

REDRESS

Ending Torture. Seeking Justice for Survivors

Comments to the Trust Fund for Victims on the Progressive Realisation of its Mandate

A Discussion Paper

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As an organisation with a mandate to ensure justice and reparation for torture and related international crimes, REDRESS has been a consistent supporter of the International Criminal Court (ICC) and has engaged in efforts leading to its establishment since before the Rome Conference in 1998. Since then, it has been at the forefront of discussions on the establishment of a strong victims' mandate for the ICC in order to enable victims to participate independently in legal proceedings, to be effectively protected from reprisals and further traumatisation and to receive reparations for the harm suffered. REDRESS has been engaged in discussions on the establishment of the Trust Fund for Victims (TFV) ever since the idea to have such a fund was first conceived and continues to be committed to working with the Board and the Secretariat to ensure the effective realisation of its important mandate.¹

We congratulate and welcome the Board Members on their recent election at the 8th Session of the Assembly of States Parties in November 2009. We hope this Discussion Paper will be useful to the Board and the Secretariat in the further development of its policies and work programmes.

Introduction

The ICC's reparations mandate is an important and innovative feature, distinguishing the ICC from most ad hoc international criminal tribunals and special courts, which have been unable to give effect to victims' rights to a remedy and reparation. The Trust Fund for Victims has the potential to play a pivotal and pioneering role in the implementation of this mandate.

In the domestic setting it is habitual and expected that a victim of a crime is able to make a claim for damages, redressing loss or injury. However, at the international level, victims' rights to obtain a remedy and reparation have been vastly ignored, mirroring the entrenchment of the impunity of the perpetrators. Indeed, the greater the crime, the greater the level of impunity; and the greater the victimisation the greater the denial of basic rights to justice. The International Criminal Court system was devised as a holistic response to systematised impunity on the one hand and systematised neglect for the rights of victims to obtain a remedy and reparation on the other.² The extent of the stigmatisation and discrimination suffered by victims of mass atrocity can be measured perhaps against the reluctance to afford victims with meaningful rights to be recognised, heard and repaired to the extent possible. In addition to any direct support or measures it can provide, the Trust Fund for Victims can play an important role in raising the profile of victims' rights to a remedy and reparation, as well as their massive needs, as part of its general communications and fundraising strategies.

The reparative mandate of the ICC includes both victims' procedural rights to be recognised and participate in proceedings, as well as victims' right to claim reparations. Victims have a right to a remedy and reparation as complementary rights. Victims' participation rights can play an empowering and rehabilitative role, in addition to any further role that reparations awards will have. For victims, justice is as much about the process as it is about the final result.

The Trust Fund for Victims was established as a means of giving effect to the ICC's reparations mandate. In many instances, despite the fact that judicial bodies have been empowered to award reparations, there have been no funds available to make these a reality, and thus victims, while recognised through

¹ REDRESS' dedicated papers on the Trust Fund for Victims to date include:

Submissions to the Board of Directors of the Trust Fund for Victims at their 4th Annual Meeting, 22 November 2007, <http://www.redress.org/publications/REDRESS%20Submission%20Board%20VTF%20Nov%202007.pdf> ;

Comments to the Secretariat of the Trust Fund for Victims on its Preliminary Draft Guideline documents, 18 May 2007;

Submissions to the Board of Directors of the Trust Fund for Victims at their 3d Annual Meeting, November 2006,

<http://www.redress.org/publications/SubmissionstoICCVictims%27Trustfund.pdf>;

The International Criminal Court's Trust Fund for Victims (Discussion Document), December 2003,

<http://www.redress.org/publications/TFVReport.pdf> ;

The ICC Trust Fund for Victims, Resource Materials on Other Trust Funds and Compensation Mechanisms, July 2002,

http://www.redress.org/publications/icc_trustFund.pdf.

² In adopting the Rome Statute, States Parties were mindful that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity", Paragraph 2 of the Preamble of the Rome Statute of the International Criminal Court.

the process, are still critically unable to benefit from rehabilitation and other forms of reparation recognised under international law. The nature of the ICC's jurisdiction over mass crimes implies vast numbers of eligible victims as the starting point. In this respect the Trust Fund for Victims is designed to fulfil the important function of implementing reparations awards where it would be impractical or impossible for the Court to award reparations directly to each eligible victim. In addition, international standards on victims' rights recognise that victims have a right to assistance during ongoing processes as integral to their right to a remedy and reparation.³ If victims are in a state of necessity physically, psychosocially or materially, they may not be able to benefit from justice processes. The ability of the Trust Fund for Victims to apply some of its voluntary resources to afford physical or psychological rehabilitation or material support for the benefit of victims and their families is therefore an important additional aspect of the VTF's work.

1. The Trust Fund's Role in Relation to Reparations Orders

At the time of writing, the ICC is more than half way through its first trial, with a second trial underway and a third due to commence in July 2010.⁴ With the Prosecution case closed and the defence case well underway in the Lubanga trial, it is possible that a final judgment may be handed down before the end of 2010. In the event of a conviction, reparations proceedings could follow soon thereafter. The Statute and Rules do not specify a time frame for reparations proceedings, which in the absence an interpretation by a Chamber could technically be initiated during the trial or during or after an appeals process. Certain victims in both the Lubanga and Katanga cases have already filed requests for reparation with the Registry in accordance with Article 75 of the ICC Statute.

Our main comments to the Board of Directors and the Secretariat at this time in relation to this aspect of its mandate are that:

- The Trust Fund's role in relation to reparations orders is essential. In our view, this role is a key purpose of the Trust Fund;
- The progression of the Court's trial proceedings means that the Trust Fund may soon be called upon to act in this area. In order for the Trust Fund to be ready to respond, it will need to now begin to develop its policy responses and undertake the necessary operational planning to scale up its activities in this area at short notice;
- By virtue of Article 75 of the ICC Statute, it is the role of the Chambers to determine the reparations orders and for the Trust Fund to implement such orders when so requested by the Chambers. It is the Role of the Judges to determine principles on reparations. Nonetheless, and despite the fact that no principles have thus far been determined by the Court, it is recommended that the Trust Fund should, to the extent that is appropriate, begin to engage with the Court on these issues and begin to plan for the different eventualities that may arise in relation to orders emanating from the Court.

a) The Court's reparations mandate

Article 75 establishes the Court's mandate to make orders for reparations. The Court may determine the scope and extent of any damage, loss and injury of victims, and is to establish reparations principles to

³ For instance, Article 12 of the UN 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, adopted on 16 December 2005 (A/Res/60/147), which falls under Chapter VIII entitled "Access to Justice", provides that: "A victim of a gross violation of international human rights law [...] shall have equal access to an effective judicial remedy as provided for under international law." In giving effect to this right, Article 12 enumerates the international standards applicable to States, including that they should: "12(c) Provide proper assistance to victims seeking access to justice".

⁴ The defence opened its case in *The Prosecutor v Thomas Lubanga* (DRC) in the first week of February 2010, the trial in *The Prosecutor v Germain Katanga & Mathieu Ngudjolo* (DRC) commenced in November 2009 and the trial in *The Prosecutor v Jean-Pierre Bemba* (CAR) is due to commence in July 2010.

guide it in making its decisions. In this respect, it may order reparations:

- a) directly against a convicted person, specifying appropriate reparation to or in respect of victims, including restitution, compensation and rehabilitation;⁵ or
- b) where appropriate, through the Trust Fund for Victims.

Reparations Proceedings

Victims can request reparations in writing and can file such applications with the Registrar.⁶ A list of required information is provided for in the ICC's Rules of Procedure and Evidence.⁷ Special forms have been devised by the Registry and approved by the Presidency for this purpose.⁸ Once received by the Registry, applications for reparations are presented to the relevant Chamber, together with a report prepared by the Registry where requested.⁹

Before the Chamber can make any decision, it must consider representations to be made by the convicted person, the victims and other interested persons or States.¹⁰ In order to assess reparations,¹¹ the Registry may, upon request, provide information or make recommendations regarding matters such as the types and modalities of reparations, factors relating to the appropriateness of awarding reparations on an individual or collective basis, the modalities for the implementation of reparations awards, the appropriate role for the Trust Fund for Victims, enforcement measures and appropriate experts that may assist the Chamber¹² in assessing the scope and extent of damages.

The Chamber can call upon experts to assist it in determining the scope, extent of any damage, loss and injury to or in respect of victims at the request of victims, their legal representatives or the convicted person; or on the Chamber's own motion.¹³ Experts can also suggest options of appropriate types and modalities of reparations. Another area that the experts may provide assistance with, is whether reparations should be awarded on an individual or collective basis, or a combination of both.¹⁴ The victims or their legal representatives, the convicted person as well as other interested persons or interested States will then be able to make observations on the experts' reports.

b) Individual awards

The significance of individual awards

International law recognises victims' individual right to reparation.¹⁵ There are obvious challenges to afford individual reparations awards in cases involving massive numbers of potential beneficiaries, though these challenges are by no means insurmountable, as is evidenced by the range of international practice.¹⁶ Individual awards recognise the harm suffered personally and specifically in a way that collective awards typically cannot and it is important that this specificity of harm is not lost.

The relevant Chambers will make a determination in accordance with Article 75 of the ICC statute to determine whether and in what circumstances it will afford reparations and in such instances in which it does make an award, the nature and form of reparations contained in that award. In this context, the

⁵ Article 75(2) of the ICC Statute.

⁶ In accordance with Rule 94 of the Rules of Procedure and Evidence (RPE).

⁷ See Section 4 of the RPE: Reparations to Victims; Rule 94, Procedure upon request.

⁸ In accordance with Regulation 88 and 23(2) of the Regulations of the Court.

⁹ Regulation 110 of the Regulations of the Registry.

¹⁰ Article 75(3) of the ICC Statute.

¹¹ In accordance with Rule 97 of the RPE.

¹² Regulation 110(2) of the Regulations of the Registry.

¹³ Rule 97(2) of the RPE on the Assessment of Reparations.

¹⁴ Rule 97(1) RPE provides that "In taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualised basis or, where it deems it appropriate, on a collective basis or both."

¹⁵ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation *op.cit.*, elaborate the scope and nature of the right to reparations under Chapter IX, "Reparation for harm suffered."

¹⁶ For a comprehensive study of mass claims processes see: Redressing injustices through mass claims processes: innovative responses to unique challenges, Ed. International Bureau of the Permanent Court of Arbitration, Oxford University Press, 2006.

relevant Chambers will determine whether it will afford individual awards or collective awards or both. It is recommended that the Board and Secretariat prepare for the eventuality that the Court affords individual awards and requests the Trust Fund to assist in their implementation.

Awards by the Court or through the Trust Fund

Individual awards are to be made by the Court directly against the convicted person,¹⁷ to, or in respect of, victims.¹⁸ However, there may be instances where the Chamber will decide that, at the time of making the order, it is impossible or impracticable for it to make individual awards directly to each victim. This could be for a number of reasons, including because there are a large number of victims, or because individual victims need to be identified and the process of identifying them for whatever reason is a process that the Court is not best placed to do. In such cases the award for reparations can be deposited with the Trust Fund and is to be separated from other resources and forwarded to each victim as soon as possible.¹⁹

In all instances where the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund or that an award be made through the Trust Fund in accordance with Rule 98(2) to 98(4) of the RPE, the Secretariat of the Trust Fund for Victims is obligated to prepare a draft plan to implement the order of the Court, to be approved by the Board of Directors, and to be submitted to the relevant Chamber for approval.²⁰

In preparing its draft implementation plan, and in determining the nature and size of awards subject to any orders of the Court, the Trust Fund must take into account a number of factors. These factors are listed in Regulation 55 of the Trust Fund's Regulations and include taking into account:

- the nature of the crimes,
- the particular injuries to the victims and the nature of the evidence to support such injuries,
- the size and location of the beneficiary group.²¹

Where victims are individually identified

Where the relevant chambers of the ICC identifies each beneficiary, the draft implementation plan shall set out the names and locations of victims to whom the award applies, where known (and subject to confidentiality), and any procedures that the Trust Fund intends to employ to collect missing details and methods of disbursement.²² Regulation 118 of the Regulations of the Registry sets out that the Victims Participation and Reparation Section (VPRS) of the Registry shall, where requested by the Chamber or by the Presidency, and after consultation with the victims or their legal representatives, provide the Secretariat of the Trust Fund for Victims with the information it has received from victims and in victims' application forms which are necessary for the implementation of the Court's order.

Where victims are not individually identified

Where the Court has stipulated individual awards are to be granted pursuant to Rule 98(2) but beneficiaries are not identified (names and/or locations of the victims are not known), these would have to meet the criteria of "victim", as defined in Rule 85 of the Rules of Procedure and Evidence, which reads as follows:

- (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, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

¹⁷ Rule 98(1) RPE.

¹⁸ Article 75 of the ICC Statute.

¹⁹ Rule 98(2) RPE.

²⁰ Regulations 54 and 57 of the Regulations of the Trust Fund.

²¹ Regulation 55 of the Regulations of the Trust Fund.

²² Regulation 59 of the Regulations of the Trust Fund.

The unidentified victims may need to correspond to a precise ‘class’ defined by the Chamber. For instance, if there were to be a conviction and reparations order in the Lubanga case, the Chamber might indicate that victims of child recruitment by a specific armed group, during a specific period or geographic location should be awarded certain types of benefits in relation to certain specified harms suffered. In this sense, the Trust Fund could possibly be entrusted with a quasi-judicial task of assessing the evidence that might demonstrate that an individual is a member of the beneficiary group and has suffered the specified harm. In such instances, it may be appropriate for the Trust Fund to propose in its draft implementation plan, how it would go about identifying and verifying potential beneficiaries. Flexible standards that rely on presumptions might be necessary and desirable, and align with the good practice of many mass claims processes.

Where the number of victims is such that it is impossible or impracticable for the Secretariat to determine these with precision, the Regulations specify that the Secretariat shall set out all relevant demographic and statistical data about the group of victims, as defined in the order of the Court, and shall list options for determining any missing details for approval by the Board of Directors.

Regulation 61 of the Regulations of the Trust Fund provides that such options may include:

- (a) The use of demographic data to determine the members of the beneficiary groups; and/or:
- (b) Targeted outreach to the beneficiary group to invite any potential members of the group who have not already been identified through the reparations process to identify themselves to the Trust Fund, and, where appropriate, these actions may be undertaken in collaboration with interested States, intergovernmental organisations, as well as national or international non-governmental organisations. The Board of Directors may put in place reasonable deadlines for the receipt of communications, taking into account the situation and location of victims;
- (c) The Secretariat may consult victims or their legal representatives and families of individual victims, as well as interested persons, interested States and any competent expert or expert organisation in developing these options.

In order to identify eligible beneficiaries, specific efforts will need to be made to reach women and girl victims in particular. In addition, the interests of the community that the victims may be part of or dependent on will need to be considered. This is particularly relevant for child victims, whose best interests should be considered holistically with attention being given to the context in which the child lives, the need for re-integration into the family and community, avoiding further stigmatisation or being inappropriately singled out against other children.²³ Significant stigma surrounds victimisation resulting from rape and child recruitment. Singling out already stigmatised and alienated individuals may be counterproductive and could even ignite resentment against such individuals. In both Uganda and the Democratic Republic of Congo, there is a sense that former combatants are the ones to have benefited through demobilisation incentives and amnesty laws.²⁴ Young people formerly associated with armed groups are perceived by many as perpetrators as well as victims, and it would be difficult to see how reparation that favours ‘former perpetrators’ over those that they terrorised would be well received within the communities that these young people may wish to reconcile with.

Where resources are inadequate

For all activities and projects that are triggered by a decision of the Court, the Board of Directors of the Trust Fund will need to determine how the funds available through a) fines and forfeiture deposited with the Trust Fund or b) resources collected through awards for reparations, should best be complemented with “other resources of the Trust Fund”. According to Regulation 56 of the Trust Fund Regulations, the Board “shall make all reasonable endeavours to manage the Fund taking into consideration the need to

²³ See REDRESS Report: Victims, Perpetrators or Heroes? Child soldiers before the International Criminal Court, September 2006, <http://www.redress.org/publications/childsoldiers.pdf>, in particular Part 3 “Ensuring Children’s’ Rights in all Phases of Proceedings”. Children have a right to respect for their dignity, a right to be protected from discrimination, and a right to protection -both physical and emotional, promoting the child’s harmonious development, and ensuring the best interests of the child, see the UN Guidelines on Justice for Child Victims and Witnesses of Crime (ECOSOC Resolution 2005/20, 22 July 2005) and Convention on the Rights of the Child, 1989.

²⁴ See REDRESS, *Victims, Perpetrators or Heroes? Child soldiers before the International Criminal Court*, September 2006, <http://www.redress.org/publications/childsoldiers.pdf>, Part I, Child Soldiers in Northern Uganda & DRC; in particular Section 1.2.4 “Mixed perceptions of children’s victimization: age and demobilization packages”, p.14.

provide adequate resources to complement payments for awards under Rule 98(3) and 98(4) RPE and taking particular account of ongoing legal proceedings that may give rise to such awards". On this basis the Board of Directors would need to consider how best to complement existing funds with "other resources", advising the relevant Chamber accordingly.²⁵ Indeed, Pre Trial Chamber 1 in the DRC Situation alluded to this provision in its decision of 11 April 2008, when it recommended that before resorting to any other activities or projects, the Board of Directors of the Trust Fund, in accordance with its obligations under regulation 56 of the Regulations of the Trust Fund, should undertake a study evaluating and anticipating the resources which would be needed to execute in the cases pending before the Court an eventual reparation order pursuant to article 75 of the Statute.²⁶

Finally, the Trust Fund will need to submit to the relevant Chamber, via the Registrar, the draft implementation plan for approval, and will consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award.²⁷ Thereafter, the Trust Fund will need to provide updates to the relevant Chamber on progress in the implementation of the award, in accordance with orders of the Chamber. Once the implementation period is complete, the Trust Fund shall submit a final narrative and financial report to the relevant Chamber.²⁸

If resources for individual awards have been collected from fines and forfeitures, and transferred to the Fund,²⁹ or if they are specifically collected through awards for reparations,³⁰ the Board of Directors must determine the uses of such resources in accordance with any stipulations or instructions of the Court, in particular on the scope of beneficiaries and the nature and amount of the awards. When using these particular funds, the Board must comply with any relevant decisions issued by the Court on the case at issue and in particular any decisions issued that:

- a) determine the scope and extent of any damage, loss and injury to, or in respect of victims; or any decision issue [Article 75(1) of the ICC Statute] or
- b) relate to the assessment of reparations [Rule 97 of the Rules of Procedure and Evidence].³¹

The Board may seek further instructions from the relevant Chamber on the implementation of its orders.³²

Implementation of Individual Reparations Awards

When it comes to disbursing individual awards, the Secretariat will need to verify that any persons who manifest themselves to the Trust Fund are in fact members of the beneficiary group in accordance with any principles set out in the order of the Court.³³ The Board of Directors will need to determine the standard of proof for the verification subject to any stipulations set out in the order of the Court.³⁴ Given the urgent situation of many victims, the Board may decide to undertake verification and disbursement in a phased approach, for instance prioritising a subgroup that has particular needs. A final list of beneficiaries will need to be approved by the Board of Directors.³⁵

c) Collective Awards through the Trust Fund

The Court may order that an award for reparations be made through the Trust Fund where the number of victims and the scope, form and modalities of reparations make a collective award more appropriate than individual awards.³⁶ Collective awards are a vital component of reparations, particularly in mass crimes cases. Certain forms of victimisation may be appropriately captured by collective awards, such as harm directed at a particular group or community or aimed at group interests. Also, certain forms of

²⁵ Regulation 56 of the Regulations of the Trust Fund.

²⁶ Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund, ICC-01/04-492, 11 April 2008, p. 11.

²⁷ Regulation 57 of the Regulations of the Trust Fund.

²⁸ Regulation 58 of the Regulations of the Trust Fund.

²⁹ pursuant to Article 75(2), article 79(2) or Rule 98(2)-(4).

³⁰ See Regulation 34 of the Regulations of the Trust Fund for Victims.

³¹ See Regulations 43 to 45 of the Regulation of the Trust Fund for Victims.

³² Regulation 45 of the Regulation of the Trust Fund for Victims.

³³ Regulation 62 of the Regulation of the Trust Fund for Victims.

³⁴ Regulation 63 of the Regulation of the Trust Fund for Victims.

³⁵ Regulations 64 and 65 of the Regulation of the Trust Fund for Victims.

³⁶ Article 75 (2) of the ICC Statute and Rule 98(3) of the RPE.

reparation may be most effectively distributed to beneficiaries through collective projects that provide services to affected communities or particularly vulnerable classes of victims, such as medical treatment, psychosocial counselling, skills training, education or income generation. As highlighted above, consideration would always need to be given to the specific harms being addressed and how the projects can nonetheless recognise the specific harm being repaired without being subsumed into a more general humanitarian project. In terms of the processes set out in relevant provisions, there is an important role for the Trust Fund for Victims to provide input to the Court in its consideration of the forms and modalities of collective awards and in devising appropriate projects and activities to implement its reparations orders.

The procedure described above, relating to the preparation of the draft implementation plan for the relevant Chamber's approval, also applies to collective awards triggered by a decision of the Court under article 75(2). When the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund, or that an award be made through the Trust Fund in accordance with Rules 98(2) - 98(4), the Secretariat must prepare a draft plan to implement the order, to be approved by the Board of Directors and the Chamber.³⁷ The draft implementation plan is to set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for their implementation. The Court will need to approve such determinations.³⁸

In some instances the Court may make quite a specific order for collective reparations. Article 75(1) indicates that "in its decision, the Court *may*, either upon request or on its own motion [...] determine the scope and extent of any damage loss and injury to or in respect of victims".³⁹ Thus, it could for instance outline different categories of harm and the corresponding types of remedy that victims should receive, either identifying them by name or simply by beneficiary 'class'. Here the Trust Fund might play a role in developing a workable and practical plan to identify, locate and then deliver the activities or projects to the beneficiary group or class, for the approval of the Chamber. It is here that the Trust Fund may be able to propose options that ensure recognition of, and a link with, the harm suffered.

In preparing its implementation plan, the Board of Directors may consult victims as defined in Rule 85 of the Rules of Procedure and Evidence.⁴⁰

The Board of Directors may also wish to consult experts or expert organisations on the nature of the collective award(s) and the methods for their implementation.⁴¹ Gender and child-specific consultations are critical to ensuring that plans will meet real needs of the most vulnerable victims. Other specific categories of victims, including the elderly and other groups judged to be vulnerable or to have very specific needs or requirements in the particular context, should be considered to ensure outreach and consultations are adapted on a case by case basis.

Alternatively, the Court may also order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organisation approved by the Trust Fund.⁴² Such an organisation might be specifically identified by the Chambers or not. In deciding whether to make an award through the Trust Fund to such an organisation, the Court must consult interested States and the Trust Fund itself.

d) Forms of Reparation: Restitution, Rehabilitation and Compensation

Article 75 provides a non-exhaustive list of forms of reparation including restitution, compensation and rehabilitation. The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation also recognise that reparation includes satisfaction and guarantees of non-repetition.⁴³ These forms of reparations are perhaps most appropriately afforded by States, and less appropriate or practicable orders that can be made against an individual found liable on the basis of individual criminal

³⁷ Regulation 54 of the Regulations of the Trust Fund.

³⁸ Regulation 69 of the Regulations of the Trust Fund.

³⁹ Article 75(1) of the ICC Statute, emphasis added.

⁴⁰ See above at page 5.

⁴¹ Regulation 70 of the Regulations of the Trust Fund.

⁴² Rule 98(4) of the Rules of Procedure and Evidence.

⁴³ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation *op.cit.*, elaborate the scope and nature of the right to reparations under Chapter IX, "Reparation for harm suffered".

responsibility.

Whilst it is the relevant Chambers that is mandated with determining reparations (as opposed to the Trust Fund), it may be useful for the Trust Fund to begin to consider the range of possible roles it may be requested to play in the implementation of such reparations orders. Such analysis might assist the Trust Fund to plan for the scaling up of its activities and when it comes time to prepare its first draft implementation plan.

i) Restitution:

Restitution is the act of restoring the victim, to the extent possible, to the original situation before the violation, crime or injury occurred. The UN Declaration of Basic Principles of Justice for Victims of Abuse of Power stipulates that:

“offenders or third parties should make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights.”⁴⁴

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation provide that:

Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.⁴⁵

The Inter-American Court of Human Rights has held that “full restitution (*restitutio in integrum*) includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.”⁴⁶ In recognition of the fact that the desired aim of full restitution for the injury suffered is not always possible to achieve, given the irreversible nature of the damages suffered, the Inter-American Court held, in the *Velásquez Rodríguez Case* that “under such circumstances, it is appropriate to fix the payment of “fair compensation” in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered.”⁴⁷

In the case of genocide, war crimes and crimes against humanity, land rights may be a major issue. Both the International Criminal Tribunal for the former Yugoslavia and for Rwanda provide detailed procedures for the restitution of property, including land.⁴⁸ The relevant Trial Chambers of the Tribunals may hold special hearings to determine the restitution of property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as they consider appropriate. If the relevant Trial Chamber is able to determine the rightful owner on the balance of probabilities, it will order the restitution either of the property or the proceeds or make such other order, as it may deem appropriate.⁴⁹ Similarly, the Rome Statute enables the relevant Chambers of the ICC to order the “forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties,” as part of the sentence,⁵⁰ and as indicated, specifically mentions restitution as one of the forms of reparation the Chambers may order against a convicted person.

⁴⁴ Principle 8, Declaration of Basic Principles of Justice for Victims of Abuse of Power, A/RES/40/34, 29 November 1985.

⁴⁵ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation *op.cit.*, Principle 19.

⁴⁶ *Godínez Cruz v. Honduras*, Series C No. 8, Compensatory Damages, Judgment of 21 July 1989, para. 24.

⁴⁷ *Velásquez Rodríguez Case*, Interpretation of the Compensatory Damages Judgment, Judgment Of August 17, 1990, Para. 27.

⁴⁸ See Article 105, common to the Rules of Procedure and Evidence for both the International Criminal Tribunal for the former Yugoslavia and Rwanda.

⁴⁹ For a more detailed review of other post-conflict settlements and mechanisms, see: REDRESS, *Reparation for Torture, A survey of Law and Practice in 30 Selected Countries*, April 2003, p.15, <http://www.redress.org/publications/AuditReportText.pdf>

⁵⁰ Art. 77 (2) (b) of the ICC Statute.

ii) Compensation:

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation provide that:

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.⁵¹

The right to compensation is recognised in a range of international and regional instruments. Article 9(5) of the International Covenant on Civil and Political Rights and Article 5(5) of the European Convention on Human Rights refer to an ‘enforceable right to compensation.’ Article 14(1) of the United Nations Convention against Torture refers to “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” Similarly, the new International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force), refers in Article 24(4) to the obligation to afford “prompt, fair and adequate compensation.” Article 21(2) of the African Charter on Human and Peoples’ Rights, in respect of spoliation of resources, refers to the obligation to afford adequate compensation.

The European Court of Human Rights has awarded pecuniary and non-pecuniary damages and recovery of costs and expenses, in a series of decisions. In particular, it has awarded the full amount of compensation requested for pecuniary and non-pecuniary damages “in view of the extremely serious violations [...] and the anxiety and distress that these undoubtedly caused.”⁵² The Inter-American Court of Human Rights also has a rich jurisprudence on the award of pecuniary and non-pecuniary damages to victims and injured parties,⁵³ both direct victims and others who have suffered harm (financial or moral) on account of their close relationship with the victim. The Court has an interesting practice of undertaking fact-finding missions to identify proactively the injured parties and quantify the damages. As an example of quantum, in the *Amparo Case* the Inter-American Court awarded the victims and injured parties an average of 23,843 USD to each of the families of the deceased for loss of income and 20,000 USD to each of the families of the deceased for moral damages.⁵⁴ The two surviving victims received 4,566 USD each for the two years they were unfit to work (loss of income), and 20,000 USD each for moral damages.

iii) Rehabilitation:

Rehabilitation is an important component of reparation.⁵⁵ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation stipulate that:

Rehabilitation should include medical and psychological care as well as legal and social services.⁵⁶

⁵¹ Article 20, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation *op.cit.*, elaborate the scope and nature of the right to reparations under Chapter IX, “Reparation for harm suffered.”

⁵² For example, *Aksoy v. Turkey*. App. No. 21987/93, Judgment of 18 December 1996 para 113; *Aydin v. Turkey*, App. No. 23178/94, Judgment of 25 September 1997; *Selmouni v. France*, App. No. 25803/92, Judgment of 28 July 1999.

⁵³ See C. Sandoval-Villalba, *The Concept of “Injured Party” and “Victim” of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations*, in *Ferstman, Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Martinus Nijhoff Publishers, 2009.

⁵⁴ *El Amparo v Venezuela*, IACtHR, Judgment on reparations, 14 September 1996. In this case, the Venezuelan military and the police opened fire against 16 fishermen. 14 were killed and 2 were left with permanent injuries. See C. Sandoval-Villalba, *op.cit.* p. 258.

⁵⁵ For a comprehensive analysis of the right to rehabilitation under international law, see REDRESS Report, “Rehabilitation As A Form of Reparation Under International Law”, Dec 2009, www.redress.org/reports/The%20right%20to%20rehabilitation.pdf.

⁵⁶ Principle 21, UN Basic Principles and Guidelines, *op.cit.*

The Convention on the Rights of the Child notes in Article 39 the need for “physical and psychological recovery and social reintegration of a child victim.” The Convention against Torture and the Declaration on Enforced Disappearances refer to “the means for as full rehabilitation as possible.” Rehabilitation also figures in the Declaration on the Elimination of Violence against Women,⁵⁷ which specifies “to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation.”

The Optional Protocol to the Convention on the Rights of the Child, provides that, in respect to the involvement of children in armed conflicts, “States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.”⁵⁸

The Inter-American Court has been the most active of the regional courts in referring to the importance of rehabilitation in the overall framework of reparations. A series of judgments have awarded rehabilitation as part of broader measures of reparation. In the *Barrios Altos* case, the Court approved the agreement signed by the State and the victims wherein the State recognised its obligation to provide “diagnostic procedures, medicines, specialized aid, hospitalisation, surgeries, labouring, traumatic rehabilitation and mental health.”⁵⁹ In other cases, the Court provided for the future medical treatment of victims, where there was a direct link between the condition and the violation.⁶⁰

Summary of issues for consideration in relation to Reparations Orders:

➤ Preparation for the implementation of reparation orders

In the event of a conviction and order for reparations, as has been outlined above, the Trust Fund for Victims, in accordance with Regulations 54 and 69 of the Regulations of the Trust Fund, will need to draft implementation plans, for the approval of the relevant Chamber. While drafting of implementations plans cannot take place until an eventual reparations order is issued, there may be useful preparatory work that can already be undertaken in order to facilitate future work. For instance:

- Monitoring of ongoing trials and evaluation of the timing and duration of possible reparations proceedings may be helpful to assist with scheduling of work and planning of the scaling up and down of resources within the Trust Fund Secretariat.
- Establishing and maintaining a list of experts and expert organisations which may be called upon in relation to Regulations 50 and 70 of the Trust Fund regulations. Such a list of experts might be shared with a list of experts that may maintained by the Registry in line with Rule 97 RPE. The following further steps may be required:
 - Establishing area(s) and levels of expertise required;
 - Establishing draft terms of reference.
- Establishing standards and modalities for cooperation with intergovernmental,

⁵⁷ United Nations General Assembly Resolution 48/104 of 20 December 1993, A/RES/48/104, 23 February 1994.

⁵⁸ Article 6(3), Optional Protocol to the Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000. entered into force on 12 February 2002.

⁵⁹ *Chumbipuma Aguirre et al. vs Peru (Barrios Altos Case)*, Series C No. 87, Reparations, Judgment of 30 November 2001, para 40.

⁶⁰ See, for example, *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 2001.

international or national organisations as provided for in Regulation 73 of the Trust Fund Regulations, having regard to the types and location of organisations which may be suitable entities to implement large scale or long-term services for the benefit of victims or who might be useful collaborators or partners, In particular, it would be useful for the Trust Fund to:

- Establish, publish and disseminate transparent selection criteria provided for in Regulation 73;
 - Establish modalities for cooperation with such organisations that ensure efficiency and transparency, such as model contracts and standard operating procedures, covering, for instance, confidentiality/protection protocols and financial and narrative reporting obligations.
- In view of the eventuality that the Court request the Trust Fund for Victims for input on appropriate forms of restitution, rehabilitation and compensation awards, the Trust Fund may wish to:
- Review the implementation of relevant restitution, rehabilitation and compensation awards granted by other Courts and tribunals;
 - Consider the range of principles applicable to other bodies of similar mandate in order to help prepare itself for future implementation strategies, particularly in the absence of principles established under Article 75. In particular principles specific to vulnerable groups such as children might be considered;⁶¹
 - Consider the functioning of other Secretariats implementing reparations awards;
 - Develop in-house expertise to plan for restitution, rehabilitation and compensation awards that are gender and child sensitive, and also adapted to specific harms resulting from crimes within the jurisdiction of the Court;
 - Gather and develop gender and child specific best practice and expertise in implementing reparations
- **Maintaining Fund Balances:** The Fund may consider the level of resources and other assets it may wish to have in bank in order to fulfil an order for reparation, particularly in view of Regulation 56, which indicates that the Board “shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98(3) and 98(4) RPE and taking particular account of ongoing legal proceedings that may give rise to such awards”. In order to maintain such balances, the Trust Fund may consider:
- How best to include the need for financing for reparations awards into its ongoing fundraising and communications strategies;
 - Developing a reserves policy for reparations, which might include, for instance, i) a policy of setting aside funds for reparations once a particular ‘situation’ is confirmed by the Pre-Trial Chamber or once a case commences against a particular accused person; ii) applying a percentage to earmarked funds for reparations reserves; iii) determining minimum levels of acceptable reserves.

2. The Trust Funds’ “other resources” and assistance mandate

The Trust Fund for Victims is bound to use resources transferred to it from fines, forfeiture or an award for reparations in accordance with the orders of the Court. However, the Trust Fund will also be in receipt of, possibly much more substantially, “other resources” that it may collect, amongst others, from voluntary contributions, including financial contributions from private institutions and funds

⁶¹ Some guiding principles used by the Truth and Reconciliation Commission for Sierra Leone included “sustainability” and “avoiding new stigma or the reinforcement of existing stigma”. See: “How the Truth and Reconciliation Commission for Sierra Leone developed its guiding principles on reparations” in the REDRESS Report: “Child Soldiers before the ICC: Victims, Perpetrators or Heroes? *Op.cit.* p.57-59, <http://www.redress.org/publications/childsoldiers.pdf>.

allocated by the Assembly of States Parties.⁶² The Trust Fund may use its “other resources” for the benefit of victims of crimes as defined in Rule 85 of the Rules of Procedure and Evidence, within the jurisdiction of the Court.⁶³ It may use these resources for two types of functions:

1. to complement resources collected through awards for reparations;⁶⁴
2. to undertake activities providing physical or psychological rehabilitation or material support for the benefit of victims.⁶⁵

The need for the Trust Fund to take steps to ensure adequate resources to complement reparations awards has been discussed in the section relating to reparations orders, above. Here, we provide some background on how and why the second mandate of the Trust Fund, often referred to as the Fund’s “assistance” mandate was established. In particular, we consider, some of the most pertinent formalities relating to this mandate, namely the requirement for the Board to be ‘seized’ and the relationship with the relevant Chamber.

a) Background to the “assistance” mandate

The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁶⁶ and the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation⁶⁷ both provide that victims should be entitled to assistance. They both provide that States should:

- provide proper assistance to victims seeking to access justice;
- endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

Victims’ right to justice would in many cases be frustrated by the inherent difficulties associated with victims’ medical, psychosocial or material situations. Indeed, most victims of mass atrocity are struggling to survive on a daily basis and are so dispossessed that they may be unaware of ongoing justice processes. In this sense, the assistance principle rests on the understanding that there is little point to victims’ rights to justice if they are not assisted in accessing justice, and supported in their medical or other necessities, which might otherwise prevent them from actually participating or enjoying the results of the process.

Victims’ needs of medical, psychosocial and immediate material support during ongoing proceedings became critically apparent in Rwanda. Victims of rape, who were HIV positive were called to testify before the International Criminal Tribunal for Rwanda (ICTR) only to later discover that accused persons who also had HIV/AIDS were benefiting from anti-retroviral drugs at the Tribunal’s expense; while they, the victims, were denied these drugs. It must be noted that at that time, the ICTR did not have the fully developed Witness and Victims Support Section that it has today, in which victims who testify are supported, as is also the case at the ICC. Nonetheless, the sense of injustice at the ICTR’s inability to adequately assist victims became a national scandal, which severely affected proceedings for a period, due to a national moratorium imposed against testifying before the ICTR.

In addition, the assistance principle recognises that for many of the worst-off victims, a reparations award that comes often a decade after the events may be hollow, if medical, psychological or material needs are urgent and pressing. For some victims, Court-ordered reparations will simply come too late.

⁶² See Regulation 47 of the Regulations of the Trust Fund.

⁶³ Regulation 50(a)(ii) of the Regulations of the Trust Fund.

⁶⁴ See Regulation 56 of the Regulations of the Trust Fund.

⁶⁵ Regulation 50(a)(i) & (ii) of the Regulations of the Trust Fund.

⁶⁶ Adopted by General Assembly resolution 40/34 of 29 November 1985.

⁶⁷ UN 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, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

b) The Assistance mandate

The Board of Directors can trigger the use of “other resources” in order to undertake specific activities or projects of *if they consider it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families*.⁶⁸ When the Board considers these criteria to be met and it advises the relevant Chambers in accordance with Regulation 50(a)(ii) and (iii) of the Trust Fund Regulations, it is then ‘seized’.

The jurisprudence of the Court makes clear that according to regulation 50(a)(ii) of the Regulations of the Trust Fund, the Board of Directors has to notify the Chamber of its conclusion to undertake specified activities, as opposed to a general notification of the intention to undertake activities in a particular situation country or region⁶⁹. This is somewhat unfortunate, as in practice it will mean that the relevant Chambers will only be brought in after the Trust Fund has undertaken significant preparatory work. To the extent that is feasible, it is encouraged that the Trust Fund maintains dialogue with the Court on its activities from the early stages.

Nevertheless, it is suggested that prior to issuing a formal notification to the Chamber in accordance with Regulation 50(a)(i), a standard process be put in place by the Trust Fund to assist it in assessing the relative needs for interventions. As such, the following type of sequence is suggested:

- a victim mapping assessment could be undertaken in each ‘situation’ country;
- the Board could *consider* the findings of the assessment and approve a detailed and focused call for proposals for projects and activities for its further review;
- the Secretariat could launch a call for proposals which, *inter alia*, would request assessment to be made of the psychosocial, physical and material needs of victims;
- the Board could *consider* the assessments made by the Secretariat on the proposals received and would decide, in accordance with Regulation 50(a)(i) whether they *consider it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families*;
- A notification is made in writing to the relevant Chamber outlining specific activities and projects.

Ensuring transparent recording of how the Board undertook its “consideration” and reached its “conclusion” to undertake specified activities under Regulation 50(a)(i) is important. Given the potential for projects or activities to be perceived by the accused as prejudicial or contrary to the integrity of the judicial proceedings, a transparent and rigorous approach would strengthen the notification of such conclusions to the Chamber, and may protect the activities and projects of the Fund from eventual criticism thereafter.

As with reparations granted by the Court, the assistance received by the victim should, as far as possible, also be a recognition of their rights. The assistance should address physical, psychosocial and material needs that would otherwise impede victims’ ability to enjoy rights to justice; and as far as possible this connection should not be lost. In this respect, in the view of REDRESS, it would be important for beneficiaries of assistance to understand that they are being assisted by the ICC’s Trust Fund for Victims.

There are real challenges in “providing proper assistance for victims accessing justice” in line with international standards without prejudicing the ICC’s proceedings. The delicate balance is evident in the detailed safeguard provisions set out in Regulation 50, as well as the fact that the Trust Fund is independent from the Court, in particular its “other resources” are independently managed from the Court’s transmission of fines, forfeiture and awards into the Fund. Nonetheless, REDRESS would like to underscore that victims who seek to participate in proceedings should in principle be able to benefit from assistance projects of the Trust Fund; this is consistent with the very essence of the assistance mandate. The issue is how to ensure that such specific projects and activities do not prejudice the integrity of proceedings; hence the delicate balance in the safeguard provisions.

⁶⁸ Regulation 50(a)(i) and (ii) of the Regulations of the Trust Fund.

⁶⁹ PTC II, Situation in the Central African Republic, Decision on the Submission of the Trust Fund for Victims dated 30 October 2009, ICC-01/05, 16 November 2009.

c) Publicity, Outreach and Fundraising in relation to the assistance mandate

Once the Trust Fund has been ‘seized’ the Chair of the Board may issue a communiqué through the Secretariat or Registry as appropriate.⁷⁰ The Board’s conclusion (and the Chamber’s authorisation) that it is necessary for victims to receive physical, psychological or material support is seen as an opportunity to launch a fundraising campaign and to undertake outreach and sensitisation to affected communities as appropriate.⁷¹ A comprehensive fundraising strategy, including soliciting contributions from private sources is important to develop at the earliest opportunity. In this regard, there are guidelines on soliciting contributions from private institutions that would need to be devised in accordance with Regulation 24.

It may be useful to develop a specific communication strategy for each situation country, which includes modalities for maintaining regular contact with affected communities, and their need to understand the policies of the Trust Fund. While much of the work that the Trust Fund undertakes in supporting victims may take place in an insecure environment, where naming beneficiaries may put them at risk, these challenges will need to be balanced with the need for open justice. Communication and outreach will be critical to the success of the Trust Fund’s work with victims and affected communities. Mistrust and anger figure amongst the many symptoms of post-traumatic stress disorder and will be prevalent amongst affected communities and local civil society groups, who by the fact of having lived through a conflict situation (even if not direct victims) will most likely have suffered or continue to suffer from post traumatic stress. A cornerstone of any communications strategy in relation to affected communities should be its sensitivity to respecting dignity, building trust and reaching the most marginalised victims such as women, children, the elderly and disabled.

The Secretariat may wish to coordinate with the Registry in relation to its communications and outreach strategies. It would be important that the Trust Fund is explained as part of the general outreach and communication undertaken by the Registry, in addition to the Trust Fund having its own strategies for engaging with victims, affected communities, stakeholders and key audiences.

Issues for consideration concerning the assistance mandate:

- It is recommended that the Trust Fund further detail and formalise the process whereby the Board of Directors “considers” and “concludes” that it is necessary to provide assistance, leading to it becoming “seized”;
- It would appear that guidelines on how to solicit financial contributions from private institutions need to be adopted in accordance with Regulation 24, or made public;
- The Trust Fund may wish to establish a common list of experts with the Victim Participation and Reparations Section of the Registry;
- The Trust Fund should develop an outreach and communications strategy.

⁷⁰ Regulation 51 of the Regulations of the Trust Fund.

⁷¹ Regulations 52 & 53 of the Regulations of the Trust Fund.