



Establishing a Trust Fund for Victims in the case of Hissène Habré: options for the way forward

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1. BACKGROUND

At the 27th ordinary session of the African Union in July 2016 in Kigali, Rwanda, the Assembly of the Union welcomed the Hissène Habré trial verdict issued by the Extraordinary African Chambers in the Courts of Senegal (EAC). The Assembly commended the government of Senegal for bringing about this historical judicial development on the continent.

Taking into account Articles 27 and 28 of the EAC's Statute on reparation for victims and on the establishment of a trust fund for victims, the Assembly urged the AU Commission, in partnership with the government of Chad, to take all necessary measures to establish a Trust Fund for Victims (the Fund), and to ensure that the court-ordered reparations are efficiently and appropriately disbursed to the victims. It was also decided that the Commission, in collaboration with Chadian authorities, would organize a pledging conference with the aim of securing resources for the establishment and management of the Fund.¹

This note – prepared by REDRESS and the Association Tchadienne pour la Paix et les Droits de l'Homme (ATPDH)- seeks to support the establishment of the trust fund for victims (Trust Fund or Fund) by outlining what future Terms of Reference (ToR) of the Trust Fund could look like. It is shared with the African Union Office of Legal Affairs and other key stakeholders involved in the establishment of the Trust Fund.

It is based on comparative research into existing Trust Funds established at national and international levels for victims of serious international crimes and which could guide and inspire the development of the ToR of the Fund, while taking into account the specific circumstances in

¹ See, African Union, Decision on the Hissene Habre Case, Doc. EX.L/986 (XXIX), 17-18 July 2016, at https://www.au.int/web/sites/default/files/decisions/31274-assembly_au_dec_605-620_xxvii_e.pdf.

the case of Hissène Habré. It also takes into account meetings between ATPDH with relevant stakeholders in Addis Ababa in February 2017, including State representatives and staff of various African Union entities involved in the establishment of the Trust Fund.

The note is divided into two parts: the first part provides relevant contextual information for the development of the ToR, while the second part outlines draft ToR that could inspire the relevant entity of the African Union tasked to develop the terms, also taking into account the EAC's appeal judgment.

The establishment of the Trust Fund is a crucial and integral component of the African Union's commendable efforts to seek accountability and justice for victims of crimes committed during Hissène Habré's regime. It is the logical next step following the EAC's judgment, which, at first instance, awarded reparation to the victims. While this judgment is currently under appeal, it is vital that the Trust Fund is established and as operational as possible once the appeal judgment - expected on 30 April 2017- is delivered so as not to unnecessarily delay the award of reparation to victims.

2. MANDATE OF THE TRUST FUND

The Fund's ToRs should set out clearly the Fund's mandate as indicated in Articles 27 (2) and 28 of the EAC's Statute which require the Fund to implement the EAC's reparation order and to receive and manage voluntary contributions. As part of the EAC's reparation order, the Fund may also be required to identify beneficiaries and implement individual and collective reparation.

The ToRs should also set out established principles the Fund will adhere to when implementing its mandate, including that the Fund will implement procedures that are victim-centred and independent and adhere at all times to the principles of efficiency, transparency, impartiality, non-discrimination and confidentiality.

Victim-centred: The ToRs should provide the Fund with the opportunity to hear victims' views and take into account victims' perspectives and to inform victims about its work throughout the process of implementing the Fund's mandate to ensure that its work is victim centred in line with international standards.² The African Commission on Human and Peoples' Rights (ACHPR) for instance considered that victims must be able to participate in the elaboration, adoption and implementation reparation programmes and mechanisms.³ The Inter-American Court of Human Rights (IACtHR) in a case in which it ordered collective reparation for a community, required that an implementation committee be established "composed of a representative appointed by the victims, a representative appointed by the State, and another representative jointly appointed by the victims and the State."⁴ To enable a victim-centred implementation of its mandate, the

² See for instance, African Commission, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, ACHPR, Communication No 276/03, 11- 25 November 2009; recommendation (f).

³ African Commission, Resolution 111 on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, November 2007, at <http://www.achpr.org/sessions/42nd/resolutions/111/>.

⁴ *Case of the Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Ser C No. 172, 28 November 2007, para. 202.

ToRs should stipulate that the Trust Fund will ensure that victims have access to relevant information concerning the implementation process.

In delivering its mandate, the Trust Fund should apply procedures that are victims friendly, taking into account their age, gender, social background, and ensure that the implementation framework is cognizant, and hence be tailored to, the reality of Chad and the different situations of the victims.

Transparency: Meeting the highest standard of transparency is essential for the successful completion of the Trust Fund's mandate. It ensures that the Fund enjoys the confidence of the victims, donors and other relevant stakeholders.

Accordingly, the ToR should provide for the periodic publication of the Trust Fund's work, including for instance progress activity reports and full disclosure of monies received and a detailed breakdown of expenditure (broken down into beneficiary classes and programme areas and differentiating between administrative or overhead costs and direct expenditure to victims) The Trust Fund can rely on international standards of transparency such as the Principles of International Aid Transparency Initiative.

Efficiency: The structure of the Trust Fund and its working method should be efficient in order to ensure that it manages to provide the court-ordered reparations to victims expeditiously while keeping costs down. Reliance on relevant technology will be crucial in that regard. For example, in the screening of beneficiaries it can use sampling techniques and presumptions and using specialised technology to reduce processing time and costs while maximising accuracy.

Independence: Independence is a crucial characteristic that a Trust Fund should have in order to guarantee the trust of the victims and donors in the process. A Trust Fund lacking independence or even perceived to lack independence can appear not to work for the benefits of the victims.

The IACtHR for instance ordered the establishment of a fund for the implementation of its reparation awards in the *Aloeboetoe* case, concerning, amongst others, extra-judicial killings and enforced disappearances. The Court specifically prohibited the Suriname government from restricting the activities of the Foundation overseeing the TF and to interfere in the decisions of the Foundation unless such interference would create more favourable conditions for the fund.⁵

Despite being an organ created under the auspices of the AU, the Trust Fund should therefore be independent and solely subject to judicial control, while operating under the supervision of a board of Trustees. Financial autonomy is, also, a guarantee of independence and the Trust Fund should therefore have its own budget.⁶ Judicial control could, for instance, be exercised by a Senegalese court. Senegal has strongly supported the EAC and should remain committed to the process until the full implementation of the reparations award as the reparation phase is an inseparable part of the proceedings. The EAC's Statute similarly envisages a role for Senegal in

⁵IACtHR, *Suriname v. Aloeboetoe et al.*, Judgment, 10 September 1993, Ser. C No. 15 1994, http://hrlibrary.umn.edu/iachr/b_11_15b.htm at para. 108.

⁶Tunisia, *Loi organique relative à l'instauration de la justice transitionnelle et à son organisation*, <http://www.ihej.org/wp-content/uploads/2014/02/Loi-justice-transitionnelle-Tunisie.pdf>, Article 64

Article 26, granting Senegalese courts competence over issues “which may arise after the dissolution of the Extraordinary African Chambers.”

The Trust Fund should, independently, be able to take all reasonable steps to pro-actively implementing its mandate. The Trust Fund should be free to engage with donors and different stakeholders at the local, regional and international level as required to fulfil its mandate. The ICC Trust Fund stipulates for instance that the “Board, with support of the Secretariat, shall establish contact with governments, international organizations, individuals, corporations and other entities to solicit voluntary contributions (...).”⁷ The Kenyan Truth and Reconciliation Commission equally endowed with the powers to associate with domestic or foreign organisations in the pursuance of its goals and to receive donations and disburse them as it sees fit.⁸ Likewise, the Board of Trustees should also decline any donation or voluntary contribution that is not consistent with the goals of the TF.⁹

An obligation to cooperate with the Trust Fund is essential to guarantee its independence. For example the Kenyan Truth, Justice and Reconciliation bill calls on all persons, including members of political parties, to cooperate with the Truth, Justice and Reconciliation Commission, which also oversees the Fund.¹⁰ In drawing up the ToR, the African Union should ensure that its member states respond to requests of assistance falling within its mandate.

Confidentiality: The Trust Fund’s work, especially concerning the identification of victims, should be confidential from the public and only communicated to the relevant authorities as to the extent necessary to provide oversight of the Trust Fund’s work.

The ICC’s Trust Fund for Victims for instance requires that the meetings of the Board are closed unless the Board decides otherwise for a specific session. Further, the decisions of the Board are only published subject to confidentiality.¹¹ Other bodies also observed the principle of confidentiality, as for example the United Nations Compensation Commission also guarantees that all the records received or developed by the Commission will be confidential.¹²

However, confidentiality should not come at the expense of transparency and the necessity to monitor the work of the Trust Trough including auditing its budget and expenses. This will require balancing the need for confidentiality with the principle of transparency.

⁷ICC, *Regulations of the Trust Fund for Victims* (2005), ICC-ASP/4/Res.3, <http://www.trustfundforvictims.org/sites/default/files/imce/ICC-ASP-ASP4-Res-03-ENG.pdf>, Annex, Regulation 23

⁸Kenya, *The Truth, Justice and Reconciliation Mission bill* (2008), <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Kenya-Charter.pdf>, Regulation 8 (a) and 8 (c)

⁹ICC, *Regulations of the Trust Fund for Victims* (2005), ICC-ASP/4/Res.3, <http://www.trustfundforvictims.org/sites/default/files/imce/ICC-ASP-ASP4-Res-03-ENG.pdf>, Annex, Regulation 30 (a)

¹⁰Kenya, *The Truth, Justice and Reconciliation Mission bill* (2008), <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Kenya-Charter.pdf>, Section 7 (2)

¹¹See for example: ICC, *Regulations of the Trust Fund for Victims* (2005), ICC-ASP/4/Res.3, <http://www.trustfundforvictims.org/sites/default/files/imce/ICC-ASP-ASP4-Res-03-ENG.pdf>, Annex, Regulation 9.

¹²United Nations Compensation Commission, *Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th meeting, Sixth session held on 26 June 1992, S/AC.26/1992/10*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G92/620/44/IMG/G9262044.pdf?OpenElement>, Article 30 (1); or: Morocco, *Dahir approving Statutes of the Equity and Reconciliation Commission* (10 April 2004), Dahir No 1.04.42, <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Morocco-Charter.pdf>, Article 4.

Impartiality and non-discrimination: All aspects of the work of the Trust Fund including its procedures and guidelines should strictly comply with the principle of non-discrimination. 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 prohibit “any discrimination of any kind or on any ground, without exception.”¹³ However, the prohibition of non-discrimination does not prohibit the Trust Fund from adapting procedures to address different victims’ needs in light of their specific circumstances. Furthermore, the principle of non-discrimination does not prohibit the Trust Fund from categorizing victims according to different categories and providing reparations to one category before the other. Such prioritization does not compromise the prohibition of non-discrimination provided it is provided for in the procedure and it is based on appropriate and justifiable grounds (e.g. providing in priority reparations to the most vulnerable groups). In Sierra Leone for instance, a Reparation Programme financed by private donations from, amongst others, the UN Peace Building Fund, complemented the Special War Fund for Victims, and provided on a priority basis reparation for war wounded amputees and victims of sexual violence.¹⁴

3. STRUCTURE OF THE TRUST FUND

The structure of the Trust Fund should be designed to allow the Trust Fund to implement the EAC’s reparations order promptly and effectively, while bringing down administrative costs to the extent possible. The budget for the Trust Fund for administration and overheads should be borne by the African Union. Any recovered assets and voluntary contributions would be used to pay the reparation awards to the victims.

Should it be decided that no separate budget for the administration and overheads of the Fund be created, it would be appropriate to consider assigning a percentage of the annual expenditure of the Fund to administrative costs. This should be capped (e.g. at 10%).

Whatever model is chosen, an essential element of trust and confidence in the work of the Trust Fund by victims and other stakeholders including donors is that funds are used as much as possible for reparations and that administrative costs are kept to a reasonable minimum.

A comparative research into victims’ trust funds established elsewhere shows that the structure of such funds habitually consists of (i) Board of Trustees; (ii) a Secretariat; and (iii) a Banking instrument.

¹³ United Nations General Assembly, *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*(21 March 2006), A/RES/60/147, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>, Principle 25

¹⁴ See International Organization for Migration, IOM Provides Technical Assistance to Reparations Programme for Victims of Sexual Violence in Sierra Leone, 22 March 2010, at <https://www.iom.int/news/iom-provides-technical-assistance-reparations-programme-victims-sexual-violence-sierra-leone>.

3.1. Board of Trustees

3.1.1. Role:

The role of the Board is to ensure that the reparation ordered by the EAC is successfully implemented within the time-limit, if any, set by the EAC. In doing so, the Board should ensure that the highest standards of transparency and efficiency are met in the receipt and disbursement of funds, in compliance with applicable financial regulations and any reparations or other orders emanating from the Chamber.

The Board may adopt guidelines and policies to organize the work of the Trust Fund and designed to assist in the implementation of the reparations order in the EAC judgment and to complement the ToR of the Trust Fund. The guidelines should ensure that the procedure by which the reparation order is implemented is adapted to the situation of victims and guarantees the effective receipt of awards by victims. For example, in the disbursement of awards the guidelines should ensure that there is a procedure to provide awards to victims with no bank account.

In addition, the Board should pro-actively explore all possible avenues of cooperation and collaboration with relevant local, regional and international stakeholders to allow it to implement the Trust Fund's mandate. Such initiatives shall include raising the profile of the Fund, which will be essential for the Board to solicit and attract donors to finance the reparations. Furthermore, the Board should also encourage bi-lateral agreements where necessary to recover assets. The African Union and Member States where assets might be located should provide all assistance necessary to the Board / the Trust Fund in its attempt to recover Habre's assets. This assistance could include seconding staff with expertise in asset tracing and recovery to assist the Trust Fund in that regard. All recovered assets by any party should be transferred to the Trust Fund to fund the implementation of the reparations awards.

3.1.2. Appointment of Members of the Board

The members of the Board of Trustees can be appointed by the African Union. The appointment process should take place through a transparent and public process. The call for nomination should be widely publicized. The communities targeted by the reparations should have confidence and trust in the Boards' members and civil society and grass-roots organisations should be entitled to propose candidates for the Board. Representation of affected communities- for instance by victims' representatives- on the Board can also contribute to a sense of ownership and add legitimacy to the Trust Fund's work.

The Inter-American Court for Human Rights in *Aloeboetoe* for example appointed experts, including a recognised human rights defender, in the board overseeing the Fund it created for implementation of the reparation awarded.¹⁵ The TF can require a quota of seats reserved for victims and human rights organisations, in recognition of the role of victims in the reparation

¹⁵ IACtHR, *Suriname v. Aloeboetoe et al.*, Judgment, 10 September 1993, Ser. C No. 15 1994, http://hrlibrary.umn.edu/iachr/b_11_15b.htm at para. 103.

procedure.¹⁶ For example, the Instance for Truth and Dignity in Tunisia more than 25% of the members are either from victims' or human rights organisations.¹⁷ Representatives of civil society organisations, including victims' lawyers are in close in contact with victims. Hence, they are knowledgeable of their demands and concerns.

Members of the Board should serve on the Board on a pro bono basis. It is important for the Board members to be of recognized integrity,¹⁸ independence¹⁹ and with no conflict of interests with the work of the Trust Fund.²⁰ The Board could consider establishing an ethics charter to complement the ToR. For example, the Commissioners of the Peruvian Truth and Reconciliation Commission signed an "Ethical Commitment".²¹ Members of the Board should have relevant experience and expertise in relation to victims of serious international crimes as well as finance and large scale project administration. Members of the boards of hailed from different sectors to ensure that the expertise of their members is relevant to the type of reparations awarded and victims.²² For example the Board of Directors of the ICC TF is currently composed of five members with a diverse professional background: A lawyer with experience in international criminal law, a foreign policy and defence expert with experience in sexual violence legislation, a human rights scholar, a clinical psychologist with focus on traumatology and a professor for history and geography advocating for women's rights.²³ In light of the crimes Mr. Habré was convicted for, it would for instance be important to ensure that the Trust Fund's Board includes experts in torture and gender based violence.

¹⁶United Nations Economic and Social Council, Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, *Updated set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/01/PDF/G0510901.pdf?OpenElement>, Principle 32

¹⁷See for example: ICC, *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims* (9 September 2002), ICC-ASP/1/Res.6, https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-06-ENG.pdf, Annex, Article 2; or: IACTHR, *Suriname v. Aloebotoe et al.*, Judgment, 10 September 1993, Ser. C No. 15 1994, http://hrlibrary.umn.edu/iachr/b_11_15b.htm at para. 103.

¹⁸ ICC, *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims* (9 September 2002), ICC-ASP/1/Res.6, https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-06-ENG.pdf, Annex, Article 3; or: Peru, *Supreme Decree No. 065-2001-PCM* (4 June 2001), <http://www.mississippitrueth.com/documents/PERU.pdf>, Article 4: The Truth and Reconciliation Commission shall be composed of persons "of recognized ethical trajectory, prestige and legitimacy in the society and identified with the defense of democracy and the institutional nature of the Constitution".

¹⁹ Morocco, *Dahir approving Statutes of the Equity and Reconciliation Commission* (10 April 2004), Dahir No 1.04.42, <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Morocco-Charter.pdf>, Article 3; or: Tunisia, *Loi organique relative à l'instauration de la justice transitionnelle et à son organisation*, <http://www.ihej.org/wp-content/uploads/2014/02/Loi-justice-transitionnelle-Tunisie.pdf>, Article 21

²⁰ See for example: United Nations Compensation Commission, *Decision taken by the Governing Council of the Nations Compensation Commission at the 27th meeting, Sixth session held on 26 June 1992*, S/AC.26/1992/10, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G92/620/44/IMG/G9262044.pdf?OpenElement>, Article 22 requires the Commissioners to disclose any information "likely to give rise to justifiable doubts as to his impartiality and independence".

²¹ The "Ethical Commitment" is available on this link: <http://www.cverdad.org.pe/ingles/lacomision/nlabor/pdfs/compromiso.pdf>

²²For example: Kenya, *The Truth, Justice and Reconciliation Mission bill* (2008), <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Kenya-Charter.pdf>, Section 10 (4) requires that Commissioners possess at least 15 years of experience in human rights law or are experts in "forensic audit, investigations, psychosociology, anthropology and social relations, conflict management, religion or gender issues"; or: Philippines, *An Act providing for Reparation and Recognition of Victims of Human Rights Violations during the Marcos Regime, Documentation of said Violations, Appropriating funds therefore and for Other Purposes* (15 February 2013), Republic Act No. 10368, <http://www.gov.ph/2013/02/25/republic-act-no-10368/>, Section 8 requires that board members have a deep and thorough knowledge of human rights and that at least a third of the members must be members of the national bar and have practiced law for ten years; or the Peruvian Truth and Reconciliation Commission which comprised a philosopher and scholar, lawyers, religious leaders, an engineer, political analyst and researchers, a former executive secretary to the national coordinator of human rights, a sociologist and former air force general. (http://www.perusupportgroup.org.uk/files/fckUserFiles/file/TRC_booklet.pdf).

²³See: ICC, Trust Fund for Victims website at: <http://trustfundforvictims.org/board-directors>

Once appointed, the profile and the biography of board members should be available to the public.²⁴

The Board of Trustees may invite others with relevant expertise, to participate in a pro-bono advisory capacity, as appropriate.²⁵ The Board can also request expertise to provide capacity-building activities to its staff before regional and international institutions.

It can also receive submissions from interested parties on topics falling within its mandate. The Board shall endeavour to seek such expertise on a pro-bono basis.

3.1.3. Removal of Trustees

The ToR should also set out how and under which circumstances a trustee can be removed. If any trustee subsequent to his or her appointment fails to uphold the required ethical or professional standards or does not fulfil his or her role as trustee, said trustee should be removed from the Board, for instance by a decision of 2/3 of the Boards' members. This would be the case, amongst others, if the trustee failed to attend the regular sessions of the Board,²⁶ or if the trustee were guilty of misconduct that tarnishes the independence and impartiality of the TF, such as accepting a bribe or dissemination of confidential information about the TF.²⁷ Instead, a new member shall be appointed to the Board according to the established appointment procedures.

The Board should meet in regular sessions which should be at least once a month.²⁸ Furthermore, it can meet for extraordinary sessions at the request of a third of its trustees or its chair. Every effort shall be made to reach decisions by consensus. If consensus cannot be reached, all decisions must be approved by a minimum of 2/3 of those voting.²⁹

²⁴ICC, Trust Fund for Victims website at: <http://trustfundforvictims.org/board-directors>; or Philippines Human Rights Victims' Claims Board website at: <http://hrvclaimsboard.gov.ph/index.php/about/17-composition-of-the-board>.

²⁵See for example: ICC, *Regulations of the Trust Fund for Victims* (2005), ICC-ASP/4/Res.3, <http://www.trustfundforvictims.org/sites/default/files/imce/ICC-ASP-ASP4-Res-03-ENG.pdf>, Regulation 8; or: Peru, *Supreme Decree No. 065-2001-PCM* (4 June 2001), <http://www.mississippitruith.com/documents/PERU.pdf>, First Final Provision: The Commission "shall be able to contract the services of professionals from the various scientific branches necessary for the correct performance of its mandate, including lawyers, sociologists, psychologists, experts in medicine and forensic anthropology".

²⁶See for example: Tunisia, *Loi organique relative a l'instauration de la justice transitionnelle et a son organisation*, <http://www.ihej.org/wp-content/uploads/2014/02/Loi-justice-transitionnelle-Tunisie.pdf>, Article 37 : Every member can be revoked through a decision by the Commission taken with a 2/3 majority if they were absent for 3 consecutive meetings or 6 non-consecutive meetings;; or Kenya, *The Truth, Justice and Reconciliation Mission bill* (2008), <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Kenya-Charter.pdf>, section 16 (f): The position of commissioner becomes vacant if a commissioner misses more than 3 consecutive meetings without good cause.

²⁷See for example: South Africa, *Restitution of Lands Rights Act 22 of 1994*, <http://www.justiceminat.gov.za/lcc/docs/1994-022.pdf>, Article 4 (5): The Minister may terminate any appointment if the incumbent is no longer complies with the requirements of appointment; or Kenya, *The Truth, Justice and Reconciliation Mission bill* (2008), <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Kenya-Charter.pdf>, section and Article 17: A Commissioner shall be removed from office for misbehaviour, misconduct or offences involving moral turpitude.

²⁸Morocco, *Dahir approving Statutes of the Equity and Reconciliation Commission* (10 April 2004), Dahir No 1.04.42, <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Morocco-Charter.pdf>, Article 11: Ordinary plenary meetings are held once a month extraordinary meetings are organised for urgent matters.

²⁹See for example: ICC, *Regulations of the Trust Fund for Victims*(2005), ICC-ASP/4/Res.3, <http://www.trustfundforvictims.org/sites/default/files/imce/ICC-ASP-ASP4-Res-03-ENG.pdf>, Annex, Regulation 13; or: Morocco, *Dahir approving Statutes of the Equity and Reconciliation Commission* (10 April 2004), Dahir No 1.04.42, <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Morocco-Charter.pdf>, Article 13.

In light of the confidentiality of the work of the trust fund the voting process is secret³⁰ unless the Board decides otherwise³¹

3.2. The Secretariat

3.2.1. Role of the Secretariat

The Secretariat shall be responsible for the day-to-day administration of the Trust Fund and for providing such assistance as is necessary for the proper functioning of the Board in carrying out its tasks.³² The Secretariat's tasks shall include communication and public engagement, outreach, registration and verification of claimants, disbursing / implementing reparations, assisting in devising and implementing collective reparations awards (if appropriate).

While carrying out its tasks the secretariat may cooperate with human rights organizations and legal representatives of victims to carry out its work. It shall ensure that the work carried out by intermediaries is in conformity with the guidelines and policies of the Trust Fund as developed by the Board of Trustees. Collaborating with other institutions on very specific and targeted issues, such as for instance outreach to affected communities, can assist in reducing the size, and therefore costs, of the Secretariat. The Foundation "Remembrance, Responsibility and Future" that was created in 2000 in Germany to provide reparations to former slave and forced labourers and other victims of National Socialism, for instance delegated outreach to potential claimants to its partners, such as the International Organisation of Migration which possesses a network of field offices.³³

The Secretariat should regularly report to the Board on its activities³⁴ and financial expenditures. In addition, a senior representative of the Secretariat should be present at the Board meetings, unless in any particular case the Board otherwise directs in writing. The Secretariat's representative shall have no vote on the decisions by the Board.³⁵

3.2.3. Staffing

The AU or any other competent regional or international organization may second staff to carry out the functions of the Secretariat. The secondment shall be made according to the required expertise to implement the EAC's order. The secondment should take place in consultation with the Board members. The secondment is final with the approval of the Board members.

³⁰ See for example: Morocco, *Dahir approving Statutes of the Equity and Reconciliation Commission* (10 April 2004), Dahir No 1.04.42, <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Morocco-Charter.pdf>, Article 13; or: Tunisia, *Loi organique relative à l'instauration de la justice transitionnelle et à son organisation*, <http://www.ihel.org/wp-content/uploads/2014/02/Loi-justice-transitionnelle-Tunisie.pdf>, Article 60.

³¹ ICC, *Regulations of the Trust Fund for Victims* (2005), ICC-ASP/4/Res.3, <http://www.trustfundforvictims.org/sites/default/files/imce/ICC-ASP-ASP4-Res-03-ENG.pdf>, Annex, Regulation 9.

³² ICC, *Regulations of the Trust Fund for Victims* (2005), ICC-ASP/4/Res.3, <http://www.trustfundforvictims.org/sites/default/files/imce/ICC-ASP-ASP4-Res-03-ENG.pdf>, Annex, Regulation 17.

³³ Foundation Remembrance, Responsibility and Future, *Law of Establishing a Foundation Remembrance, Responsibility and Future* (2000), <http://www.stiftung-evz.de/stiftung/gesetz-der-stiftung-evz.html>, Article 10 (2)

³⁴ ICC, *Regulations of the Trust Fund for Victims* (2005), ICC-ASP/4/Res.3, <http://www.trustfundforvictims.org/sites/default/files/imce/ICC-ASP-ASP4-Res-03-ENG.pdf>, Annex, Regulation 18.

³⁵ Kenya, *The Truth, Justice and Reconciliation Mission bill* (2008), <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Kenya-Charter.pdf>, Section 13 (4)

At the request of the Board, the AU should provide the secretariat with any capacity buildings initiatives provided by any relevant stakeholders.

3.2. Banking instrument

3.3.1. General

The Trust Fund should have a banking instrument to receive and disburse funds to beneficiaries. It is important for the banking instrument to be based at a reputable bank with offices in locations relevant to the Fund. It should be stipulated that the banking instrument can receive funds from assets from the perpetrator as well as funds from other sources – private donations, government contributions, and contributions in kind.

3.3.2. Auditing and transparency

The Trust Fund should be subject to regular audit by an independent authority. Previous reparations programs have been subject to audits at different intervals and different authorities. The Foundation established by the IACHR to administer the reparations in the above mentioned *Aloeboetoe* case was audited by an international accountancy firm.³⁶ The UN Compensation Commission, created in 1991 to process claims and pay compensation for losses and damage suffered as a result of Iraq's unlawful invasion and occupation of Kuwait in 1990-1991, reported generally every six months on the processing of claims.³⁷ This period could be extended to twelve months for unusually large or complex claims. 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.³⁸

Furthermore, the Foundation Law of the German Foundation/Slave and Forced Labour Settlement subjected the utilization of Funds to monitoring by the Foundation. In contrast, the Swiss Banks' Settlement's awards were submitted every few weeks to a Court.

³⁶For example The Foundation established by the IACHR in the *Aloeboetoe* case also submitted annual auditing reports to the Court. The auditing was conducted by the external firm Ernst&Young. The auditing reports are all made public. Annual Reports of the Foundation including audit: 1998: StichtingBeheerFondsAloboetoe.e.a., *1998 Annual Report Foundation Aloeboetoe* (10 November 1999), <http://www.corteidh.or.cr/docs/casos/aloeboetoe/fundalo5.pdf>; 1997: StichtingBeheerFondsAloboetoe.e.a., *1997 Annual Report Foundation Aloeboetoe* (22 September 1998), <http://www.corteidh.or.cr/docs/casos/aloeboetoe/fundalo4.pdf>; 1996: StichtingBeheerFondsAloboetoe.e.a., *1996 Annual Report Foundation Aloeboetoe* (4 July 1997), <http://www.corteidh.or.cr/docs/casos/aloeboetoe/fundalo3.pdf>; 1995: StichtingBeheerFondsAloboetoe.e.a., *1995 Annual Report Foundation Aloeboetoe* (4 September 1996), <http://www.corteidh.or.cr/docs/casos/aloeboetoe/fundalo2.pdf>; Sep 1993 – 31 Dec 1994: StichtingBeheerFondsAloboetoe.e.a., *1994 Annual Report Foundation Aloeboetoe* (27 February 1995), <http://www.corteidh.or.cr/docs/casos/aloeboetoe/fundalo1.pdf>

³⁷ UNCC Governing Council, *Decision Concerning Further Procedures for Review of Claims Under Article 38, S/AC.26/Dec.35* (1995)

³⁸ *ibid.*

To expedite the auditing work and ensure that it is comprehensive it is advisable to adhere to international standards and auditing and accounting. Furthermore, movement of funds should have a signature trail to allow auditors to monitor those movements. Full disclosure of monies received and a detailed breakdown of expenditure (broken down into beneficiary classes and programme areas and differentiating between administrative or overhead costs and direct expenditure to victims) in publicly accessible reports will greatly assist in building public confidence in the work of the Fund. 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.

3.3.3. Judicial supervision:

As outlined above, it is important that the Trust Fund is, and is perceived to be, fully independent. It is therefore important that the Trust Fund is accountable to an entity free from any interest, such as a court. The ToRs could stipulate that the Trust Fund will operate under judicial supervision by the Dakar Court of Appeal, pursuant to Article 37 (3) of the EAC's Statute which provides that "national courts shall examine all matters which may arise subsequent to the dissolution of the Extraordinary African Chambers."

The judge or court could supervise the implementation of reparations orders by the Trust Fund, and any other matters concerning the implementation of reparations, such as the receipt of applications from victims, their legal representatives or from representatives of the Trust Fund, to seize and transfer assets newly located or transfer assets already seized (and/or to change into cash for the purpose of transfer), to the Trust Fund.

ANNEX: SUGGESTED TERMS OF REFERENCE FOR THE TRUST FUND FOR VICTIMS IN THE CASE OF HISSÈNE HABRÉ

A. Mandate of the Trust Fund

1. The Trust Fund for Victims in the case of Hissène Habré (Trust Fund) is established for the benefit of victims of crimes within the jurisdiction of the Extraordinary African Chambers (EAC), and of the rightful claimants of such victims, pursuant to Article 28 of the EAC's Statute.
2. The Trust Fund shall implement the reparation award by the EAC. The Trust Fund's mandate shall end upon full and comprehensive implementation of the EAC's reparation award.
3. In implementing the reparation award, the Trust Fund shall comply with the EAC's relevant orders. It shall receive and manage voluntary contributions and identify assets of the convicted person as set out in Section E of these Terms of Reference.
4. Throughout the implementation of its mandate, the Trust Fund will adhere to principles of efficiency, transparency, impartiality, non-discrimination and confidentiality.
5. The Trust Fund will develop working regulations as per Section C of these Terms of Reference that are victim-centred and allows the Trust Fund to hear victims' views, take into account victims' perspectives and situations and keep victims informed about its work throughout the implementation of the Trust Fund's mandate.

B. THE MANAGEMENT AND OVERSIGHT OF THE TRUST FUND

B.1. General

6. In the performance of its mandate, the Trust Fund shall be independent and shall not be subject to the control or direction of any institution or authority other than a competent Senegalese judge or court (Court) as provided for in Article 37.3 of the EAC Statute.
7. The Trust Fund for Victims shall enjoy financial independence and an autonomous budget.

B.2. Board of Trustees

B.2.1. Tenure of Board Members

8. Board members shall be appointed by the African Union through a transparent and public process. The number of Board member should be limited to five, with at least three members being from Chad.
9. Board members shall serve a maximum of two terms of five years each term.
10. Board members shall act in their personal capacity on a pro bono basis.
11. Board members from Chad shall be nominated on the basis of equitable geographical, ethnic and religious distribution of Chad and taking into account the need to ensure

equitable gender distribution. All Board members shall be of high moral character, impartiality and integrity and shall have competence in the administration and/or implementation of reparations to victims of serious crimes.

12. The AU shall invite the general public to nominate candidates for appointment.
13. Any Board member can be removed by a 2/3 vote of its members for incapacitation, death, bankruptcy, repeated absence, resignation or gross misconduct that tarnishes the independence and impartiality of the Trust Fund.
14. The Court shall hear any dispute arising out of the removal of a Board Member.

B.2.2. Election of a Chair of the Board of Trustees

15. A Chair shall be elected by an absolute majority of the members of the Board of Trustees.
16. The Chair shall serve until the end of his/her respective term as Board member. He/she shall be eligible for re-election as Chair once. If the Chair finds it necessary to be absent during a meeting or any part thereof, he/she may designate another Board member to take his/her place. If the Chair is unable to perform his/her functions, a new Chair shall be elected for the un-expired term.
17. The Chair shall be responsible for co-ordinating the work of the Board and overseeing the proper administration of the Trust Fund.

B.2.3. Meetings of the Board

18. The Board shall meet in regular sessions at least once every two months.
19. The Board may hold special sessions when circumstances so require, and the Chair shall fix the date of commencement, the duration and the location of each such special session. Special sessions may be convened at a fixed location, or by telephone, web or video conferencing.
20. The Chair shall determine the provisional agenda for the regular and special sessions of the Board. The Chair may receive suggestions for agenda items from other members of the Board and the Trust Fund Secretariat. Any Item proposed for inclusion in the agenda shall be accompanied by an explanatory memorandum and other relevant documents. All materials shall be distributed to members of the Board sufficiently in advance, and where possible, at least two weeks in advance of the session.
21. In addition to any other powers accorded to the Chair, he/she shall preside over each session and shall, inter alia, declare the opening and closing of each session, direct the discussions and coverage of agenda points in such sessions and to ensure observance of any other guidelines and procedures that are in force.
22. The provisional agenda for any session shall be submitted for consideration and adoption to the Board of Trustees at the commencement of that session.
23. A representative of the Secretariat shall be present for all the regular and special sessions of the Board, unless in any particular case the Board otherwise directs in writing. The Secretariat representative shall have no vote on the decisions adopted by the Board.
24. The Board of Trustees may invite others with relevant expertise, to participate in an advisory capacity, as appropriate, in specified sessions of the Board and make oral or written statements and provide information on any question under consideration.
25. As a general rule, sessions of the Board of Trustees shall be held in private unless the Board decides otherwise. Decisions of the Board of Trustees shall be made public,

subject to any protective measures, and shall be communicated, to the extent possible, to beneficiaries, African Union and implementing partners. At the close of a session of the Board of Trustees, the Chair may issue a communiqué through its Secretariat, as appropriate.

26. The presence of representatives of a majority of the Board of Trustees shall be required for any decision to be taken.

B.2.4. Decisions of the Board of Trustees

27. Decisions of the Board of Trustees shall be taken in regular or special sessions. Each Board Member shall have one vote.
28. Every effort shall be made to reach decisions by consensus. If consensus cannot be reached, all decisions must be approved by a minimum of 2/3 of those voting.

B.3. THE SECRETARIAT

B.3.1. Appointment

29. A Trust Fund Secretariat (Secretariat) shall be established.
30. The African Union, the African Commission and Court on Human and Peoples' Rights, the UN Office of the High Commissioner for Human Rights and other relevant regional and international institutions can second staff to fulfil the tasks of the Secretariat. The costs of the seconded staff member shall be borne by the contributing institution.
31. The Board of Trustees shall approve the nomination of the Secretariat's staff including seconded staff.
32. The Board shall ensure that the Secretariat has the necessary skills to carry out the work of the Trust Fund. It shall pro-actively seek to ensure training and capacity-building initiatives to the Secretariat by relevant competent institutions or organisations.
33. Members of the Secretariat shall work on a full-time basis

B.3.2. Functions

34. The Secretariat shall be responsible for the day-to-day administration of the Trust Fund and for providing such assistance as is necessary for the proper functioning of the Board in carrying out its tasks.
35. The Secretariat can use intermediaries to carry out its mandate provided such intermediaries comply in their work with the guidelines established by Board of Trustees as set out in Section C of the Terms of Reference.

B.3.3. Reporting of the Secretariat

36. The Board of Trustees shall determine the nature and scope of the Secretariat's work and shall oversee the day-to-day administration of the Trust Fund by the Secretariat. The Secretariat shall report on a monthly basis to the Board of Trustees on its activities. Such report shall be made public. They shall be redacted to the extent necessary to preserve the confidentiality of the work of the Trust Fund.

C. WORKING REGULATIONS OF THE TRUST FUND

37. Within 60 days of the appointment of its members the Board shall adopt such additional guidelines and procedures that are necessary to carry out its functions. These additional guidelines and procedures must be consistent with the present Terms of Reference and designed to further facilitate the implementation of the EAC's reparation award.
38. Within that same period the Board shall submit the Trust Fund's budget for adoption by the African Union.
39. The Board may also provide for a procedure for amendments to these Terms of Reference.
40. Guidelines, budget and any amendment thereof shall be made public.

D. COSTS OF THE FUND

41. All administrative and overheads costs, and any relating expenses, of the Trust Fund shall be borne by the African Union.
42. The funds to cover such costs shall be made available to the Trust Fund through an autonomous budget.
43. Any remaining funds from the EAC budget shall be transferred to cover the expenses of the Trust Fund.

E. SOURCES OF THE FUND FOR THE IMPLEMENTATION OF THE REPARATION AWARD

E.1. Voluntary Contributions

44. The Board shall raise awareness about the Trust Fund and the plight of victims, their families and the EAC's reparation award.
45. The Secretariat, with the support of members of the Board and the African Union, as appropriate, shall establish contact with governments, international organizations, individuals, corporations and other entities to solicit voluntary contributions to the Trust Fund.
46. The Secretariat shall take receipt of all voluntary contributions and shall note the sources and amounts received in its regular reports to the Board.
47. Non-earmarked contributions shall be referenced and deposited into the Trust Fund and shall be considered to be consistent with the goals and the activities of the Trust Fund, unless the Board determines otherwise.
48. Voluntary contributions from sources stipulated may be partially earmarked [up to a maximum of 75%] by the donor so long as the allocation, as requested by the donor, benefits the beneficiaries of the EAC's reparations awards.
49. The Board shall regularly review the nature and level of voluntary contributions in order to ensure that no such allocation would result in a manifestly inequitable distribution of available funds and property among the different groups of victims.
50. The Board of Trustees may amend or impose further restrictions on the nature and/or level of earmarking, as appropriate.

E.2. Assets Recovered

51. The convicted person's assets shall be used to fund the reparations awards.
52. All assets belonging to the convicted person, or traced back to the convicted person, that have been identified prior to the establishment of the Trust Fund and any assets of

such kind identified subsequently shall be transferred in priority to Trust Fund upon recovery.

53. The Secretariat, with the support of members of the Board of Trustees and the African Union shall strive to identify the convicted person's assets whatever their location and use all the means at their disposal to recover such assets.
54. The Board, with the support of the Secretariat, shall encourage the conclusion of bi-lateral cooperation agreements between States where relevant assets are determined to exist for the purpose of their recovery by the Trust Fund.

F. BANKING INSTRUMENT

F.1. General

55. Bank account(s) of the Trust Fund shall be opened according to the most favourable banking conditions.
56. The bank identified should have an office in Chad.

F.2. Accounting

57. The bank account used to fund the administrative and overhead costs of the Trust Fund shall be separate from the bank account containing the funds for the reparations awards.
58. All movement of funds shall carry a signature trail to allow their tracing from receipt to disbursement.
59. A computer tracking system should be established to enable tracking of, inter alia:
 - a. The sources of funds received, including, where applicable, the name of the donor, the date and the amount of the contribution;
 - b. All requests for earmarked contributions, including the nature of the request, and what was ultimately agreed upon and received;
 - c. All pledges received, the date and nature of the pledge, any follow-up by the Board of Trustees, and the date on which funds were actually received;
 - d. All resources that have been attributed by the Trust Fund, sorted by sources of funds, by the nature of the attribution, and by beneficiary(ies);
 - e. Receipt by implementing partners of attributed resources, by the date of the attribution;
 - f. Receipt by beneficiaries by the date of receipt by the beneficiary, where possible.
 - g. With respect to allocations, the named implementing partner or beneficiary group, the object of the grant, the amount of the grant, obligations under the grant contract, reporting deadlines, verification of completion and the accomplishment of results.
60. The accounting system of the Trust Fund shall adhere to recognized international standards of accounting.
61. The Trust Fund shall be subject to regular auditing by an independent authority.
62. Auditing reports shall be made public

63. Detailed accounting and audit principles, including the periodicity of auditing of the trust fund, should be provided for in the working regulations prepared by the Board of Trustees as per Section C.

G. THE PROCEDURES OF THE TRUST FUND

G.1. GENERAL PRINCIPLES

64. The Secretariat shall prepare a draft plan to implement the EAC's reparation award.
65. In developing the implementation plan, the Secretariat shall consult, as necessary, with victims and their families or their legal representatives and may consult any competent expert organisation, in the preparation of the draft implementation plan.
66. The Board shall present the implementation plan to the Court for approval and adoption. The Court can hear relevant submissions from interested parties.
67. The Board of Trustees shall provide regular, six monthly, updates to the Court on progress with the implementation of the award. At the end of the implementation period, the Trust Fund shall submit a final narrative and financial report to the competent to the Court.

G.2. Individual Compensation Awards

68. The implementation plan shall set out the names and locations of victims to whom the award applies, where known (and subject to any protective measures), any procedures that the Trust Fund intends to employ to collect missing details, and methods of disbursement.

G.2.1. Identifying the names and locations of members of the beneficiary class

69. Where the names and/or locations of the victims are not known, or where the numbers of victims is such that it is impossible or impracticable for the Secretariat to determine these individually with precision, the Secretariat shall set out all relevant demographic/statistical data about the class of beneficiaries, as defined in the order of the EAC, and shall list options for determining any missing details for approval by the Board of Trustees. Such options may include:
- a. The use of demographic data to determine the members of the beneficiary class; and/or;
 - b. Targeted outreach to the beneficiary class to invite any potential members of the class who have not already been identified by the EAC to identify themselves to the Trust Fund. Where appropriate, outreach may be undertaken in collaboration with relevant stakeholders including, intergovernmental, national or international organisations, civil society organisations and legal representatives of victims. The Board of Trustees may put in place reasonable deadlines for the receipt of communications, taking into account the situation and location of victims. These may be extended as required.

- c. The Secretariat may consult victims and their families or their legal representatives, interested persons, interested States and any competent expert organisation, in developing these options.

G.2.2. Verification of victims' identities

70. The Secretariat shall verify that any persons who identify themselves to the Trust Fund are veritable members of the beneficiary class, in accordance with any principles set out in the reparation order of the EAC.
71. A final list of beneficiaries shall be approved by the Board.
72. The Court shall hear appeals by claimants who have not been included in the final list.
73. Taking into account the urgent situation of the beneficiaries, the Board may decide to institute phased or priority verification and disbursement procedures. In such cases, the Board of Trustees may prioritise a certain sub-class of beneficiaries for verification and disbursement.

G.2.3. Disbursement of awards

74. The Board, with the support of the Secretariat, shall determine the modalities for the disbursement of reparations awards to beneficiaries taking into account their present circumstances and locations and subject to the stipulations in the reparation order of the EAC.
75. The Board may decide to use intermediaries to facilitate the disbursement of reparations awards, as necessary, where to do so would provide greater access to the beneficiary group and would not create any conflict of interest. Intermediaries may include competent, national or international organisations, civil society organisations and legal representatives of victims working in close proximity with the beneficiary groups.
76. The Secretariat shall put in place procedures to verify that awards were received by beneficiaries, following the implementation of a disbursement programme. Beneficiaries shall be required to acknowledge in writing³⁹ receipt of the award and these acknowledgments shall be stored by the Secretariat. Additional spot checks and monitoring of the receipt of awards should be implemented to avoid unforeseen difficulties or the potential for fraud or corruption.

H. COLLECTIVE AWARD(S) TO VICTIMS

77. Where the EAC ordered collective reparations, the draft implementation plan shall set out the precise nature of the collective award(s), where not already specified by the EAC as well as the methods for its implementation.
78. The Board may, through the Secretariat, consult as far as possible, victims and their families or their legal representatives and may consult any competent expert

³⁹By signature or thumbprint as appropriate.

organisation on the nature of the collective award(s) and the methods for their implementation.

79. The Board of Trustees may identify intermediaries or partners or invite proposals for the implementation of the award.
80. The Secretariat shall put in place procedures to monitor the implementation of a collective award.

I. COOPERATION WITH THE TRUST FUND

81. All State parties to the African Union shall cooperate with the Trust Fund to enable it to successfully implement its mandate. Senegalese authorities shall provide all necessary assistance to the Trust Fund to enable it to successfully implement its mandate pursuant to their obligation stemming from article 1 of the EAC statute.
82. State parties shall not hinder in any whatsoever any activity carried out by the Trust Fund in furtherance of its mandate.
83. The African Union, after considering the request of the Trust Fund, shall impose sanctions pursuant to article 23 of the AU Charter for any state that unjustifiably fails to cooperate with the Trust Fund or hinders its work.