs that are immediately knowable. However, decisions on how general funds will be used will impact on the availability of funds for future victims, and adequate planning of expenditure is therefore crucial. In addition to setting caps, the Board of Directors may wish to set priorities or criteria for expenditures on programmes or projects, both those which apply to all programmes and projects, and those which are set within projects or situations that the Trust Fund is addressing. The Regulation establishing the Trust Fund requires, at Paragraph 7 of the Annex that "before establishing and directing the activities and projects of the Trust Fund, the Board shall consult, as far as possible, victims and their families or their legal representatives and may consult any competent expert or organization." This will assist the Board in framing the work of the Trust Fund, and will help to clarify the objectives for the staff.

For the Swiss Banks Settlement Fund, 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 amount. The Special Master met with individual victims and reviewed hundreds of written

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<sup>107</sup>Article 19 General Settlement Fund Law.

<sup>108</sup> See permissible list of documents, Sections. 19-21 of the Rules of Procedure under "Tasks/Arbitration Panel", <http://www.nationalfonds.parlament.gv.at/aef/english/index.htm>.

proposals submitted by interested persons representing each of the 5 victim or target groups. He also conducted extensive research and prepared a plan for allocation and distribution of settlements. In the plan, the Settlement Fund was allocated among different classes of victims and different organizations were assigned the task of processing claims. While the plan for allocation and distribution listed amounts for individual victims in some of the specified classes of victims, and set out rules governing the different classes of claims, the organizations were granted a certain flexibility to carry out their responsibilities, under the overall supervision of the Court. The Settlement was “explicitly designed to benefit Jews, homosexuals, Jehovah’s Witnesses, the disabled and Romani – groups recognised by the United Nations as having been targets of systematic Nazi persecution on the basis of race, religion or personal status.”<sup>109</sup> The Plan of Allocation and Distribution set aside \$800 million of the \$1.25 billion settlement for awards to Deposited Assets class members,<sup>110</sup> and repayments to bank depositors were to be deducted first from the Settlement Fund.<sup>111</sup> Approximately \$450 million remained from the Settlement Fund to pay claimants’ insurance policies, as well as members of the other four settlement classes, and fees and administrative expenses, “with perhaps additional funds remaining after the Deposited Assets claims process is completed”<sup>112</sup> within the remaining four classes “the neediest elderly Nazi victims should receive the highest priority” and will be paid during the first stage of payments.<sup>113</sup>

At the UN Compensation Commission, the Governing Council decided to expedite and treat on an urgent basis the resolution of a number of categories of claims of individuals, and also decided to ensure equal treatment to similar situated claims within each category of claims.<sup>114</sup> It devised an initial payment mechanism,<sup>115</sup> to begin when “sufficient funds have been accumulated in the Compensation Fund to make payment” on all of those claims.<sup>116</sup> For the South African President’s Fund, the Committee has proposed a five-part Reparation and Rehabilitation Policy, including the following components:<sup>117</sup> Interim reparation; individual reparation grants; symbolic reparation, legal and administrative

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<sup>109</sup> Section I-6 Corrected Memorandum & Order, [http://www.swissbankclaims.com/PDFs\\_Eng/MemorandumOrder.pdf](http://www.swissbankclaims.com/PDFs_Eng/MemorandumOrder.pdf).

<sup>110</sup> Section I-C1 Summary of Draft Plan of Allocation, [http://www.swissbankclaims.com/PDFs\\_Eng/SWBPOADetailSummary.pdf](http://www.swissbankclaims.com/PDFs_Eng/SWBPOADetailSummary.pdf).

<sup>111</sup> Section 5.2 Settlement Agreement, [http://www.swissbankclaims.com/PDFs\\_Eng/exhibit1toPlanofAllocation.pdf](http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf).

<sup>112</sup> Section I-C1 Summary of Draft Plan of Allocation.

<sup>113</sup> Section I-C2(b) Summary of Draft Plan of Allocation, [http://www.swissbankclaims.com/PDFs\\_Eng/SWBPOADetailSummary.pdf](http://www.swissbankclaims.com/PDFs_Eng/SWBPOADetailSummary.pdf).

<sup>114</sup> Article 1, Priority of Payment and Payment Mechanism Guiding Principles - December 17, [http://www.unog.ch/uncc/decision/dec\\_17.pdf](http://www.unog.ch/uncc/decision/dec_17.pdf).

<sup>115</sup> “payment of an initial amount of \$2,500 (or the principal amount of the award, if less) will be made to each successful claimant in categories “A”, “B” and “C” (Article 2, Priority of Payment and Payment Mechanism Guiding Principles - Dec. 17).

<sup>116</sup> Article 4, Priority of Payment and Payment Mechanism Guiding Principles.

<sup>117</sup> <http://www.doj.gov.za/trc/reparations/summary.htm#SECTION%203>

measures;<sup>118</sup> community rehabilitation programmes;<sup>119</sup> and institutional reforms to prevent recurrence.<sup>120</sup>

The German Remembrance, Responsibility and Future Fund set aside 700 million DM including interest accruing thereto to be used for "projects that serve the purposes of better understanding among peoples, the interests of survivors of the National Socialist regime, youth exchange, social justice, remembrance of the threat posed by totalitarian systems and despotism, and international cooperation in humanitarian endeavours. In commemoration and respect of those victims of National Socialist injustice who did not survive, it is also intended to further projects in the interest of their heirs."<sup>121</sup> The Austrian National Fund of the Republic of Austria for Victims of National Socialism provides funds to persons who have not received any or only insufficient benefits, who require special assistance or, in whose case, assistance appears to be justified on the basis of their situation in life. They may support projects to aid victims, to contribute to the scientific research of Nazism and fate of victims, to recall nazi injustice or preserve the memory of victims.<sup>122</sup>

### C. Specific Scenarios for the Trust Fund

- **The Court makes an individual award for reparations directly against a convicted person<sup>123</sup>**

In this case, the Court would not necessarily request an overt role for the Trust Fund, however, there would be several issues that the Board of Directors would need to contend with. In particular, if the convicted person against whom an award for reparations is made is not capable of paying, should the Trust Fund be seized of the matter and if so, in what way? Would the beneficiaries of the reparations award need to apply directly to the Trust Fund for assistance or would the Trust Fund have the ability to act in an *ex officio* capacity?

- **The Court orders that an award for reparations against a convicted person is deposited with the Trust Fund.<sup>124</sup>**

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<sup>118</sup> Available to victims identified through the Truth and Reconciliation Commission process, as well as communities and national groups. The following types of services would be available: issuing of death certificates, exhumations, reburials, clearing of criminal records, renaming of streets, and the creation of culturally appropriate ceremonies and monuments. See <http://www.doj.gov.za/trc/reparations/summary.htm#symbolic>.

<sup>119</sup> These are proposals for setting-up community-based services and activities on health care (both physical and psychological), education and housing, which can promote the healing and recovery of individuals and communities affected by human rights violations. <http://www.doj.gov.za/trc/reparations/summary.htm#community>.

<sup>120</sup> <http://www.doj.gov.za/trc/reparations/summary.htm#institutional>.

<sup>121</sup> Section 2(2) Federal Law, [http://www.stiftung-evz.de/fremdsp/englisch/st\\_ges\\_en.html](http://www.stiftung-evz.de/fremdsp/englisch/st_ges_en.html).

<sup>122</sup> Article I, Section 2(2) and (2) National Fund Law, <http://www.nationalfonds.parlament.gv.at/nf/english/index.htm>.

<sup>123</sup> Rules of Procedure and Evidence 98(1).

<sup>124</sup> 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 will be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible, Rules of Procedure and Evidence, 98(2).

In this case, the Board of Directors will need to examine a series of questions, as follows:

- How will the funds be physically separated from the rest of the Trust Fund resources?
- If the Court order does not identify the individual victims, how will the Trust Fund go about identifying victims?
- What if the funds received from the convicted person (if any) are not sufficient to cover the reparations award issued by the Court? Should/must the Trust Fund supplement this award with its other general resources, should it have any?
- How will the Trust Fund report to the Court on the implementation of its order?
  
- **The Court orders that an award for reparations against a convicted person is 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.**<sup>125</sup>
- How will the principles relating to reparations that will be issued by the Court,<sup>126</sup> apply to the Trust Fund?
- If no directions come from the Court, how will the Trust Fund determine the nature and content of the award?<sup>127</sup>

With respect to these first two issues, it is recommended that the projects or activities to be subsidized by the Trust Fund should support the goals of the Fund and benefit victims as defined in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>128</sup> and the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of violations

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<sup>125</sup> RPE 98(3).

<sup>126</sup> Art 75(1) Rome Statute: "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."

<sup>127</sup> Resolution ICC-ASP/1/Res.6, Annex para 7: "...Before establishing and directing the activities and projects of the Trust Fund, the Board shall consult, as far as possible, victims and their families or their legal representatives and may consult any competent expert or organization." See 97(2) RPE: "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."

<sup>128</sup> Adopted by General Assembly resolution 40/34 of 29 November 1985. This Declaration notes that " 'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

of international human rights law and violations of international humanitarian law.<sup>129</sup>

These draft basic principles and guidelines, which have been developed by experts over the past 15 years, as well as any principles on reparation to be developed by the judges in accordance with Article 75 of the Statute, should inform the nature of the award. In particular, the draft basic principles and guidelines refer to the following forms of reparation: restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition. The content of the award must be guided by the particular context and the specific needs of victims and family members. Staff of the Trust Fund would be well advised to undertake a needs assessment and to involve potential beneficiaries in the process.

Other issues that would need to be addressed include:

- What procedures need to be in place to ensure maximum acceptability and legitimacy of the award?
- What enforcement processes are available? Will the Court and/or the Fund undertake/commission asset tracing activities and if so at what stage?
- Will the Trust Fund's plan for allocation need to be 'confirmed' by the Court?
- Is the decision on the nature and the content of the award, if made by the Trust Fund, reviewable? If so, by whom? To whom? On what grounds? With what procedure?
- How will the Trust Fund implement the award? What general principles and procedures should be in place to increase transparency in the implementation process?
- **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>130</sup>

Here, the Board of Directors will need to determine procedures for its staff (Secretariat), as follows:

- Will the Trust Fund be able to 'sub-contract' the entire award to an outside body or will it need to retain some oversight role and, if so, what would this oversight role be?

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<sup>129</sup> E/CN.4/2000/62 of 18 January 2000. The latest draft of the basic principles and guidelines on the right to a remedy and reparation for victims of [gross] violations of international human rights law and [serious] violations of international humanitarian law at the time of writing is the revised text of 24 October 2003, available with the authors. Paragraphs 8 – 10 of the draft provides that "For purposes of this document, a victim is a person or a collective group of persons who suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of their fundamental legal rights. A "victim" may also be a legal personality, the representative of a victim, a dependant, a member of the immediate family or household of the direct victim, as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, suffered physical, mental, or economic harm. For the purposes of this document, a victim as defined above is one who suffers harm as a result of acts or omissions that constitute a gross violation of international human rights, or serious violations of humanitarian law. 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>130</sup> Rules of Procedure and Evidence, 98(4).

- Assuming the court does not specify the exact nature of reparations, will the Board of Directors of the Trust Fund determine it or would it be possible for an external body with the contract to do this?

Here, it is recommended that the Board of Directors retains full oversight over any contracted activity and that, ideally, it should encourage the Court to specify the nature of reparations awards; ideally, this would remain a centralized function to avoid inconsistencies in approaches.

- How will the Trust Fund determine what body(ies) to approve for this function? – e.g., will it put out a call for proposals? Will it invite cold applications? will there be additional selection criteria relating to the suitability of the implementing body (i.e., a certain size, knowledge of a particular situation or victims, proven independence and impartiality and proven capacity to manage grants)?<sup>131</sup> No scheme should create a ‘cottage industry’ for professionals, and activities should directly benefit the victims.
- **Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.**

The Trust Fund has a broad scope for providing assistance to victims of crimes within the jurisdiction of the Court, and the families of such victims. In particular, Rule 98(5) of the Rules of Procedure and Evidence specifies that “other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of Article 79.”

As a general consideration, in evaluating the best possible uses of the Trust Fund ‘to benefit victims...,’ due regard should be given to existing or expected programmes of assistance external to the Trust Fund. Victims of crimes under the jurisdiction of the Court will have a variety of needs, many of which cannot be met by the Trust Fund for Victims, whose general resources may be small and insufficient. Longstanding channels of assistance and care should have a primary role in addressing some of the needs. Also, under the provisions of the Statute and Rules of Procedure and Evidence, the Victims and Witnesses Unit is tasked with meeting some of the needs of victims and witnesses appearing before the Court and duplication should therefore be avoided.

It is therefore recommended that the Trust Fund be used, ‘for the benefit of victims’, to support those needs which are not otherwise covered by the Court or other external programmes benefiting victims. This assistance would also ideally be temporary. Initiatives will also need to operate in complement with the national jurisdictions in which they operate, not duplicating efforts or operating in conflict with them. Priorities will need to be set for the types of assistance to be provided. The staff of the Trust Fund would be advised to liaise with humanitarian aid organisations and other networks to encourage

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<sup>131</sup> For example, the UN Voluntary Fund for Victims of Torture notes that applicants [who are nongovernmental organisations] must submit satisfactory narrative and financial reports on the use of previous project grants before any new grant can be considered. Organisations in receipt of grants must submit yearly accounts and reports.

them to take over the financing of projects funded by the Trust Fund particularly where needs turn out to be of longer duration.

Other issues that the Board of Directors will need to decide include the following:

- How will the Trust Fund determine how and when to use these funds? Will it conduct its own research/investigations into suitable projects? Will it solicit applications from victims and disburse on the basis of these applications? If so, will it require those who have applied to the Court under the reparations process to apply once again to the Trust Fund?<sup>132</sup>
- Will the Trust Fund determine globally applicable priority areas for intervention? Will it develop country or conflict-specific priorities within these or independently?
- How independent will this function be from the Court? Even though there is no relation with an order of the Court as in the other scenarios listed, is there no need to ensure that the funds relate in some way to proceedings before the Court?
- How independent will this function be from the Assembly of States Parties?
- When and how will the Trust Fund be able to act under this scenario? Will it be able to make interim or urgent awards? Will it only be able to make an award once guilt has been established? Does it have to be tied to a Court process? If so, at what time in the process can the Trust Fund undertake its first activities?<sup>133</sup>
- How will the Trust Fund ensure that it uses the funds equitably among conflicts and generally?
- Is there a review function for this quasi- or non-judicial function?<sup>134</sup>

Given the breadth of Rule 98(5), it is not fully clear how closely connected is this function of the Trust Fund, with the other processes of the Court. In particular, the Board of Directors will need to determine the scope of victims within its mandate.<sup>135</sup>

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<sup>132</sup> For example, with the UN Voluntary Fund for Victims of Torture, eligible organisations apply using an Application Form pursuant to published Guidelines drafted by the Board of Trustees.

<sup>133</sup> Most domestic compensation schemes have provision to make some funds available for individuals with urgent needs who cannot await the processing of claims, which is usually limited to cases of extreme financial hardship. Certain international trust funds do have procedures in place for extraordinary applications, though they are of an exceptional nature and are not set up to deal with urgent needs on a large scale. For example, the UNVFT allows individual victims of torture to apply for emergency assistance at any time, on an exceptional basis.

<sup>134</sup> None of the humanitarian assistance funds have provided for appellate or review functions, though when there is a judicial or administrative oversight body, at times, these can act as review panels. With the UK Criminal Injuries Compensation Board, accountability for the scheme and decisions under it are achieved not only through the courts applying the principles of judicial review, but it also has a provision for Parliamentary scrutiny of the Scheme and any changes made to it. Additionally, decisions of administrative officers may be referred to the Parliamentary Commissioner for Administration. There is also an internal complaints system whereby a complaint is considered by a senior member of staff.

<sup>135</sup> See footnotes 123 and 124 and accompanying text.

#### **D. Who are the Victims Subject to the Provisions of Article 79?**

Article 79(1) of the Rome Statute provides that: "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.*" [emphasis added]

Eligible beneficiaries are "victims<sup>136</sup> of crimes within the jurisdiction of the Court and their families." It is not clear whether victims *of crimes within the jurisdiction of the Court* are limited to those that have participated in proceedings before the Court from their very first encounter with it or, more broadly, those that have suffered crimes over which the Court has a mandate (genocide, crimes against humanity and war crimes). 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." There is some debate, however, concerning the reach or scope of victims and their families who can benefit from the trust fund. For instance, is the Trust Fund restricted to crimes actively investigated by the Court? Would it apply only to victims appearing before the Court from their very first encounter with it? Or, is it much broader, encompassing victims of any crime listed in Article 5 of the Statute irrespective of whether jurisdiction was seized by the Court, including, possibly, victims who are part of complementarity processes where there is no national ability to claim reparations? It would seem that at least a minimal degree of connection with the processes of the Court should be required.<sup>137</sup> The definitions in article 5 of the Rome Statute are legal and claims by victims that what they have been subjected to is one of the enumerated crimes would put the Trust Fund in the odd position of having to determine whether or not the events in question corresponded to those legal definitions. From another perspective, while most of the Trust Fund's activities and programmes will relate to the Court's reparations process and, as a result, the eligible victims may be circumscribed by it, Rule 98(5) of the Rules of Procedure and Evidence, which enables the Trust Fund to allot resources for the benefit of victims, does not relate to the reparations process and, therefore, would not necessarily require a close connection with the criminal proceedings of the Court. After all, a person's status as 'a victim' should not depend on any relationship that may exist, or has existed, between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted or convicted.<sup>138</sup>

Furthermore, it is not clear what 'and their families' entails. The Board of Directors will need to examine these questions in order to take its decisions,

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<sup>136</sup> Definition of victim in Rule 85 of the RPE: Rule 85 of the 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."

<sup>137</sup> See, for example, the South African President's Fund, where potential beneficiaries must first have appeared before the TRC in order to claim reparations (Article 25(1)(a)(i) of 1995 Act). Article 26(1) provides that: "Any person who is of the opinion that he or she has suffered harm as a result of a gross violation of human rights may apply to the Committee for reparation in the prescribed form." Relatives and dependants of victims may also qualify for reparation.

<sup>138</sup> Victims' Declaration, *supra*.

yet it is not clear how it will do so, given the contextual nature of some of these questions.

## **E. Disbursement of Awards**

Principles for distribution of awards to individual claimants must take into account the needs of victims, the available resources of the Trust Fund, and include terms for payment in instalments and pro rata payments. Many claims assessment bodies have introduced multiple-tiered processes to ensure that claimants can collect at least a portion of their funds without delay. However, if the systems for claim evaluations are designed efficiently, long delays can and should be avoided. This is a particularly important consideration for elderly victims and for those with immediate humanitarian needs which could be met through the awards. At the first stage, claimants would be eligible for a first tranche 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.

Many of the larger funds developed phased systems of disbursement. The Governing Council on the UNCC, for example, established guiding principles on the priority of payment and payment mechanisms,<sup>139</sup> with three phases of payment.<sup>140</sup> Phased payments were regularly used by the Swiss Banks' Settlement Fund,<sup>141</sup> and by the German and Austrian funds.<sup>142</sup> With the insurance claims, the Tribunal issued Certificates of Validity redeemable for payment from the Settlement Fund, and the awards were paid in instalments.<sup>143</sup> Phased distribution was also used by the South African President's Fund, with interim reparations to be made until the Government introduces the final reparation measures,<sup>144</sup> and Final reparation measures included as recommendations in the final report of the Truth and Reconciliation Commission to the President.<sup>145</sup>

With national compensation schemes, most claims have been paid out in a lump sum. This is perhaps easier to administer, and would avoid having to go back to the victims several times, which could prove difficult, particularly if victims are

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<sup>139</sup> [http://www.unog.ch/uncc/decision/dec\\_17.pdf](http://www.unog.ch/uncc/decision/dec_17.pdf).

<sup>140</sup> Payment started with an initial amount of \$2,500 to each successful category "A", "B", and "C" claimant; After all the initial payments were made, and when there were sufficient funds in the Fund to make a minimum payment of \$5,000 (or the unpaid principal amount of the award, if less) in respect of each approved claim, the Executive Secretary transferred funds to each appropriate government in respect of approved claims in each category; and successful claimants in categories "D", "E" and "F" receive an initial amount of up to US\$5 million, in the order in which the recommended amounts are approved. Subsequent payments of US\$10 million will be made available for distribution to successful claimants in those categories of claims.

<sup>141</sup> Article 7.5 of the Settlement Agreement. See, also, Section I-C2 (a), (b)(i)-(iv) of the Summary of Draft Plan of Allocation.

<sup>142</sup> See, for example, Section 9(9) Federal Law, [http://www.stiftung-evz.de/fremdsp/englisch/st\\_ges\\_en.html](http://www.stiftung-evz.de/fremdsp/englisch/st_ges_en.html); Articles 16 and 17 of the General Settlement Fund Law <http://www.usembassy-vienna.at/gsf.pdf>.

<sup>143</sup> Articles 17.3 and 17.4 of the Settlement Agreement.

<sup>144</sup> <http://www.doj.gov.za/trc/reparations/summary.htm#when>. See, specifically, the Committee's Policy Framework for Urgent Interim Reparation Measures, available at <http://www.doj.gov.za/trc/reparations/policy.htm>.

<sup>145</sup> <http://www.doj.gov.za/trc/reparations/summary.htm#when>.

are refugees or internally displaced and changing their locations. On the other hand, victims will have long-term needs and a one-time payment may not be the best way to meet them. In the Inter-American system, for example, awards have occasionally included pension benefits, scholarships and long-term medical care.<sup>146</sup> It was possible to assign the States concerned with these types of responsibilities because the obligation to provide reparations in the Inter-American system, as with other human rights courts, is on the State. While this is not the case with the ICC, it would still be possible in some cases for ICC reparations or Trust Fund awards to be administered by the State, either through complementary processes or through the extensive State cooperation provisions set out in the ICC Statute. This would depend on the degree of collaboration that could be expected with the State in question, whether its infrastructure could support such a role and where no question exists regarding the possibility of corruption in ensuring that the funds reach the victims.

A number of claims processes have used intermediaries to assist them in disbursing awards. For example, the UN trust funds distribute "through established channels of humanitarian assistance,"<sup>147</sup> the Iran-United States Claims Tribunal used governments to "carry out the award without delay,"<sup>148</sup> and the UNCC distributed funds through governments and organisations who must "provide information in writing through the Executive Secretary to the Governing Council on the arrangements it has made for the distribution of funds to claimants."<sup>149</sup> They are responsible for distribution to claimants within six months of receipt (Article 3) and must report back to the Governing Council within three months on the amounts of payments distributed to claimants (Article 4). Further payments are suspended if governments/organisations fail to comply with their reporting obligations.

The overall goal of the payment must be taken into account when assessing the most appropriate method for disbursement. If they are to represent restitution payments, i.e., compensation for the deprivation of assets, then it would be advisable to apply as precise a valuation and disbursement procedure as possible. Examples are the deposited assets class of the Swiss Banks Settlement or the property restitution exercise which was administered by the Claims Conference with regard to properties looted by the Nazis in former East Germany. While lump sum payments may be less resource intensive, if payments are to provide longer-term assistance, such as the Central and Eastern European Fund or Hardship Fund payments made by the German government and administered by the Claims Conference to Holocaust survivors in Eastern Europe, then pension payments might be more appropriate. These programmes should be set up so that the administrative burden is as automated as possible and could potentially be handed over to a qualified third party (such

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<sup>146</sup> See, for example, [Chumbipuma Aguirre et al. vs Peru](#), (Barrios Altos Case), Series C No. 87, Reparations, Judgment of 30 November 2001; [Loayza Tamayo vs Peru](#), Series C No. 42, Reparations, Judgment of 2 November 1998; [Cantoral Benavides Case vs Peru](#), Series C No. 88, Reparations, Judgment of 3 December 2001; [Durand and Ugarte Case vs Peru](#), Series C No. 89, Reparations agreement between the victims and the State), 3 December 3 2001.

<sup>147</sup> Art. 1(a) GA Res. 36/151, <http://www.un.org/documents/ga/res/36/a36r151.htm>.

<sup>148</sup> Article 32(2) of the Claims Settlement Declaration, <http://www.iusct.org/claims-settlement.pdf>.

<sup>149</sup> Article 2, UNCC, Distribution of Payments and Transparency, S/AC.26/Dec.18/1994 of 24 March 1994, available at: [http://www.unog.ch/uncc/decision/dec\\_18.pdf](http://www.unog.ch/uncc/decision/dec_18.pdf)

as an aid organisation). Automation of payments (with the appropriate controls) which reflect the economic systems in the claimant's country is also recommended as this is often the most cost effective and transparent route. Precedents can be found in several of the Holocaust restitution initiatives. The slave and forced labour payments to Argentina for example had to be made by cheque to prevent assets from being frozen during the banking crisis. Special arrangements have been made to make the same payments to claimants in Hungary who do not have bank accounts via survivor outreach organisations which are wired funds that can be paid out in cash in local currency to eligible claimants.

## VII. FINANCIAL OVERSIGHT/AUDIT

### A. General Principles Relating to Financial Oversight

Rule 98(4) of the Rules of Procedure and Evidence provide that "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..."

The Financial Regulations and Rules provide that the "budget narrative shall set out, wherever possible concrete objectives, expected results and key performance indicators for the financial period... the Registrar shall monitor the achievement of objectives and service delivery during the financial period and report in the context of the next proposed budget on actual performance attained".<sup>150</sup> Furthermore, Rule 104.2 of Regulation 3, which deals with the administration of appropriations and allotment advice states that: "the Registrar shall issue at least annually a detailed allotment advice to each organ of the Court for the objects of expenditure for which it is responsible". The Financial Regulations and Rules apply *mutatis mutandis* to the administration of the Trust Fund, except as otherwise provided.<sup>151</sup>

Given the varied nature and scale of the grants likely to be awarded (and any conditions that may be applied individually to these grants), it would seem advisable to establish mechanisms for use by the Board of Directors of the Trust Fund which set out clear reporting goals, the objectives, expected results and key performance indicators for each financial period, accompanied by a breakdown of how they translate into monetary disbursements and funds spent. The structure of these mechanisms could be conveyed to grant recipients and implementing partners to ensure that their reporting furnishes the information required for budgetary purposes and for monitoring progress. Use of "live" and fully integrated (i.e. into the claims/awards handling processes) budgeting and accounting systems would facilitate the monitoring function and streamline the budget development/assessment function for the Board of Directors and the

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<sup>150</sup> ICC-ASP/1/3, Rule 103.2 of Regulation 3 Programme Budget.

<sup>151</sup> Resolution ICC-ASP/1/Res.6, Annex, para. 13.

Assembly of States Parties, as appropriate. It would also provide a clear audit trail and a high degree of transparency, which is important for maintaining the comfort levels of contributors and ensuring compliance with the Financial Rules and Regulations by staff.

The following are examples of methods for financial management and oversight in three international claims processes:

**UNCC:** Reporting periods are generally every six months. "A strict time limit is set for the panels of Commissioners to deal with each instalment of claims. Claims are normally resolved by panels within six months. The time frame may be extended to twelve months in the case of 'unusually large or complex' claims."<sup>152</sup> Upon completion of its review of a particular instalment of claims, each panel of Commissioners submits a written report through the Executive Secretary to the Governing Council on the claims received and, for each claim, the amount of compensation recommended. The reports also provide brief explanations as to the reasons for the recommendations. Generally, these reports contain the category of claim, the number of claims to be resolved, compensation sought by claims to be resolved, number of claims resolved, compensation sought by claims resolved in US\$, number of resolved claims awarded compensation, compensation awarded in US\$ and US\$ paid. This provides for a degree of transparency in the process and allows monitoring progress, though it does not allow for easy comparison with previous periods and it is unclear how this is used for budgetary purposes.

**Swiss Banks' Settlement Deposited Assets Class:** Redacted award summaries are published on the CRTii website every few weeks and all awards approved by the special masters are submitted to the Court in batches every few weeks. A summary report which is updated on the website provides very broad overview information; it contains a summary of total number of claims filed, total number of claims filed that match published account owner names, number of awards certified by the tribunal and approved by the Court and total amount awarded on an accrued basis. Up to US\$800 million has been allocated/budgeted for payments relating to the Deposited Assets Class. A relatively limited substantive analysis is provided regarding the monitoring of awards in relation to this amount, in part, presumably because a relatively small portion of the budgeted amount has been awarded to date. Reporting/monitoring mechanisms for unmatched claims relating to the Deposited assets class, which will receive lump sum payments, have not been developed yet.

**German Foundation/Slave and Forced Labour Settlement:**

Section 17 of the Foundation Law states that "The utilisation of funds will be appropriately monitored by the Foundation". Partner organisations are required to submit details of claims they recommend for approval and to provide a reconciliation of claims approved, paid out and/or cashed. Any funds sent for payment but not claimed are offset against future monies to be remitted. A final report will be due from each partner organisation detailing all payments made by claimant and payment category.

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<sup>152</sup> <http://www.unog.ch/uncc/paymproc.htm>.

Given the diverse nature of claims, grants, recipients and implementing partners of the Trust Fund, and its potential monetary constraints, we would propose using an integrated system for monitoring allocation, receipt and application of grant monies. A standard reporting template could be delivered to implementing partners so that their performance measures could be recorded and then integrated into a central system for monitoring and reporting purposes. It would allow for funds to be tracked from receipt by the Trust Fund to final payment. Performance monitors could also be built in for each financial period and project. It would also allow for a transparent grant allocation process to demonstrate that funds are applied in accordance with the criteria under which they were donated. Fraud alerts could be built into the system as well. Reporting would be facilitated and could be in "real time" for use by monitoring bodies such as the Registrar, Committee on Budget and Finance and Project managers. Different reports could be designed for use by different administrative functions. The system could also ensure compliance with procurement and other relevant regulations set out in the Financial Regulations and Rules. It would also provide a system which is relatively easy to maintain (once designed and implemented, it would function with a high degree of automation) and require minimal staff input.

The Resolution establishing the Trust Fund provides that "The Committee on Budget and Finance shall examine the budget of the Trust Fund annually and submit to the Assembly of States Parties a report and recommendations for the best possible financial management of the Trust Fund. The Financial Regulations and Rules shall apply *mutatis mutandis* to the administration of the Trust Fund, except as otherwise provided in the present resolution."<sup>153</sup>

The Financial Regulations and Rules specify that "In the application of the Financial Regulations and Rules, officials shall be guided by the principles of effective financial administration and the exercise of economy".<sup>154</sup>

We assume that the Committee on Budget and Finance would be responsible, *inter alia*, for dictating what accounting standards apply, which auditor to appoint and what the auditor's fees should be. We further assume that the Committee on Budget and Finance would be the body to whom the auditors report. Of course, the auditors must be professionally qualified by a recognised body of good standing and they must be completely independent when performing their work.

Given the international/multi-lateral nature of the ICC, it would be appropriate to apply the International Auditing Guidelines as the basis for any accounting policy decisions. These have the advantage of being non-national. More specifically, it would be advisable to adopt International Accounting Standards which have the benefit of being non-national and increasingly widely accepted.<sup>155</sup>

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<sup>153</sup> Para 12 –13.

<sup>154</sup> Rule 101.1 Regulation 1: Applicability.

<sup>155</sup> Regulation 12, 12.2 of the Financial Regulations and Rules: "the audit shall be conducted in conformity with generally accepted common auditing standards, subject to any special directions to the Assembly of States Parties and in accordance with the additional terms of reference set out in the Annex to these Regulations."

It is assumed that the Trust Fund is likely to have a relatively straightforward asset base as well as cost and revenue make-up. As such, there should be few, if any, potentially contentious accounting issues arising from the treatment of Trust Fund assets and revenue streams.

Individual and multilateral funds that are subject to specific conditions (e.g., a particular programme or activity, a specific but not programme restricted use, subject to time related conditions) may introduce some complexity. Clear tracking of all fund allocations and uses will therefore be required. It would behove the Board of Directors to stipulate in advance as clearly as possible on what basis funds will or are likely to be allocated, for example, by type of activity and, as specific projects are approved, to set out the criteria which need to be fulfilled to allow for fund allocation and disbursement. Given also that certain costs will be deemed central to the function and administration of the Trust Fund, while other costs will be perhaps specifically or partially related to particular activities, it may also be necessary to track, to group and to allocate/apportion costs by type as well as by type of programme or activity.

Under trust accounting principles, the Board should also determine who will perform the audit, how will audits be performed, and what type of statements should be produced.<sup>156</sup> Given that an audit trail will be required, most potentially controversial accounting issues should be readily avoidable. The Board of Directors may also want to consider what performance or similar statistics and ratios it may want to include.

Precedent and the use of technology indicate that there is no reason for the confidentiality of claimant information to be compromised while a transparent audit process is maintained. In several restitution initiatives, claimant confidentiality is provided for in the settlement agreement or by law. For example, in the German Foundation law, section 18 provides that "the information received may be used only for the purpose of carrying out the goals of the Foundation, and an applicant's personal data may be used only for the grant procedure under Section 11. The use of this data for other purposes is admissible only with the express consent of the applicant." In the Swiss Banks' Settlement, Swiss Banking law guarantees the secrecy of the identity of account holders and those that share their names. All information reported regarding awards made is in redacted form to protect the identity of claimants and account holders alike. Both the database which contains the claimant information and the one which contains account holder information reside in Switzerland and are highly secure. Only those involved in processing claims are privy to that information and it is not released outside of CRTii Swiss premises. Article 40 (3) provides that "no information about the identity of Account Owners or would necessarily identify Owners of specific Accounts may be disclosed by the CRT or any other person employed or retained by the CRT without the approval of the Account Owners or their heirs or the appropriate Swiss governmental authorities." In general, data protection constraints should be observed and reporting and monitoring kept transparent while protecting the identity of claimants.

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<sup>156</sup> The Financial Regulations and Rules provide clear guidelines on this.

By allocating claim identification numbers and ensuring the use of secure systems, it is possible, for example, to track the progress of funds relating to an approved claim or report on groups of claims without revealing the identity of the claimant. Furthermore, reports can be designed to offer any level of analysis of claims (from micro to macro), on an anonymous basis, whether by use of numbers in lieu of names, redaction or reporting on a strictly generic basis.

