

*THE INTERNATIONAL CRIMINAL COURT
THE TRUST FUND FOR VICTIMS (ARTICLE 79 OF THE ROME
STATUTE)*

A Discussion Paper

BY:

Thordis INGADOTTIR

PiCT

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FOREWORD

This paper has been prepared by the Center on International Cooperation under the auspices of the Project on International Courts and Tribunals (PICT) to provide the Preparatory Commission for the International Criminal Court and the future Assembly of States Parties with issues for consideration.

Aware that international law is the linchpin of a burgeoning international public sector, and that courts, tribunals and other dispute settlement bodies have emerged in virtually every area of international activity, in 1996 the Center on International Cooperation (New York University) and the Foundation for International Environmental Law and Development - FIELD (School of Oriental and African Studies, University of London) launched PICT.

PICT's mission is to address the legal, institutional and financial issues arising from the multiplication of international courts and tribunals and other dispute settlement bodies, as well as from the increased willingness of members of the international community to have recourse to them.

PICT addresses legal, institutional and financial issues arising out of the proliferation of international courts and dispute settlement bodies and the growing number of cases which these bodies are called upon to address. The overall objective is to promote research, training and public education activities that will contribute to the more effective, equitable and efficient delivery of international justice.

- *Effectiveness*: reinforcing the role of international courts and bodies in the administration and development of the international legal system; strengthening their credibility as convenient and efficient dispute settlement bodies; ensuring the implementation of their rulings;
- *Equity*: reducing financial and structural barriers that limit the ability of less well-endowed actors to use international courts and dispute settlement bodies; providing practical know-how and legal skills to their actual and potential users;
- *Efficiency*: ensuring the availability of adequate financial means and the use of the best management practices; decreasing costs and length of proceedings by streamlining statutes and rules of procedure.

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To achieve these general objectives PICT promotes and undertakes research on legal, financial, procedural and access issues which affect the delivery of international justice, with the intent of identifying potential solutions.

This discussion paper on the Trust Fund for Victims is the third prepared by PICT on the International Criminal Court. The two previous papers were on the Victims and Witnesses Unit (article 43.6 of the Rome Statute) and on the Financing of the International Criminal Court.

PICT itself takes no position on the legal questions involved but believes that the views of the papers' author can help to both clarify provisions in the Rome Statute and inform decisions on the Trust Fund for Victims. We invite readers to comment on the paper directly to the author or to PICT staff at <cr28@acf2.nyu.edu> .

Shepard Forman
Director
Center on International Cooperation
PICT Co-Director

Philippe Sands
Professor of International Law,
London University;
Barrister, Matrix Chambers
PICT Co-Director

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The views presented in this paper are those of the author and do not necessarily represent the ones of the collaborators or the commentators.

1. INTRODUCTION

According to article 79 of the Rome Statute:

“1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.”

Article 75.2 provides that:

“2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.”

The establishment of the Trust Fund is an important component of the Rome Statute’s overall goal: restoring peace by dispensing retributive justice to criminals and restorative justice to victims¹. However, the Rome Statute merely sketches the general outlines of the future Trust Fund, leaving the Assembly of States Parties to decide how to implement these undetermined indications. The aim of this paper is to assist the Assembly of States Parties in this crucial task by highlighting issues for consideration, drawing from some insightful precedents, and laying out some options². Unquestionably, the key issues the Assembly of

¹ The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses (art. 68.1). In doing so, victims of crimes can access the Court to express their views (art. 68) and claim reparations for the wrong suffered (art. 75). Furthermore, a Victims and Witnesses Unit shall be set up which shall provide protective measures and assistance to witnesses and victims appearing before the Court (art. 43.6).

² The United Nations General Assembly, in its *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, encourages the establishment of national funds for compensation of victims of crimes. It also encourages the establishment of other funds for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate; General Assembly Resolution 40/34 of 29 November 1985, principle 13. At the international level

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States Parties will have to address are how the Trust Fund will be financed, for which purposes it should be utilized, and who will administer it.

The Rome Statute leaves the Assembly of States Parties quite a substantial latitude as to the scope of the Trust Fund. It can establish one with a very limited source of income, restricting its financing to money and properties seized from the convicted persons by Court order. Or, it can create a proactive fund, engaged in soliciting, collecting, and allocating contributions from governments, international organizations, corporations, and individuals.

Considering the nature of the crimes within the jurisdiction of the Court, the Trust Fund will be dealing with situations of enormous scale and equally large needs of its beneficiaries. Realistically, it should not be expected that the Trust Fund will be able to fully

funds have been created for the benefit of victims of human rights violations. Of the 195 general trust funds currently under the responsibility of the Secretary-General of the United Nations, several are dedicated to humanitarian assistance and some to victims of major human rights violations. For instance, the *United Nations Voluntary Fund for Victims of Torture* and the *United Nations Voluntary Trust Fund on Contemporary Forms of Slavery* were both established by General Assembly Resolutions for the benefit of victims of certain human rights violations; See General Assembly Resolution 36/151 of 16 December 1981, and General Assembly Resolution 46/122 of 17 December 1991.

Other significant international examples include: the establishment of the *United Nations Compensation Commission* and the *United Nations Compensation Fund* by the UN Security Council in 1991 to handle and pay compensation for losses, damages and injury resulting directly from Iraq's invasion and occupation of Kuwait (SC Res. 687 of 3 April 1991); the Dayton Peace Agreement envisaged the establishment of a *Refugees and Displaced Persons Property Fund* (although this fund has not yet been created because of lack of funding) (General Framework Agreement for Peace in Bosnia and Herzegovina, initialed in Dayton, Ohio, 21 November 1995, signed in Paris, 14 December 1995, ILM 75 (1996), Annex 7, art. 13). The establishment of a trust fund has also been recommended for the proposed international criminal tribunal for Cambodia to try Khmer Rouge officials for crimes against humanity and genocide committed from 17 April 1975 to 7 January 1979 (Report of the Group of Experts for Cambodia, established pursuant to General Assembly Resolution 52/135. U.N. Doc. S/1999/231 of 16 March 1999, Recommendation 9). Unsuccessful proposals were made for establishment of a fund for victims in the negotiations leading to the adoption of the statute of the International Criminal Tribunal for the former Yugoslavia (The National Alliance of Women's Organizations for instance proposed that the Security Council establish a fund for the benefit and compensation of victims of war crimes and crimes against humanity).

At the national level, there are some examples of funds established for the benefit of victims of human rights violations. According to the United Nations Transitional Administration in East Timor (UNTAET) Regulation On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, a Trust Fund may be established by decision of the Transitional Administrator in consultation with the National Consultative Council for the benefit of victims of crimes within the jurisdiction of the panels, and of the families of such victims. The panels may order money and other property collected through fines, forfeiture, foreign donors or other means to be transferred to the Trust Fund. The Trust Fund shall be managed according to criteria to be determined by an UNTAET directive; see Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG.2000/15, 6 June 2000, Section 25.

assist all victims within the jurisdiction of the Court and their families. At the same time it is extremely important the Trust Fund will be given enough flexibility to be able to utilize its limited sources in the most efficient way.

The ultimate status of the Trust Fund and its relationship with the Court will depend on the chosen administering authority. Administration by the Court would bring the Trust Fund in close association with the Court while administration by the Secretary-General of the United Nations or the United Nations Development Programme might increase its independence.

2. THE TRUST FUND VIS-À-VIS THE ROME STATUTE

2.1 The Trust Fund and the Court

Although it is provided for in the Rome Statute, the Trust Fund is by and large an entity on its own. The Trust Fund does not have any direct link with any organs of the Court, and

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no provision in the Rome Statute gives the Court power to manage or utilize the Trust Fund.³ The Rome Statute merely describes how the Court can make contributions to the Trust Fund by way of reparations, and fines and forfeiture (art. 75 and art. 79). Similarly, the Trust Fund is outside the basic budgetary framework of the Court and the Assembly of States Parties set out in part 12 of the Rome Statute. The Court's funding and the

Trust Fund are separate. Thus, voluntary contributions to the Court's funding, in accordance with article 116, are not to be confused with possible voluntary contributions to the Trust

³ During the drafting of the Rules of Procedure and Evidence unsuccessful proposals were made to allow the Court to utilize the Trust Fund. For instance, a discussion paper proposed by the Coordinator on Rules of Procedure and Evidence related to Part 6 of the Statute proposed that the "Court may, at any time before it has made a determination relating to reparations, order the Trust Fund to provide interim relief to victims, such as medical or psychological attention or other humanitarian assistance"; UN Doc. PCNICC/1999/WGRPE/RT.5/Rev.1/Add.3, Rule E.

Fund.⁴ Voluntary contributions to the Court are separate and will be subject to its own criteria.⁵

The nature of the Trust Fund is also very different from that of the Court. Being a trust fund it cannot incur obligations unless the necessary cash has been received. By contrast, the Court will operate, and thereby entail financial obligations, whether or not all assessed contributions and other funds have been received.

The Court's funding and the Trust Fund are separate. Voluntary contributions to the Court's funding are not to be confused with possible voluntary contributions to the Trust Fund. Voluntary contributions to the Court are separate and will be subject to its own criteria.

Despite this structural separation, the Court's policies and operation will necessarily have a bearing on the Trust Fund. For example, the identification of the Trust Fund beneficiaries depends upon the Court's actions. The Court is able to contribute funds to the Trust Fund and order that any award for reparations be made through the Trust Fund. Furthermore, the Trust Fund will naturally take into account assistance already provided by the Court to victims, such as assistance provided by the Registry and the Victims and Witnesses Unit.⁶

2.2 The Trust Fund and the Assembly of States Parties

The Assembly of States Parties is entrusted by article 79 of the Rome Statute with establishing the Trust Fund. This is a mandatory task which should be carried out timely and sufficiently. Nonetheless, the legislative history of article 79 suggests that the Assembly of

⁴ According to article 116 of the Rome Statute “[w]ithout prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties”.

⁵ The term Trust Fund in this paper will be limited to the Trust Fund for Victims established under article 79. The term will not refer to a possible trust fund for the Court, established in accordance with article 116.

⁶ According to article 43.6, “[t]he Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence”. On the Victims and Witnesses Unit see “The International Criminal Court – The Victims and Witnesses Unit (art. 43.6 of the Rome Statute)”, PICT Discussion Paper #1, by Thordis Ingadottir, Françoise Ngendahayo, Patricia Viseur Sellers, March 2000.

States Parties might eventually delegate the task, for instance to the U.N. Secretary-General.⁷

According to the same article, the Assembly of States Parties shall also determine the management criteria of the Trust Fund. This would include decisions on funding, utilization, and administration.⁸ Of course, all decisions regarding the Trust Fund's functioning and activities will have to be consistent with the norms and principles of the Rome Statute, and the Trust Fund must be structured in such a way as to being capable of benefiting victims accordingly, using resources in the most effective way.⁹

To facilitate prompt establishment of the Trust Fund and adequate criteria, the Preparatory Commission for the International Criminal Court should consider it within its mandate to prepare proposals for the establishment and management of the Trust Fund.

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3. BENEFICIARIES

According to article 79 of the Rome Statute, the beneficiaries of the Trust Fund shall be the *victims of crimes within the jurisdiction of the Court, and the families of such victims*.¹¹

⁷ *Infra* p. 31.

⁸ See Secretary-General's Bulletin: Establishment and Management of Trust Funds, ST/SGB/188, 1 March 1982, rule 17.

⁹ Black's Law Dictionary, 6th Edition 1990, at 1508.

¹⁰ This task is not explicitly enumerated in the mandate of the Preparatory Commission. However, the Preparatory Commission has the mandate of preparing proposals for practical arrangements for the establishment and coming into operation of the Court, and its itemized list of draft texts is stipulated as "including". This suggests that the Preparatory Commission can prepare draft texts other than those that are explicitly enumerated in its mandate. Furthermore, the Preparatory Commission shall prepare draft texts of the Court's Financial Regulations and rules; See Resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

¹¹ Earlier proposals on the Trust Fund contained much broader definitions, defining beneficiaries as victims of crimes. For instance, the draft statute prepared by the International Law Commission contained a proposal for "a trust fund established by the Secretary-General of the United Nations for the benefits of victims of crime"; Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May-22 July, 1994, UN Doc. G.A., 49th Sess., Supp. No.10, A/49/10, 1994, art. 47. Similarly, the Preparatory Committee Draft Statute

Importantly, the Rome Statute establishes a link between the judicial functions of the Court (identification of crimes and punishment of criminals) and the activities of the Trust Fund (assistance to victims of such crimes and their families).

The definition of the Trust Fund's beneficiaries is twofold. Firstly, who are *victims and the families of such victims*, and secondly, what constitutes *crimes within the jurisdiction of the Court*.

3.1 Victims and the Families of Such Victims

The Rome Statute includes no definition of the term "victim".¹² The Draft Rules of Procedure and Evidence adopted by the Preparatory Commission for the International Criminal Court define victims as:

- (a) ... 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 organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes";¹³

The reason for the inclusion of natural persons in the definition of victims is self-evident. Importantly, the definition includes victims regardless of whether they appear before the

The definition includes victims regardless of whether they appear before the Court. Unlike the Court's Victims and Witnesses Unit, the beneficiaries of the Trust Fund will therefore include both groups.

proposed "[as a matter of priority] a trust fund [established by the Secretary-General of the United Nations] or [administered by the Court] for the benefit of victims of the crime [and their families]"; see Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute & Draft Final Act*, UN Doc. A/Conf.183/2/Add.1, 1998, art. 79.

¹²During the drafting of the Rome Statute, for the purpose of the interpretation of the terms "victims" and "reparations", references were made to definitions contained in the text of article 44, para. 4 of the Statute, article 68, para. 1, the UN Victim Declaration and examples in paragraphs 12 to 15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, see footnote made by the Working Group on Procedural Matters at the Rome Conference, A/CON.183/C.1/WGPM/L.63/Rev. 1.

¹³ See Report of the Preparatory Commission for the International Criminal Court, Addendum, Part I, Finalized draft text of the Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1, 2 November 2000, rule 85. The Draft Rules of Procedure and Evidence will be submitted to the Assembly of States Parties for adoption.

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Court. Unlike the Court's Victims and Witnesses Unit, the beneficiaries of the Trust Fund will therefore include both groups (the VWU shall assist ... witnesses, *victims who appear before the Court* and others who are at risk on account of testimony given by such witnesses, art. 43.6).

In addition to natural persons, crimes under the jurisdiction of the Court can be committed against legal persons.¹⁴ Accordingly, the definition proposed in the Draft Rules of Procedure and Evidence includes legal entities as possible victims.¹⁵ In cases where the Court orders reparations to legal entities and such reparations to be paid through the Trust Fund, the Trust Fund would need to be able to disburse them accordingly, including to legal entities.¹⁶

According to article 79, the Trust Fund shall not only benefit victims of crimes within the jurisdiction of the Court, but it will also benefit *the families of such victims*. The

The addition of victims' families broadens the Trust Fund's mandate beyond that of the Court, but it is not supererogatory. The Trust Fund and the Court pursue complementary, but profoundly different objectives. The interests and motivations of victims and their families using the Trust Fund is different from victims participating in criminal trials and eventual reparations proceedings.

addition of victims' families broadens the Trust Fund's mandate beyond that of the Court, but it is not supererogatory.¹⁷ The Trust Fund and the Court pursue complementary, but profoundly different objectives. The interests and motivations of victims and their families using the Trust Fund is different from victims participating in criminal trials and eventual reparations proceedings. Moreover, because the Trust Fund does

not have a judicial nature, the broader definition of its beneficiaries will not have any effect on the Court's work.

¹⁴Article 8 on war crimes includes acts of "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives, see article 8 para. 2, b(xiii) and e(iv).

¹⁵The inclusion of the term was debated in the Preparatory Commission for the International Criminal Court, as various states wanted to limit the definition to natural persons.

¹⁶ *Infra* p. 15.

¹⁷ In the Preparatory Committee's draft statute this term was included square-bracketed, i.e. as an option. Article 68 of the Rome Statute refers only to "victims and witnesses". The provision in article 75 of the Rome Statute only uses the term "victims". However, at the Conference in Rome a footnote was added that the term "refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victim's families and successors. See Working Paper of the Committee of the Whole of the Rome Conference, A/CONF/183/C.1/WGPM/L.63/Rev.1, footnote 1.

In light of its limited resources, the Trust Fund will be forced to prioritize its assistance. The fact that families of victims can also benefit from the fund would suggest that natural persons should be given priority over legal persons, as the latter can logically have no family members. A similar hierarchy has for instance been applied by the United Nations Compensation Commission.¹⁸ It could be argued that such prioritizing is not only suggested by humanitarian reasons, but is also necessary as the Trust Fund is not likely to be able financially to assist all victims in need.

3.2 Crimes within the Jurisdiction of the Court

The Trust Fund shall benefit victims of *crimes within the jurisdiction of the Court*, and of the families of such victims. “Crimes within the jurisdiction of the Court” are defined in article 5 of the Rome Statute as the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁹ The Court’s jurisdiction over these crimes shall be exercised in *accordance with this Statute*. Thus, it is limited to crimes committed after the entry into force of the Statute (art. 11), and to crimes occurring on the territory of a state party to the Rome Statute, or committed by a person who is a national of a state party to the Rome Statute, or if a non-member state has accepted the Court’s jurisdiction (art. 12).²⁰ Furthermore, the Court’s jurisdiction is complementary to national criminal jurisdictions (art. 1). The nationality or residence of the victims does not affect the Court’s jurisdiction. Victims of crimes within the jurisdiction of

It is undeniable that the operation of the Trust Fund in a given case ultimately depends upon the findings of the Court, it is also evident that it could take years before the Court could convict the perpetrator of a given crime, while his/her victims might need assistance much sooner. Policies and guidelines therefore will need to be adopted. Initiation of investigation or the indictment by the Prosecutor might be events that could trigger assistance by the Trust Fund.

¹⁸ Before the United Nations Compensation Commission, individuals were given a priority in the distribution of payments. An opposite procedure was applied by the Iran-USA Claims Tribunal, where claims by legal entities were given priority over claims by individuals.

¹⁹ The crime of aggression can be included in the future as the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations; see the Rome Statute, art. 5, para. 2.

²⁰This does not apply if a situation is referred to the Prosecutor by the Security Council.

the Court can benefit from the Trust Fund regardless of whether they are citizens of, or residents in, States Parties.²¹

However, if it is undeniable that the operation of the Trust Fund in a given case ultimately depends upon the findings of the Court, it is also evident that it could take years before the Court could convict the perpetrator of a given crime, while his/her victims might need assistance much sooner. Policies and guidelines therefore will need to be adopted. Initiation of investigation or the indictment by the Prosecutor might be events that could trigger assistance by the Trust Fund.²² The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power supports a broad application, as it states that a person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted.²³

4. CONTRIBUTIONS

The Trust Fund is outside the basic budgetary framework of the Court and the Assembly of States Parties set out in part 12 of the Rome Statute. The Court's funding and the Trust Fund are separate. Thus, the Court's own trust fund, created by article 116 of the Rome Statute is not to be confused with the Trust Fund established by article 79.

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The Rome Statute disciplines only funding of the Court

²¹ It is notable in this respect, that as the United Nations Compensation Commission was established based on state responsibility for injury to aliens, victims who are nationals of Iraq cannot file claims before the commission.

²² At the United Nations Voluntary Fund for Victims of Torture "priority is given to aid to victims of violations by States in which the human rights situations has been the subject of resolutions or decisions adopted by either the General Assembly, the Economic and Social Council or the Commission on Human Rights"; see Resolution 36/151 of 16 December 1981.

²³ See the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 2, principle 2. In some trust funds these victims have been thought of as the ones especially in need of aid. The UN Voluntary Fund for Victims of Torture assists these victims, and the fund financially assists legal services helping victims collecting evidence and instituting proceedings against their perpetrators.

²⁴ Part 12 of the Rome Statute on Financing, stipulates the funds of the Court and the Assembly of States Parties as assessed contributions made by States Parties (art. 115.a), and funds provided by the United Nations subject to the approval of the General Assembly (art. 115.b). In addition the Court may receive voluntary contributions, in accordance with relevant criteria adopted by the Assembly of States Parties (art. 116).

and of the Assembly of States Parties. The Statute touches upon the Trust Fund's financing only insofar as it originates from the Court, such as in the case of awards of reparations to be made through the Trust Fund (art. 75), and money and other property collected through fines or forfeiture to be transferred to the Trust Fund (art. 79.2). This does not exclude the possibility that the Trust Fund might be financed from other sources.

Within the limits set by the purpose and fundamental principles of the Rome Statute, the Assembly of States Parties has carte blanche in this regard. Because of the problems the Court will likely experience in securing payments of fines, forfeiture and reparations, and their likely inadequacy to fully compensate and assist all victims, alternative sources of financing not listed in the Rome Statute need to be considered. To maintain flexibility the list of alternative sources should be kept open.

Because of the problems the Court will likely experience in securing payments of fines, forfeiture and reparations, and their likely inadequacy to fully compensate and assist all victims, alternative sources of financing not listed in the Rome Statute need to be considered. To maintain flexibility the list of alternative sources should be kept open.

4.1 Fines and Forfeiture (art. 79.2)

Article 79, providing for the establishment of the Trust Fund, is in Part 7 of the Rome Statute dealing with Penalties. Under article 77.2, in addition to imprisonment, the Court may order fines and forfeiture of proceeds, property, and assets derived directly or indirectly from the adjudged crime, without prejudice to the rights of *bona fide* third parties. Fines will be collected and property will be forfeited by States Parties in accordance with the procedure of their national law, and those funds will be transferred to the Court (art. 109). The Court may eventually order money and any other property collected therefrom to be transferred to the Trust Fund (art. 79.2).²⁵

²⁵ In addition, in case of offenses against the administration of justice, the Court may impose a term of imprisonment or a fine in accordance with the Rules of Procedure and Evidence (art. 70.3). Similarly, in case of misconduct before the Court, the Court may sanction persons with a fine (art. 71).

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The significance of this source of financing will largely depend on the amount of fines imposed and collected.²⁶ In determining the sentence, the Court shall take into account such factors as the gravity of the crime and the individual circumstances of the convicted person (art. 78.1).²⁷ According to the Draft Rules of Procedure and Evidence, the Court shall, in its determination whether to order a fine, also give due consideration to the financial capacity of the convicted person (rule 146.1). In addition, the Draft Rules of Procedure and Evidence fix a maximum fine which can be imposed by the Court. In particular, “[u]nder no circumstances may the total amount exceed 75 per cent of the value of the convicted person’s identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted persons and his or her dependants” (rule 146.2).

Once the Court has ordered fines or forfeiture, it may or may not decide to transfer them to the Trust Fund. However, there are strong arguments in favor of using these funds solely for the benefit of victims and not to support operational costs of the Court.

Once the Court has ordered fines or forfeiture, it may or may not decide to transfer them to the Trust Fund (the Court “...may order...”, art. 79.2). However, there are strong arguments in favor of using these funds solely for the benefit of victims and not to support operational costs of the Court. First, the legislative history of the article supports such interpretation.²⁸ Second, funds deriving from fines and

²⁶ The international criminal tribunals for the former Yugoslavia and Rwanda offer no guidance, as they do not have provisions for the imposition of fines in their statutes.

²⁷ See also the Draft Rules of Procedure and Evidence, *supra* note 13, rule 145: Determination of sentence.

²⁸ Article 79, providing for the establishment of the Trust Fund, is in Part 7 of the Rome Statute (Penalties). In earlier drafts the Trust Fund was part of the provision on fines collected by the Court. Both the International Law Commission Draft Statute and the Preparatory Committee Draft Statute indicated that fines could either be transferred to a trust fund, to the State of which the victims were nationals, or to the Registry to defray the costs of the trial. Conversely, during the negotiations in Rome, preference was given to using the funds collected through fines and forfeiture to benefit victims through a trust fund and other options were accordingly dropped from the text, see Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court, *supra* note 11, art. 47 and Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, *supra* note 11, art. 79. In 1996, the Preparatory Committee on the Establishment of an International Criminal Court debated whether, “...the International Criminal Court should concern itself with the collection of pecuniary sanctions, other than for the purpose of compensating victims”; UN Doc. G.A., 51st Sess., Supp. No 22, A/51/22, 1996, footnote 69, at 228. See also Rolf Einar Fife, Penalties, *in The International Criminal Court - The Making of the Rome Statute* (Roy S. Lee ed., 1999), 319, at 343.

forfeiture are not included as sources of the Court's funding listed in article 115.²⁹

According to the Draft Rules of Procedure and Evidence, before making an order pursuant to article 79, paragraph 2, a Chamber may request the representatives of the Fund to submit written or oral observations (rule 148). Neither the Rome Statute nor the Draft Rules of Procedure and Evidence give any direction on how eventual money and other property collected through fines or forfeiture transferred to the Trust Fund is to be used. In its observation to the Court, the Trust Fund could make such suggestions, though the Court should have the primary responsibility in determining the allocation. This determination should be contained in the decision concerning transferring fines and forfeiture to the Trust Fund. The Trust Fund should be allowed to determine the destination and use of such funds only when the Court declines to do so. Needless to say, clear policies on the allocation of such fines or forfeiture between cases will have to be adopted. Indeed, under the Rome Statute funds are not necessarily earmarked exclusively for the benefit of the victims of the case from which they originate.

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4.2 Reparations (art. 75.2)

Under article 75.2 of the Rome Statute, once the Court has ordered the convicted person to make reparations, it may also order the award of reparations to be made through the Trust Fund. The actual use of the Trust Fund as a means to transfer reparations from the convicted person to victims is only optional. Reparations are transferred to the Court first and, under the Statute, the Court is free to decide whether to transfer them directly to the victims or to use the Trust Fund.

²⁹Italy has proposed that money and other property collected through fines and forfeitures transferred to the Court by States Parties in accordance with article 109 can also be used to cover the costs to be borne by the Court for the enforcement of sentences in accordance with Rule 208 of the Rules of Procedure and Evidence and with articles 100 and 103,4; see Proposal submitted by Italy on regulation 7 of the draft financial regulations contained in document PCNICC/2000/WGFIRR/L.1, UN Doc. PCNICC/2000/WGFIRR/DP.34, 1 December 2000.

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The wording of article 75.2 clearly indicates that reparations can be awarded by the Court's order *through* rather than *into* the Trust Fund.³⁰ The difference is momentous, for

The wording of article 75.2 clearly indicates that reparations can be awarded by the Court's order through rather than into the Trust Fund. The difference is momentous, for the use of the preposition "through" implies that the Trust Fund never acquires proprietary rights to compensations awarded for the benefit of victims. It merely acts as an intermediary and is bound to disburse the reparations in a manner decided by the Court.

the use of the preposition "through" implies that the Trust Fund never acquires proprietary rights to compensations awarded for the benefit of victims. It merely acts as an intermediary and is bound to disburse the reparations in a manner decided by the Court. Similarly, the Trust Fund is not to be obliged to make an award of reparations *from* the Trust Fund, that is to say it does not have to use

other funds to supplement insufficient awards of reparations collected from the convicted person.

It is difficult to predict the amount of reparations which will be eventually channeled through the Trust Fund for several reasons. First, there are very few precedents for guidance. An order of reparations against individuals is a novelty before international criminal courts and the ICC predecessors have not made orders of reparations to victims.³¹ Second, it is at

³⁰ Indeed, the Preparatory Committee's Draft Statute did authorize the Court to order that the award of reparations be made *into* the Trust Fund. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, *supra* note 11, art. 73. However, the French text of article 75.2 leaves no room for doubt. It reads: "La Cour peut rendre contre une personne condamnée une ordonnance indiquant la réparation qu'il convient d'accorder aux victimes ou à leurs ayants droit. Cette réparation peut prendre notamment la forme de la restitution, de l'indemnisation ou de la réhabilitation. Le cas échéant, la Cour peut décider que l'indemnité accordée à titre de réparation est versée *par l'intermédiaire* du Fonds visé à l'article 79."

³¹ The judges from the International Criminal Tribunal for the former Yugoslavia agree that the Security Council should consider creating a body to compensate the victims of crimes under ICTY jurisdiction, but do not see a role for the tribunal in handling the issue; See Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General, UN Doc. S/2000/1063, Annex. Similarly, the judges from the International Criminal Tribunal for Rwanda support the principle that the victims of the crimes over which the tribunal has jurisdiction should be compensated for the losses or injuries they have sustained, but do not see a role for the tribunal in handling the issue. However, the judges believe that the ICTR may be vested with the power of ordering compensation payments from a trust fund to victims who appear as witnesses in trials before it, but that such a measure would require the amendment of the tribunal's statute by the Security Council; See Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda, addressed to the Secretary-General, UN Doc. S/2000/1198, Annex. The United Nations Compensation Commission in this sense offers little guidance, since it was established to exact reparations from the State of Iraq and not from its leader or any other officers. Since 1992, the UNCC has received approximately 2.6 million claims seeking compensation in excess of \$300 billion. As of January 2001 the fund has been able to pay \$11 billion. Judgments in human rights cases in national courts against individuals have reached billion of

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the Court's discretion whether to order reparations (the Court "may make an order", art. 75.2). Third, if the Court does make such an order, the Draft Rules of Procedure and Evidence propose that the award of reparations should be made directly to victims and the Trust Fund to be used only when such transfer is impossible or impracticable.³² Fourth, any reparations are contingent upon the ability of a convicted person to pay. Judging from the experience of the international criminal tribunals for the former Yugoslavia and Rwanda, collecting reparations might be wishful thinking since almost all of the defendants before the tribunals have been declared indigent.³³ Finally, if assets do exist, freezing and collecting them might become a difficult task.

The Court solely determines the award of reparations and the Trust Fund is not given any role in the process. According to article 75.3 of the Rome Statute: "Before making an order under this article [i.e. an order to repair and/or to award reparations through the Trust Fund], the Court may invite and shall take into account of representations from or on behalf of the convicted person, victims, other interested persons or interested states". Surprisingly, the Trust Fund is not included in this list, even though it potentially could provide valuable insight in this area.

The Court solely determines the award of reparations, and the Trust Fund is not given any role in the process Surprisingly, the Trust Fund is not included in this list of entities the Court can consult While the Rome Statute will not likely be amended for years to come, there is still time to fill this gap in the Rules of Procedure and add the Trust Fund to the list of observers.

The Draft Rules of Procedure and Evidence detail the procedure for reparations to victims, either when awarded upon request by victims or on the motion of the Court (rules 94-99). The Draft Rules stipulate the procedures to be followed for the filing of claims, publication of reparations proceedings, and assessment of reparations. As in the case of the

dollars. *In re Estate of Marcos*, a class action on behalf of an estimated 10,000 victims, the jury awarded the plaintiffs \$1.2 billion in exemplary damages and \$766 million in compensatory damages; see Dinah Shelton, *Remedies in International Human Rights Law*, p. 80-90. Recently, a jury in federal court in Manhattan, NY, ordered Radovan Karadzic, the former Bosnian Serb wartime leader, to pay \$4.5 billion in damages to victims of rape, torture and genocide; see *Doe v. Karadzic*, No. 93 CIV 0878, (September 25, 2000, S.D.N.Y.).

³² *Infra* p. 17.

³³ In the case of the international criminal tribunals for former Yugoslavia and Rwanda the accused can request the assignment of a counsel without payment by him if he does not have sufficient means to pay for legal representation. Most indictees have fulfilled the tribunals' requirements and done so. See the Statute of the International Criminal Tribunal for the former Yugoslavia, art. 21, the Statute of the International Criminal Tribunal for Rwanda, art. 20, and the tribunals' Directives on Assignment of Defence Council.

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Rome Statute, the Draft Rules do not include the Trust Fund in the list of entities which can make observations on reports of experts appointed by the Court to assist in determining the scope and extent of any damage, loss and injury to, or in respect of, victims and to suggest various options concerning the appropriate types and modalities of reparations. Again, the Trust Fund might have an interest in the matter. The omission is also striking because before making an order pursuant to article 79, paragraph 2, a Chamber may request the representatives of the Trust Fund to submit written or oral observations (rule 148). While the Rome Statute will not likely be amended for years to come, there is still time to fill this gap in the Rules of Procedure and add the Trust Fund to the list of observers.

Once the Court has ordered the convicted person to make reparations, awards might be made through the Trust Fund. In the case of awards on an individual bases, the Draft Rules of Procedure and Evidence indicate a preference for direct transfer to the victims.³⁴ The Draft Rules mandate also that the award for reparations eventually deposited in the Trust

In the case of awards on an individual bases, the Draft Rules of Procedure and Evidence indicate a preference for direct transfer to the victims. Conversely, when the Court awards reparations on a collective basis, the Draft Rules of Procedure and Evidence privilege the use of the Trust Fund.

Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.³⁵ The Trust Fund could easily comply with this by establishing sub-trust funds earmarked for each victim.

Conversely, when the Court awards reparations on a collective basis, the Draft Rules of Procedure and Evidence privilege the use of the Trust Fund.³⁶ As before, the Trust Fund would have to disburse the awards of reparations strictly in accordance with the Court's order. Moreover, in the case of collective reparations awarded to intergovernmental, international or national organizations (and only in this case), the Draft Rules of Procedure provide that the Court should consult with the Trust Fund, which should

³⁴ According to rule 98.2 “[t]he Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individually awards directly to each victim.” See Draft Rules of Procedure and Evidence, *supra* note 13.

³⁵ *Id.*

³⁶ According to rule 98.3 “[t]he Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate”. See Draft Rules of Procedure and Evidence, *supra* note 13.

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approve the receiver.³⁷ Preferably, the Court should involve the Trust Fund early on in the process of selection.

As the experience of the United Nations Compensation Commission demonstrates, it is unlikely that sufficient funds could be exacted from convicted persons to pay all claims.³⁸ Fines and forfeiture transferred to the Trust Fund could provide additional funding for these awards. If money and any other property collected through fines or forfeiture are eventually to be used also to supplement inadequate reparations that victims of crimes obtain from the convicted person (i.e. inadequate because assets could not be seized or because they are insufficient), then the Court must have full control of these resources.

In addition, it might be easier for the Court to seize fines and forfeited property or assets than to get reparations. The Rome Statute provides that upon warrant of arrest or summons, the Court might ask States Parties to identify, trace and freeze proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, should the indictee be found guilty (art. 57.3.e and 93.1.k).³⁹ However, under the Statute the Court cannot take similar provisional measures with regard to reparations until it has actually convicted the accused person.⁴⁰ This makes the collection of forfeited assets and property more likely than that of reparations. This is why funds obtained through article 79.2 should also be used to finance awards of reparations.

³⁷ *Id.*, rule 98.4.

³⁸ This is even more true given that while UNSC Resolution 687 established State responsibility, in the case of the ICC only individual responsibility applies. Since 1991, the United Nations Compensation Commission has received approximately 2.6 million claims seeking compensation in excess of \$300 billion. As of January 2001 the fund has been able to pay \$11 billion. As it was clear that available funding would not be enough to pay all claims, the United Nations Compensation Commission adopted the Priority of Payment and Payment Mechanism Guiding Principles, UN Doc. S/AC.26/Dec. 17 (1994).

³⁹ Of course, assistance in the identification and tracing of assets by States which are not party to the Rome Statute would depend on their national law. E.g., the U.S. Statute on International Judicial Assistance provides that the "...district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal", 28 U.S.C. §1782.

⁴⁰ "In exercising its power under [article 75: Reparations to Victims], the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1"; art. 75. para. 4. See also the Draft Rules of Procedure and Evidence, *supra* note 13, rule 99: Cooperation and protective measures for the purpose of forfeiture under articles 57, paragraph 3 (e) and 75, paragraph 4.

Yet, even when funds deriving from fines and forfeiture are drawn, it is still unlikely that there will be sufficient resources to pay all claims. Criteria on priority of payments should be set. The Court will inevitably have the primary responsibility in doing so, as it has to decide priorities between awards distributed directly to victims as well as between those and the ones to be made through the Trust Fund. Various factors could be taken into account, such as the kind of injury to be repaired, or the nature of the claimant (natural or legal person).⁴¹ Another issue to be considered is whether to resort to installment payments for all or only certain groups of victims.⁴²

4.3 Voluntary contributions

Fines, forfeiture, and reparations ordered by the Court are likely to be minimal sources of financing of the Trust Fund. Besides, their flow is totally under the discretion of the Court

Fines, forfeiture, and reparations ordered by the Court are likely to be minimal sources of financing of the Trust Fund. Besides, their flow is totally under the discretion of the Court and is contingent upon the convicted person's ability to pay as well as successful collection. Voluntary funding could strengthen the Trust Fund and its capacity to assist victims.

and is contingent upon the convicted person's ability to pay as well as successful collection. Voluntary funding could strengthen the Trust Fund and its capacity to assist victims. Such additional funding is also highly pertinent, considering that the Court itself can accept voluntary funding from governments, international organizations, individuals, corporations, and other entities (art. 116).⁴³

⁴¹ For instance, in the UNCC compensation of claims under categories "A" (Claims for departure), "B" (personal injuries), and "C" (damages up to \$100,000) has been given priority over State and corporate claims. UNCC Dec. No. 1, Criteria for Expedite Processing of Urgent Claims, UN Doc. S/AC.26/1991/1 (1991). The first award paid went to category B.

⁴² The UNCC made pro rata payments to Governments as funds became available, *id.*

⁴³ A proposal on voluntary funding to the Trust Fund was submitted by France during the drafting of the Rules of Procedure and Evidence. According to the proposal "[t]he Fund established pursuant to article 79, paragraph 1, may receive voluntary contributions from Governments, international intergovernmental or non-governmental organizations, any association and any individuals or corporations, in accordance with the same criteria as those adopted by the Assembly of States Parties under article 116."; see Proposal submitted by France concerning part 7 of the Rome Statute of the International Criminal Court, UN Doc. PCNICC/1999/WGRPE(7)/DP.1, 19 November 1999. See also proposal submitted by France concerning regulation 6 of the draft financial regulations: "This fund shall be funded by: ... (c) Voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties"; see Proposal submitted by France concerning regulation 6 of the draft financial regulations contained in document PCNICC/2000/WGRIRR/L.1, UN Doc. PCNICC/2000/WGFIRR/DP.33, 30 November 2000. See also proposal submitted by Italy: "The Trust

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Although it is impossible to estimate income from voluntary contributions, it is not unlikely that it might be considerable.⁴⁴ Among trust funds dealing with challenges similar to those the Trust Fund of the Rome Statute might be facing, the UNDP Trust Fund for Rwanda is worth mentioning. Created in 1995, that fund has received, as of 30 September 1999, \$119,536,758. The Netherlands and Japan are by far the biggest donors, with \$55 million and \$22 million respectively.⁴⁵ Among trust funds with competencies which might eventually overlap with those of the Trust Fund, the UN Voluntary Fund for Victims of Torture receives voluntary contributions from governments, non-governmental organizations and private individuals. In 1998, it disbursed grants totaling \$4.1 million to 114 projects by 105 organizations, in 1999 \$5.1 million to about 130 organizations, and in 2000 about \$7 million.⁴⁶ The number of States contributing to this fund rose from five in 1982 to 14 in 1990, and 37 in 1998. As of September 2000, the voluntary fund for the International Criminal Tribunal for the former Yugoslavia had received \$30.2 million, and that of Rwanda \$8 million.⁴⁷ Still, the voluntary funds for the ICTY and ICTR are more akin to the trust fund of the International Criminal Court itself (art. 116) rather than the Trust

Fund ... shall be funded by: (a) Voluntary Contributions to the Fund pursuant to article 116"; see Proposal submitted by Italy on regulation 6 of the draft financial regulations contained in document PCNICC/2000/WGFIRR/L.1, UN Doc. PCNICC/2000/WGFIRR/DP.35, 1 December 2000. See for comparison the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery: "Funding shall be obtained by means of voluntary contributions from Governments, non-governmental organizations and other private or public entities", UN Doc. A/RES/46/12 (1991).

⁴⁴ During the biennium 1998-1999, total income for all general trust funds under the direct responsibility of the UN Secretary-General was \$495.6 million. Income of general trust funds for humanitarian activities was \$203.5 million; Financial report and audited financial statements for the biennium ended 31 December 1999 and Report of Board of Auditors, Volume I, UN Doc. A/55/5 (2000).

⁴⁵ The objective of the UNDP Trust Fund for Rwanda is to provide the donor community with an opportunity to contribute financial resources to Rwanda through the United Nations Development Programme for the purpose of assisting the government and the people of Rwanda in undertaking development and rehabilitation activities. The UNDP trust fund succeeded the Secretary General's Trust Fund for Rwanda, which was established in order to "finance humanitarian relief and rehabilitation programmes" (S/1994/1133); see UNDP Trust Fund for Rwanda and other financing modalities, Progress Report No. 15, UNDP 1999.

⁴⁶ Requests for assistance for victims of torture are constantly increasing. In 1996, more than \$5 million was requested from the Voluntary Fund for Victims of Torture; in 1998 this amount was \$6.8 million, in 1999 it was more than \$8 million, and in 2000 it was \$10 million; UN Doc. E/CN.4/2000/60.Add 1 of 24 March 2000, UN Doc. A/53/283 of 20 August 1998 and the High Commissioner for Human Rights, Press Release of 23 June 1999, available at www.un.org/news (Site last visited September 2000).

⁴⁷ See tables 1-4.

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Fund for the benefit of victims and their families, as they are generally used to finance the activities of tribunals rather than to assist victims.⁴⁸

While potentially considerable in amount, voluntary contributions are by their very nature highly volatile and tend to be emergency driven. The Trust Fund should be allowed to engage in negotiations with governments and other potential contributors. Direct negotiations with States Parties and Non-Parties is essential to obtain long-term voluntary pledges to ensure stability and greater effectiveness of the Trust Fund. The Trust Fund should also be able to negotiate *ex gratia* contributions with Governments. Under the Rome Statute only individuals can be held responsible for crimes.⁴⁹ However, while not legally responsible, States might nonetheless feel the moral obligation to contribute to the reparation of certain crimes (e.g. when the convicted person is a national of theirs, or when crimes have been committed under a previous government

While potentially considerable in amount, voluntary contributions are by their very nature highly volatile and tend to be emergency driven. The Trust Fund should be allowed to engage in negotiations with governments and other potential contributors.

⁴⁸ In 1999 and 2000 the ICTR's Trust Fund did support the Programme of Support Services to Witnesses and Potential Witnesses. The main objectives of the programme include ensuring physical security for the individual and his or her property; fostering physical and psychological rehabilitation by providing medical care; strengthening witnesses' and victims' ability to fend for themselves through legal assistance and advice; and providing witnesses with financial assistance to deal with basic needs for a limited period during the relocation process; see Status of the ICTR Trust Fund and Trust Fund Projects, Note by the Registrar, ICTR 2000.

⁴⁹ An unsuccessful proposal was advanced in Rome to include state responsibility for reparation to victims. The Preparatory Committee Draft Statute had a provision that "[b]The Court may also [make an order][recommend] that an appropriate form of reparations to, or in respect of victims, including restitution, compensation and rehabilitation, be made by a State: [-if the convicted person is unable to do so himself/herself; [and -if the convicted person was, in committing the offence, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority]]; c) [in any case other than those referred in subparagraph b), the Court may also recommend that States grant an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation].", see Report on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, *supra* note 11, art. 73. However, the Rome Statute does prescribe that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law"; art. 25.4. Furthermore, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states that "[w]here public officials or other agents acting in a official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims"; principle 11. Germany has paid almost \$100 billion in various forms of compensation and support to Jewish groups, the state of Israel and to Central European countries that Germany invaded during World War II.

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which has been overthrown).⁵⁰ Similarly, corporations might have interest in victims' redress and the Trust Fund might benefit from their contributions.⁵¹

If the Trust Fund is going to accept voluntary contributions, like this paper advocates,

If the Trust Fund is going to accept voluntary contributions...the Assembly of States Parties will need to adopt criteria establishing from whom donations can be accepted. It would also need to establish clear policies for the allocation of these contributions.

the Assembly of States Parties will need to adopt criteria establishing from whom donations can be accepted.⁵² It would also need to establish clear policies for the allocation of these contributions. Indeed, donors might want to earmark their contributions for the benefit of victims of certain cases, crimes, regions or for certain activities, as the experience of the ICTY and ICTR trust funds demonstrates.⁵³ Yet,

disproportionate earmarking might result in imbalances in the amounts disbursed by the Trust Fund to victims of different cases or situations. The Trust Fund needs clear policies and guidelines to avoid that, for it would be highly discriminatory and contrary to the

⁵⁰ According to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power "[w]hen compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to: (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization"; See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 2, principle 12. The final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, proposes that "[I]n the event that the party responsible for the violation is unable or unwilling to meet these obligations, the State should endeavour to provide reparation to victims who have sustained bodily injury or impairment of physical or mental health as a result of these violations and to the families, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of the violation. To that end, States should endeavour to establish national funds for reparation to victims and seek other sources of funds wherever necessary to supplement these."; see Civil and Political Rights, Including the questions of: Independence of the judiciary, administration of justice, impunity, The Right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, Annex, principle 18, UN Doc. E/CN.4/2000/62, 18 January 2000.

⁵¹ In a recent agreement, the German government and German companies agreed to contribute \$5 billion to compensate forced laborers from the Nazi era; see *The New York Times*, "Germans Sign Agreement to Pay Forced Laborers of Nazi Era", July 18, 2000.

⁵² See for instance the policies on acceptance of pledges in the Secretary General Bulletin: Establishment and Management of Trust funds, *supra* note 7, rule 17.c. See also proposals in *supra* note 43.

⁵³ During the early stages of the ICTY, 1994-1995, no voluntary contributions were earmarked. During 1996-1997, approximately one third of contributions were earmarked for specific projects. From 1998 to present day, the majority of contributions received have been earmarked for specific projects.

policies and aims of the Rome Statute. Assistance to victims in situation X and not in situation Y is not acceptable.

Finally, the criteria on voluntary contributions to the Trust Fund should be broader than those made to the Court's trust fund. Two considerations suggest this. First, while voluntary contributions to the latter might raise questions about the Court's ultimate independence and impartiality, those to the former, because they will eventually benefit only victims, do not. Second, if the Trust Fund will be administered outside the Court, this consideration is further eliminated.

The criteria on voluntary contributions to the Trust Fund should be broader than those made to the Court's trust fund.

4.4 Contributions to the Trust Fund from the Court's resources

The work of the Preparatory Commission for the International Criminal Court has raised the issue of whether the Court itself could or should provide additional funding to the Trust Fund. For instance, the Report of the Paris International Seminar on Victims' Access to the International Criminal Court recommended that "consideration ought to be given to allocating to the Fund a percentage of the assessed State Party contributions to the Court."⁵⁴ A French proposal for the Court's Rules of Procedure and Evidence contained a provision that "(X) per cent of the annual contributions of States Parties to the budget of the Court shall be transferred each year to the Fund established pursuant to article 79, paragraph 1."⁵⁵ Similarly, a French proposal for the Court's Financial Regulations contained a provision that "[e]ach year, the Assembly of States Parties shall allocate a portion of the Court's financial resources to the fund for victims referred to in article 79 of the Statute".⁵⁶

As ideal as it would be, linking the financing of the Court with that of the Trust Fund is problematic. First, the Court will require significant amounts of resources by itself.⁵⁷ To illustrate, in 1999 the costs of the International Criminal Tribunal for the former Yugoslavia was \$95.1 million, while in the same year that of the International Criminal Tribunal for

⁵⁴ See UN Doc. PCNICC/1999/WGRPE/INF/2, 6 July 1999, Recommendation D.

⁵⁵ Proposal submitted by France concerning part 7 of the Rome Statute of the International Criminal Court on penalties, UN Doc. PCNICC/1999/WGRPE(7)/DP.1, 19 November 1999, Rule 7.3.

⁵⁶ Proposal submitted by France concerning regulation 5 of the draft Financial Regulations contained in document PCNICC/2000/WGFIRR/L.1, UN Doc. PCNICC/2000/WGFIRR/DP.24, 28 November 2000.

⁵⁷ See "Financing of the International Criminal Court", PICT Discussion Paper #2, by Cesare Romano and Thordis Ingadottir, June 2000.

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Rwanda amounted to \$70.1 million. Because the Court will require large (and possibly larger) amounts to finance its core activities, and because securing such financing is by itself arduous (as the experience of the two ad hoc criminal tribunals demonstrates), the Trust Fund should not encumber the Court's budget. Second, the Rome Statute does not stipulate that funds for the Trust Fund should come from the funds of the Court or the Assembly of States Parties. Article 114 merely provides that "[e]xpenses of the Court and the Assembly of the States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court". Establishing compulsory funding to the Trust Fund from the Court's funds would transform States' contributions to the Trust Fund, which are in principle voluntary, into mandatory and assessable contributions, which goes against Part 12 of the Rome Statute.

Because the Court will require large amounts to finance its core activities, and because securing such financing is by itself arduous, the Trust Fund should not encumber the Court's budget.

Be that as it may, the Assembly of States Parties should be able to consider whether it should share some of the voluntary contributions the Court might receive under article 116 of the Rome Statute with the Trust Fund. Voluntary contributions to the Court are "additional funds" and are not to be considered funds of the Court and the Assembly of States Parties in the meaning of article 115.⁵⁸ Article 116 indicates that while core expenses of the Court are to be covered by States Parties' assessed contributions, voluntary contributions could be used for collateral activities such as those to be funded by the Trust Fund.⁵⁹

The Assembly of States Parties should be able to consider whether it should share some of the voluntary contributions the Court might receive under article 116 of the Rome Statute with the Trust Fund.

5. UTILIZATION

The Assembly of States Parties will have to address the question of how the Trust Fund shall be utilized. As noted before, the Rome Statute provides only one function for the

⁵⁸ Id.

⁵⁹ See proposal submitted by France that the Trust Fund "shall be funded by: ... (d) A portion of the Court's financial resources that the Assembly of States Parties may allocate to the fund on a regular

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Fund: that of eventual intermediary for the award of reparations. Yet, besides collected reparations, the Trust Fund may receive money collected through fines, forfeiture and as

Policies and guidelines have to be adopted on the use of money collected through fines, forfeiture and as proposed, voluntary contributions, including procedures for the selection, evaluation and monitoring of projects drawing on the Trust Fund. However, as there is no way to predict the situations the Trust Fund will be facing, nor the amount of its resources, it should be given great flexibility in how it will be utilized.

proposed, voluntary contributions. Policies and guidelines have to be adopted on their use, including procedures for the selection, evaluation and monitoring of projects drawing on the Trust Fund. However, as there is no way to predict the situations the Trust Fund will be facing, nor the amount of its resources, it should be given great flexibility in how it will be utilized. In addition, its role in each situation

will inevitably depend on the assistance provided by the Court, paid reparations from convicted persons or other parties, and humanitarian assistance provided by other organizations.⁶⁰ This paper suggests that the Trust Fund at least might use its resources for interim relief, legal assistance, and humanitarian aid through collective projects.

The Trust Fund at least might use its resources for interim relief, legal assistance, and humanitarian aid through collective projects.

5.1 Interim Relief

One of the possible roles of the Trust Fund is to assist victims *litis pendente*, in particular by providing interim relief.⁶¹ Years are likely to pass between the time crimes are

basis"; Proposal submitted by France concerning regulation 6 of the draft financial regulations, UN Doc. PCNICC/2000/WGFIRR/DP.33, 30 November 2000.

⁶⁰ Trust funds are not the only way through which victims of crimes might receive humanitarian assistance. For instance, from 1994 to 1998 the former Yugoslavia received \$2.4 billion in emergency assistance through UN Consolidated Inter-Agency Humanitarian Assistance Appeals; see <www.reliefweb.int/fts/fintrak.html>.

⁶¹ The Report on the international seminar on victims' access to the International Criminal Court noted that "regarding the Trust Fund ... provision of urgent interim relief, such as medical attention, for instance for victims such as those who contract AIDS or become pregnant as a result of rape, needed to be dealt with in the Rules of Procedure and Evidence and that standard of care afforded to victims and witnesses when under the protection of the Court shall be at least that afforded to accused persons"; UN Doc.PCNICC/1999/WGRPE/INF/2, p. 8. A discussion paper proposed by the Coordinator on Rules of Procedure and Evidence related to Part 6 of the Statute proposed that the "Court may, at any time before it has made a determination relating to reparations, order the Trust Fund to provide interim relief to victims, such as medical or psychological attention or other humanitarian assistance."; UN Doc. PCNICC/1999/WGRPE/RT.5/Rev.1/Add.3, Rule E.

committed and when victims might be awarded reparations (which requires a full trial, conviction, and the seizure of assets). Interim assistance might help victims sustain

The Trust Fund's activities are not judicial in nature and, furthermore, the Rome Statute does not give the Court the authority to allocate the Trust Fund's resources. Its assistance should therefore have no direct implications on the Court's potential future decisions regarding reparations to victims.

themselves, especially when expensive medical and/or psychological support is severely needed. As illustrated previously, the Trust Fund's activities are not judicial in nature and, furthermore, the Rome Statute does not give the Court the authority to allocate the Trust Fund's resources. Its assistance should therefore have no direct implications on the Court's potential future decisions regarding reparations

to victims.

Similarly, assistance should be complementary to and provided in close coordination with the Court's Victims and Witnesses Unit, which has the mandate of providing protective measures and security arrangements, counselling, and other appropriate assistance to witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses (art. 43.6). Only where the duties of the Victims and Witnesses Unit stop, should the Trust Fund step in.⁶² The Trust Fund should not take over duties of the Victims and Witnesses Unit, which enjoys more stable and secure existence, since it is incorporated in the budget of the Court differently from the Trust Fund.

5.2 Legal Assistance

Secondly, the Trust Fund should assist victims in obtaining *legal assistance* in the pursuit of reparations. Such assistance is to some extent provided by the Court. According to the Draft Rules of Procedure and Evidence, victims may receive financial assistance from the Registry to pay for common legal representation in the criminal proceedings.⁶³ However, legal assistance is not explicitly provided to victims requesting reparations. Usually, legal

Legal aid should be granted not only in proceedings before the Court itself, but also for any other proceedings in national fora aimed at obtaining reparations when the Court has declined doina so.

⁶² See "The International Criminal Court – The Victims and Witnesses Unit (art. 43.6 of the Rome Statute)", PICT Discussion Paper #1, by Thordis Ingadottir, Françoise Ngendahayo, Patricia Viseur Sellers, March 2000.

⁶³ "A victim or a group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance"; see Draft Rules of Procedure and Evidence, *supra* note 13, rule 90.5.

expenses incurred by victims for filing their claims and having them adjudicated are included in reparations. Nonetheless, the Trust Fund could fund legal assistance to individuals who wish to file claims but are unable to do so because they cannot afford the legal expertise to prepare them, or to defray legal costs for those who file claims and whose cases are pending.⁶⁴

Moreover, legal aid should be granted not only in proceedings before the Court itself, but also for any other proceedings in national fora aimed at obtaining reparations when the Court has declined doing so. Indeed, since the Rome Statute leaves the Court discretion to decide whether to order reparations, in those cases where proceedings result in conviction but the Court does not order reparations, victims should nonetheless receive help in pursuing remedial justice in national or regional human rights courts.

5.3 Humanitarian Assistance by Way of Collective Projects

Reasons of efficiency and effectiveness strongly suggest that the Trust Fund should,

Reasons of efficiency and effectiveness strongly suggest that the Trust Fund should, whenever possible, assist victims collectively rather than individually.

whenever possible, assist victims collectively rather than individually. Firstly, the Trust Fund will have limited resources, while there might be significant economies of scale involved in humanitarian assistance. There are some illustrious precedents. For example, the UN Voluntary Fund for Victims of Torture assisted about 60,000 victims and members of their families through its support to various collective projects in 1997.⁶⁵ Secondly, assistance on an individual basis might unduly overburden the Trust Fund and in fact drain its resources by imposing excessive administrative operations (e.g. filing of claims, evaluation etc.).

The advantage of collective assistance is that it can also reach unidentified victims who, due to their victimization and/or social situation, cannot claim their right to reparations through formal procedures. The Trust Fund's collective assistance activities could include

⁶⁴ The Report on the international seminar on victims' access to the International Criminal Court proposed that "[t]he Court may also order the Trust Fund to provide funds for legal assistance as well as other appropriate assistance during the trial". UN Doc. PCNICC/1999/WGRPE/INF/2, Rule F. The proposal was opposed as unacceptable by some states, arguing that the Trust Fund should only benefit victims and not lawyers. A statement in this respect was made by the United Kingdom at the 3rd session of the Preparatory Commission for the International Criminal Court. Argentina, the Netherlands and Senegal also opposed the proposal on the same occasion.

⁶⁵ See UN Doc. A/53/283 of 20 August 1998.

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the establishment of orphanages, psychological assistance, and medical assistance training programs. For instance, the UN Voluntary Fund for Victims of Torture finances programs which provide medical, psychological, social, or legal assistance as directly as possible to the victims of torture and their relatives. Examples of this include the establishment of treatment centers, meetings of experts, aid to indirect child victims, publications, legal assistance, and economic and social rehabilitation.⁶⁶

The Trust Fund could assist victims directly or through established channels of humanitarian assistance. It should be able to do both. In light of the nature of the crimes within the jurisdiction of the Court, and the urgent needs which the Trust Fund's beneficiaries might have, the Trust Fund should be given as much latitude as possible as to how it will carry out its difficult task. Both the UN Voluntary Fund for Victims of Torture and the UN Voluntary Trust Fund on Contemporary Forms of Slavery provide financial assistance only "through established channels of assistance" and the funds do not directly administer projects nor do they give assistance directly to individuals.⁶⁷ On the contrary, the UNDP trust funds initiate and implement projects directly, either on their own or through other UN agencies.⁶⁸

The Trust Fund could assist victims directly or through established channels of humanitarian assistance. It should be able to do both. In light of the nature of the crimes within the jurisdiction of the Court, and the urgent needs which the Trust Fund's beneficiaries might have, the Trust Fund should be given as much latitude as possible as to how it will carry out its difficult task.

6. ADMINISTRATION OF THE TRUST FUND

The Rome Statute does not indicate who is to administer the Trust Fund. In the end, this was left for the Assembly of States Parties to decide ... The fundamental elements the Assembly of States Parties should keep in mind in making its choice are the need to ensure effective administration of the Trust Fund and its ability to efficiently carry out its mandate.

The Rome Statute does not indicate who is to administer the Trust Fund. During the work of the Preparatory Committee for the Establishment of the International Criminal Court, two types of administering authorities were proposed. Either the Trust Fund should be "*administered by the Court*",

⁶⁶ See UN Doc. A/48/520, Annex I.

⁶⁷ The UN Voluntary Fund for Victims of Torture has interpreted this to mean that assistance will be provided through existing humanitarian organizations to projects or to initiate projects sponsored or administered by these humanitarian organizations, and the fund does not directly administer projects nor does it give assistance directly to individuals.

⁶⁸ *Infra* p. 33.

or it should be “*administered by the Secretary-General of the United Nations*”.⁶⁹ In the end, this was left for the Assembly of States Parties to decide.⁷⁰

The Assembly of States Parties’ decision will have fundamental bearing on the Trust Fund’s status and operation. For instance, administration by the Court would certainly strengthen the Trust Fund’s relationship with the Court, while outside management might increase the Trust Fund’s independence. In any event, the fundamental elements the Assembly of States Parties should keep in mind in making its choice are the need to ensure effective administration of the Trust Fund and its ability to efficiently carry out its mandate.

6.1 Administration by the Court or by the Assembly of States Parties

The Trust Fund could be administered by the Court itself. The Rome Statute has already established a relationship between the Trust Fund and the Court (i.e. the Court may order certain money to go into it or through it; and the Trust Fund beneficiaries’ definition is based on the crimes within the jurisdiction of the Court). Administration by the Court would further strengthen this association.

Still, in light of the respective functions and mandates of the Trust Fund and the Court, placing of the Trust Fund under the Court’s management is questionable. Firstly, the arrangement might unnecessarily burden the Court. Unlike other international judiciary bodies, such as the International Court of Justice, European Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda, the International Criminal Court will not function within the framework of a wider international organization, and it has to establish and operate its own financial and administration system. This enormous task will alone tax the Court’s capacity. Administering the Trust Fund, which has the mandate of benefiting all victims of crimes within its jurisdiction and their families, might plainly be beyond its reach, or worse, could

In light of the respective functions and mandates of the Trust Fund and the Court, placing of the Trust Fund under the Court’s management is questionable.

⁶⁹ See for instance the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, G.A., 51st Sess., Supp. No. 22. A/51/22, 1996, at 234 and the Preparatory Committee Draft Statute and Draft Final Act, *supra* note 11, art. 79.

⁷⁰ See Mark Jennings, Article 79, *in Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed., 1999), 1005, at 1006.

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result in a neglected or very limited operation of the Trust Fund. Besides, the Court might also have its own voluntary trust fund (art. 116) which might create a conflict of interest.

Secondly, the Court's status as an independent, impartial judicial body might restrain the Trust Fund's activities; limiting the Fund's ability to engage in certain activities which might otherwise have been in the interest of victims. This issue has been pertinent at the ICTR, where activities funded by its trust fund have caused some bickering, temporary halting its activities and seriously effecting its income.⁷¹

Finally, administration of the Trust Fund by the Court might be politically awkward. In the public's eyes, the Trust Fund and the Court would be synonymous, where the acts of one might be considered as the acts of the other. A Trust Fund with meager funds and activities, or even less than highest expectations, could cast a negative light on the Court itself and its operation. Administration by the Court might also raise issues of accountability. Even if the Registrar is given the mandate to administer the Trust Fund, the judges of the Court are ultimately responsible. Under the Rome Statute the Registrar has no direct link with the Assembly of States Parties as he or she is elected by the judges and exercises his or her function under the authority of the President of the Court.

An option is to have the Assembly of States Parties establish a special body under its auspices to administer the Trust Fund

Another option is to have the Assembly of States Parties establish a special body under its auspices to administer the Trust Fund. This arrangement might limit some of concerns raised earlier about having the Trust Fund administered by the Court itself. Nevertheless, this arrangement would further increase the already substantial responsibilities of the Assembly of States Parties.

⁷¹ In 1997 the ICTR Registrar developed a plan to use the ICTR Trust Fund to finance partially a new programme to provide funds to non-governmental organizations that provide assistance to victims of the genocide and other war crimes in Rwanda. Secretariat staff from the Department of Management, the Office of Legal Affairs and the Office of the Internal Oversight Services opposed the programme and its funding from the Trust Fund; See Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, Report of the Secretary-General on the activities of the Office of Internal Oversight Services, UN Doc A/52/784, para. 76-78. Contributions to the ICTR Trust Fund, as of November 1997, totalled more than \$7.3 million. Voluntary contributions to the fund for the biennium 1998-1999 were \$490,000. Only two member states contributed or pledged to contribute to the fund during 1999 and 2000. For the period 30 September 1998 to 30 September 2000, the ICTY received approximately \$15 million in voluntary cash donations. See tables 1-4.

6.2 Administration by the UN Secretariat

Another option for the Assembly of States Parties is to place the Trust Fund under the authority of the Secretary-General of the United Nations. The Court will enter into relationship agreement with the United Nations (article 2); having the UN Secretary-General administer the Trust Fund could be part of such relationship. In addition, administration by the Secretary-General would have positive side-effects. It would bring the Trust Fund into direct relationship with an organization with a far larger membership than the Court, improving its independence and funding credentials. Such an arrangement would also ease the administrative burden on the Court and the Assembly of States Parties and, in some sense, prevent the reinvention of the wheel as the Secretary-General has extensive experience in administration of trust funds.

Another option for the Assembly of States Parties is to place the Trust Fund under the authority of the Secretary-General of the United Nations. Such an arrangement would also ease the administrative burden on the Court and the Assembly of States Parties and, in some sense, prevent the reinvention of the wheel as the Secretary-General has extensive experience in administration of trust funds.

Administration of trust funds is a routine activity of the UN Secretary-General. During the biennium 1998-1999, he administered 195 general trust funds, with a total income of \$495.6 million. Six large funds accounted for 59.5 percent of the total expenditures for these trust funds: the United Nations Fund for International Partnership (\$73.3 million), the Trust Fund for Disaster Relief (\$61.5 million), the Afghanistan Emergency Trust Fund (\$51.6 million), the Trust Fund to Support the United Nations Interim Administration in Kosovo (\$24.7 million), the Voluntary Trust Fund for Assistance in Mine Clearance (\$15.1 million), and the Trust Fund for the Strengthening of the Office of the Emergency Relief Coordinator (\$12.4 million).⁷² Among other trust funds administered by the Secretary-General are the Trust Funds for the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for the Rwanda.⁷³

Trust funds administered by the Secretary-General must support or supplement the substantive work program of the United Nations or contribute to activities of humanitarian

⁷²Financial report and audited financial statements for the biennium ended 31 December 1999 and Report of Board of Auditors, UN Doc. A/55/5 (2000).

⁷³ The ICTR Trust Fund was established by the General Assembly by resolution 49/250 of July 1995. The General Assembly, in its resolutions 49/242 B of 20 July 1995 and 53/212 of 18 December

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or relief assistance.⁷⁴ The ICC Trust Fund could fit into either category. Furthermore, placing the Trust Fund under the authority of the Secretary-General would facilitate its establishment (although that would imply a 13 percent service fee, as determined by the General Assembly). The trust funds under the authority of the Secretary-General are administered in accordance with United Nations policies and procedures regarding trust funds and the United Nations Financial Regulations and Rules. These include rules on establishment, acceptance of pledges, administration, and audit.⁷⁵

UN procedures require trust funds to be established either by the General Assembly or by the Secretary-General.⁷⁶ Nothing bars the Assembly of States Parties from adopting a decision recommending that the General Assembly establish the Trust Fund.⁷⁷ The compromise reached in Rome, to have this matter open for the Assembly of States Parties to decide, also supports such a conclusion.

The spending authority of trust funds administered by the Secretary-General lies with the Assistant Secretary-General for Financial Services. No commitment, obligations, or disbursements against any funds may be incurred without his or her written authorization.⁷⁸ But, at the same time, according to the Rome Statute, the Court must be able to use the Trust Fund as an intermediary to award reparations. The conflict is only apparent. Indeed, when the Court orders awards of reparations to be made through the Trust Fund, it does not

1998, invited member states and other interested parties to make voluntary contributions to the ICTY that are acceptable to the Secretary-General.

⁷⁴ See Establishment and Management of Trust Funds, Secretary-General's Bulletin, *supra* note 8.

⁷⁵ The Secretary-General's Bulletin on the Establishment and management of trust funds, *supra* note 8, and Administrative Instruction: General Trust Funds, ST/AI/284, 1 March 1982. The ICTR has established additional Guidelines and Procedures for Acceptance and Utilization of Voluntary Contributions to the ICTR (ICTR, 29 December 1998).

⁷⁶ On the procedures for the establishment of a trust fund by the General Assembly or the Secretary-General see Establishment and Management of Trust Funds, Secretary-General's Bulletin, *supra* note 7, rules 20-25, and Secretary-General's Administrative Instruction: General Trust Funds, UN Doc. ST/AI/284, 1 March 1982.

⁷⁷ States Parties to the United Nations Convention on the Law of the Sea recently adopted a decision recommending that the General Assembly establish a voluntary trust fund for the International Tribunal for the Law of the Sea, to be administered by the Secretary-General, to facilitate the submission of cases by states. See UN Press Release SEA/1680, Tenth meeting of parties to Law of the Sea Convention concludes, 30 May 2000, UN Press Release SEA/1679, States Parties to Law of Sea Convention to recommend Assembly consideration of Trust Fund to assist parties in International Tribunal proceedings, and United Nations Convention on the Law of the Sea, Report of the tenth meeting of the states parties, UN Doc. SPLOS/20, 22 June 2000; all available at <http://www.picti.org/news/>.

⁷⁸ See Establishment and Management of Trust Funds, *supra* note 8, rule 40.

create an obligation on the Trust Fund to disburse amounts in excess of received awards of reparations from the Court (collected from the convicted person). Consequently, the received funds can be considered as simply being earmarked contributions and be treated accordingly by the Assistant Secretary-General for Financial Services.

6.3 Administration by UNDP

A further option for the Assembly of States Parties is to have United Nations Development Programme administer the Trust Fund. Trust fund arrangements are established by the Administrator of UNDP, who manages such funds in accordance with UNDP financial regulations and rules. The establishment of a trust fund must be consistent with the policies, aims, and activities of UNDP and compatible with the country program or other relevant programs administered by the organization. To establish a trust fund under UNDP authority there is no need for that organization to contribute to it. Moreover, managing fees are far lower than those of funds managed by the UN Secretary-General (1-3 percent).⁷⁹ Currently UNDP administers approximately 100 trust funds. Among its trust funds are the UNDP Trust Fund for Rwanda and the UNDP Trust Fund for Crisis, Post-Conflict, and Recovery Situations.

A further option for the Assembly of States Parties is to have United Nations Development Programme administer the Trust Fund.

What ultimately distinguishes the UNDP trust funds from the trust funds administered by the Secretary-General is that UNDP has the capacity directly to implement funded projects through its 132 local offices. This implementation could involve the arrangement of contractors or an on-site oversight of the operation.⁸⁰ No additional fees are required for this service.

⁷⁹ See UNDP "IIC. Trust Funds" and "UNDP Policies and Procedures for the Administration of Programme or Projects under a Trust Fund."

⁸⁰ The UNDP executive capacity has been perceived as very advantageous. For instance, in July 1994 the Trust Fund for Rwanda was established by the Secretary-General on request of the UN General Assembly, in response to the urgent needs arising from the crisis and in order to "finance humanitarian relief and rehabilitation programmes" (S/1994/1133). Donors gave \$ 8 million, but after a year nothing had been spent. By request of the government of the Netherlands, in February 1995 the United Nations Development Programme Trust Fund for Rwanda was established to succeed the previous one. UNDP had a unit on-site with both administrative and program capacity, and could convert donations into programs on the spot. At the end of the year, the fund had received \$100 million.

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However, trust funds administered by UNDP provide assistance only through collective projects and not directly to individuals. To illustrate, the UNDP Trust Fund for Crisis, Post-Conflict, and Recovery Situations utilizes its funds “for the purpose of meeting the costs of the projects as approved by the UNDP”. This could cause complications with regard to reparations to be made through the Trust Fund to individual victims as well as individual interim relief. But the problem might be solved by establishing sub-trust funds, and/or projects dedicated to these purposes. A further consideration is that UNDP’s own projects in this area might raise some conflicts of interest with its administration of the Trust Fund. Alternatively, involvement of UNDP in the operations of the Trust Fund might be considered regardless of which authority will ultimately manage the Trust Fund.

6.4 Advisory Board

Regardless whether the Trust Fund will be administered by the Court, the Assembly of States Parties, the Secretary-General, or UNDP, the Assembly of States Parties should establish a Trust Fund Advisory Board. The Advisory Board could promote and solicit contributions to the Fund and advise on its utilization. Board members should have wide experience in victims’ issues and in the field of human rights. To ensure coherence and collaboration with the operations of the Court, a member of the Victims and Witnesses Unit of the Court should be appointed. Furthermore, as local knowledge will be extremely important for an efficient functioning of the Trust Fund, the structure of the advisory board should be flexible enough to enable such representation as new situations arise.

The Advisory Board could promote and solicit contributions to the Fund and advise on its utilization. Board members should have wide experience in victims’ issues and in the field of human rights.

In the case of Secretary-General’s trust funds, he is generally assisted by a board of trustees in managing voluntary trust funds for human rights purposes. The Secretary-General is not obliged to follow recommendations of the board of trustees, although in almost all cases he has done so. Qualifications of board members of voluntary trust funds administered by the UN Secretary-General are similar, *mutatis mutandis*. In particular, they are required to have “wide experience in the field of human rights” (Voluntary Fund for Victims of Torture); “relevant experience on issues affecting indigenous populations” (Voluntary Fund for Indigenous Populations); and “relevant experience in the field of human rights and contemporary forms of slavery” (Voluntary Trust Fund on Contemporary

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Forms of Slavery). As advisors to the Secretary-General, board members are chosen as individuals who do not represent countries or regions. However, at least one member of the indigenous fund's board "shall be a representative of a widely recognized organization of indigenous people." Furthermore, all boards, with the exception of the Voluntary Fund for Indigenous Populations, are appointed "with due regard to equitable geographical distribution."⁸¹

As for the ICTR Trust Fund, the Registrar of the tribunal approves the project or proposal for the Trust Fund expenditures and submits it to the Secretary-General. At the same time, the ICTR Trust Fund has an Advisory Board which serves "as a consultative forum for the exchange of views on Trust Fund related matters by all three organs of the Tribunal, thereby ensuring regular in-put by these organs into Trust Fund operations," and "[t]o propose broad directions to be pursued in funding activities in order to ensure correct reflection of the Tribunal's priorities as they may exist from time to time". Furthermore, the Advisory Board shall "make proposals on, and, to the extent feasible, assist with, fund-raising activities to benefit the Trust Fund". The ICTR Trust Fund's Advisory Board, which is composed of the President of the Tribunal, the Prosecutor, and the Registrar, meets once a year. Two distinguished external members can also sit on the Advisory Board, if deemed necessary. As of today, the board consists only of the three ex-officio members.⁸²

7. CONCLUSIONS

The original and foremost rationale for the provision of the Trust Fund in the Rome Statute was to equip the Court with a mechanism to collect and redistribute funds derived from the enforcement of fines and forfeiture. Beside this core function, the Court might use the Trust Fund as an intermediary for the distribution of reparations. There is a substantial

⁸¹ As for the UN Voluntary Trust Fund for victims of Torture it is administered by the Secretary-General, with the advice of a Board of Trustees composed of a Chairman and four members with wide experience in the field of human rights, acting in their personal capacity as experts of the United Nations, to be appointed by the Secretary-General for a period three year term of office. The Board holds an annual two-week session to consider the large number of projects received. The Board adopts recommendations for approval by the High Commissioner for Human Rights on behalf of the Secretary-General.

⁸² See Guidelines and Procedures for Acceptance and Utilization of Voluntary Contributions to the United Nations International Criminal Tribunal for Rwanda (ICTR, 29 December 1998).

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difference between the funds the Trust Fund will manage under article 79.2 and those under 75.2. In the case of the former, the Trust Fund is used by the Court as a depository, while in the latter case it is merely used as an intermediary. In either case, the use of the Trust Fund for these functions is not mandatory and the Draft Rules of Procedure and Evidence suggest that the Trust Fund should mainly be used for distribution of reparations when the Court decides to do so on a collective basis. The Trust Fund is not given any role in the Court's decision-making process on reparations and it is crucial that the Trust Fund will be given the right of observation.

This paper argues that funds arriving from fines and forfeiture should be used for the benefit of victims only, and under no circumstances should they be used to support operational costs of the Court. They should be used to finance compensation first. The Court should be given the primary responsibility in designating funds derived from fines and forfeiture and the Trust Fund should be allowed to determine the destination and use of such funds only when the Court has declined to do so.

The Trust Fund should be allowed to accept voluntary contributions, and the Assembly of States Parties will need to adopt criteria deciding from whom and for what purposes contributions can be accepted. In light of the non-judicial nature of the Trust Fund, these criteria should be broader than those relating to voluntary contributions to the Court. However, should voluntary contributions be excluded from the Trust Fund's funding sources, it should nonetheless be considered whether the Court should share with the Trust Fund some of the voluntary contributions it might receive under article 116 of the Rome Statute.

Considering the unpredictable and enormous situations the Trust Fund might be called upon to handle, it should be given great flexibility in how to utilize its funds. It should be able to assist victims through interim relief, legal assistance, and humanitarian assistance, preferably through collective projects. The Trust Fund should be able to carry out these functions directly or through established channels of humanitarian assistance. Again, the Trust Fund's non-judicial nature will need to be clearly stressed to avoid any misgivings about the effects of its various engagements.

The designation of how the Trust Fund will be administered will have a fundamental bearing on its status and operation. Administration by the Court would surely establish a

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close relationship between the Trust Fund and the Court and might facilitate close collaboration. However, mainly in light of the different nature of the Court as a judicial body and the Trust Fund as a humanitarian relief body, such affiliation raises some questions. Another option is to place the Trust fund under the auspices of the Assembly of States Parties. Other options include having the Secretary-General of the United Nations or the United Nations Development Programme administer the Trust Fund. A Trust Fund Advisory Board, composed of individuals with wide experience in victims' issues and in the field of human rights, should be established to assist the Trust Fund's administrator in its work.

RECOMMENDATIONS

1. The Preparatory Commission for the International Criminal Court should consider it within its mandate to submit draft proposals for the establishment and management of the Trust Fund.
2. The criteria for management of the Trust Fund should clarify who are the Trust Fund's beneficiaries.
3. The criteria for management of the Trust Fund should specify when the Trust Fund can assist its beneficiaries.
4. The Trust Fund should be able to receive various sources of income.
5. The Financial Regulations should stipulate that funds collected from fines and forfeiture should only be used for the benefit of victims.
6. The Financial Regulations should allow the Court to designate funds from fines and forfeiture in its order of transfer to the Trust Fund.
7. The Rules of Procedure and Evidence should mandate the Court to consult the Trust Fund before making awards of reparations.
8. The Trust Fund should be allowed to accept voluntary contributions. A criteria on voluntary contributions should be adopted, addressing from whom donations can be accepted, and the purposes for which contributions can be made. The criteria on voluntary contributions to the Trust Fund should be broader than the criteria for voluntary contributions to the Court in accordance with article 116.
9. The Trust Fund should not encumber the budget of the Court and the Assembly of States Parties. The Assembly of States Parties should be able to consider whether it should share some of the voluntary contributions it might receive under article 116 of the Rome Statute with the Trust Fund.
10. The criteria for management of the Trust Fund should address how the Trust Fund should be utilized. The Trust Fund should be given great flexibility in how to utilize its funds.
11. The Trust Fund should at least be able to use its resources for interim relief, legal assistance, and humanitarian aid through collective projects. The Trust Fund should be able to assist victims directly or through established channels of humanitarian assistance.
12. The criteria on management of the Trust Fund should stipulate procedures for the selection, evaluation and monitoring of projects drawing on the Trust Fund.
13. The Assembly of States Parties shall decide who will administer the Trust Fund. Possible options should include the Court, the Assembly of States Parties, the United Nations Secretariat and the United Nations Development Programme.
14. The Trust Fund should have an Advisory Board. The Advisory Board could promote and solicit contributions to the Trust Fund and advise on its utilization. Board members should have wide experience in victims' issues and in the field of human rights.

ANNEX I

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 79

Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Rule 98

Trust Fund

1. Individual awards for reparations shall be made directly against a convicted person.

2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.

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

4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.

5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.

ANNEX II

Basic References (in chronological order)

1. *Administrative Instructions: General Trust Funds* (UN Doc. ST/AI/284, (1982)).
2. *Establishment and Management of Trust Funds* (UN Doc. ST/SGB/188 (1982)).
3. *Financial Regulations and Rules of the United Nations* (UN Doc. ST/SGB/Financial Rules/1/Rev.3 (1985)).
4. *The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (UN Doc. G.A. Res. 40/34 (1985)).
5. *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. Final Report Submitted by Mr. Theo van Boven, Special Rapporteur, Commission on Human Rights (UN Doc. E/CN.4/Sub.2/1993/8).
6. *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law*, by Mr. Theo van Boven (UN Doc. E/CN.4/1997/104, Appendix).
7. *Rome Statute for the International Criminal Court*, Rome Statute (UN Doc. A/CONF.183/9 (1998)).
8. *Civil and Political Rights, Including the questions of: Independence of the judiciary, administration of justice, impunity, the Right to Restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni (UN Doc. E/CN.4/2000/62 (2000)).
9. *Finalized draft text of the Rules of Procedure and Evidence*, Adopted by the Preparatory Commission for the International Criminal Court, at its 23rd meeting on 30 June 2000 (UN Doc. PCNICC/2000/1/Add.1 (2000)).

Table 1

Cash Contributions to the ICTY Voluntary Trust Fund

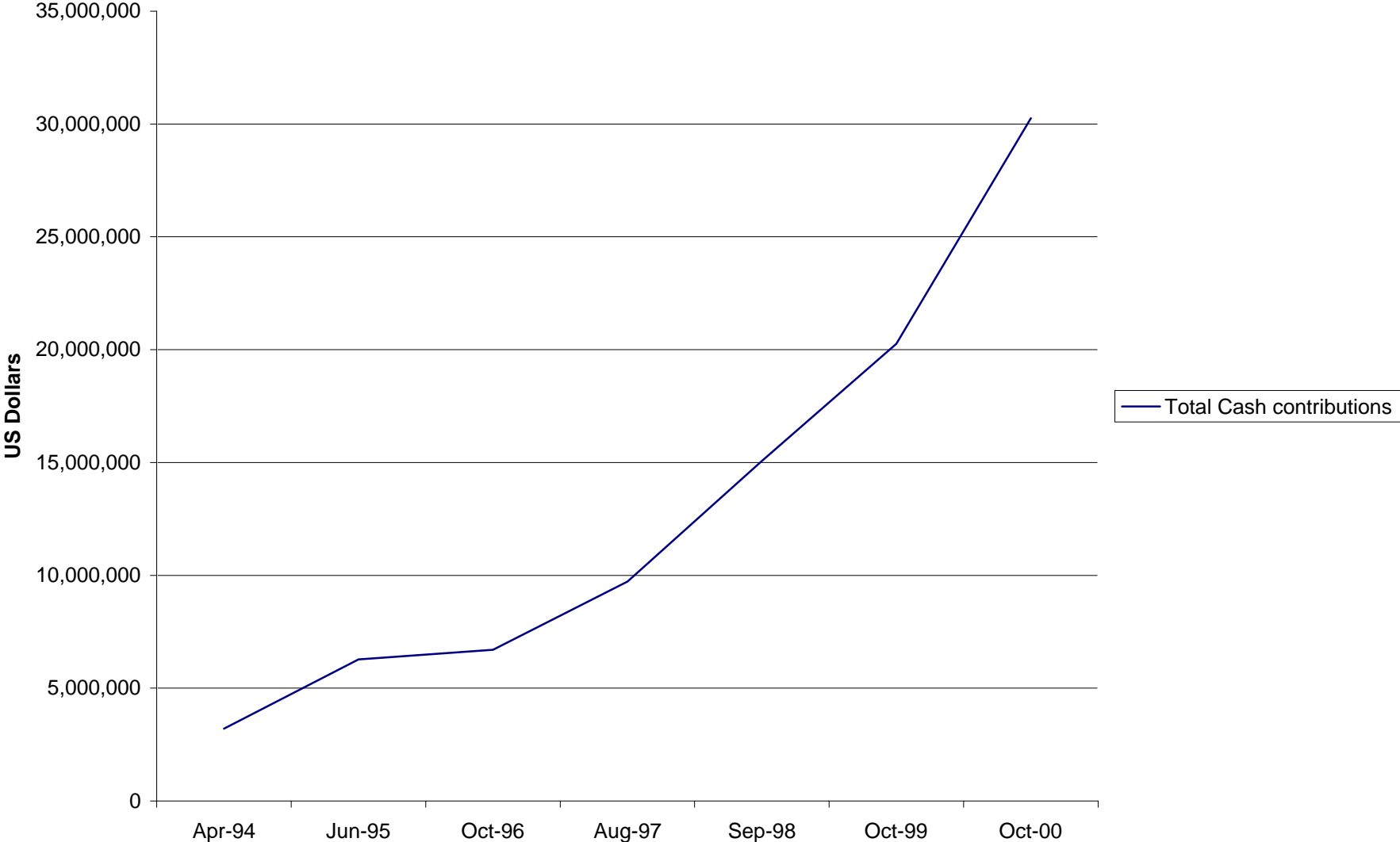


Table 2**Cash Contributions to the ICTY Voluntary Trust Fund as of 30 July 2000**

Contributor	Contribution (US\$)
Austria	108 574
Belgium	74 892
Cambodia	5 000
Canada	1 457 151
Chile	5 000
Cyprus	4 000
Denmark	263 715
European Union/ Carnegie Foundation	542 204
Finland	178 795
Germany	250 000
Hungary	2 000
Ireland	121 768
Israel	7 500
Italy	2 080 049
Liechtenstein	4 985
Luxembourg	194 163
Malaysia	2 500 000
Malta	1 500
MacArthur Foundation	200 000
Namibia	500
Netherlands	2 727 523
New Zealand	14 660
Norway	977 410
Pakistan	1 000 000
Portugal	10 000
Saudi Arabia	300 000
Slovenia	10000
Sweden	461 626
Switzerland	674 516
United Kingdom	3 193 223
United States	12 755 047
Utrecht University	2 196

Table 3

Cash Contributions to the ICTR Voluntary Trust Fund

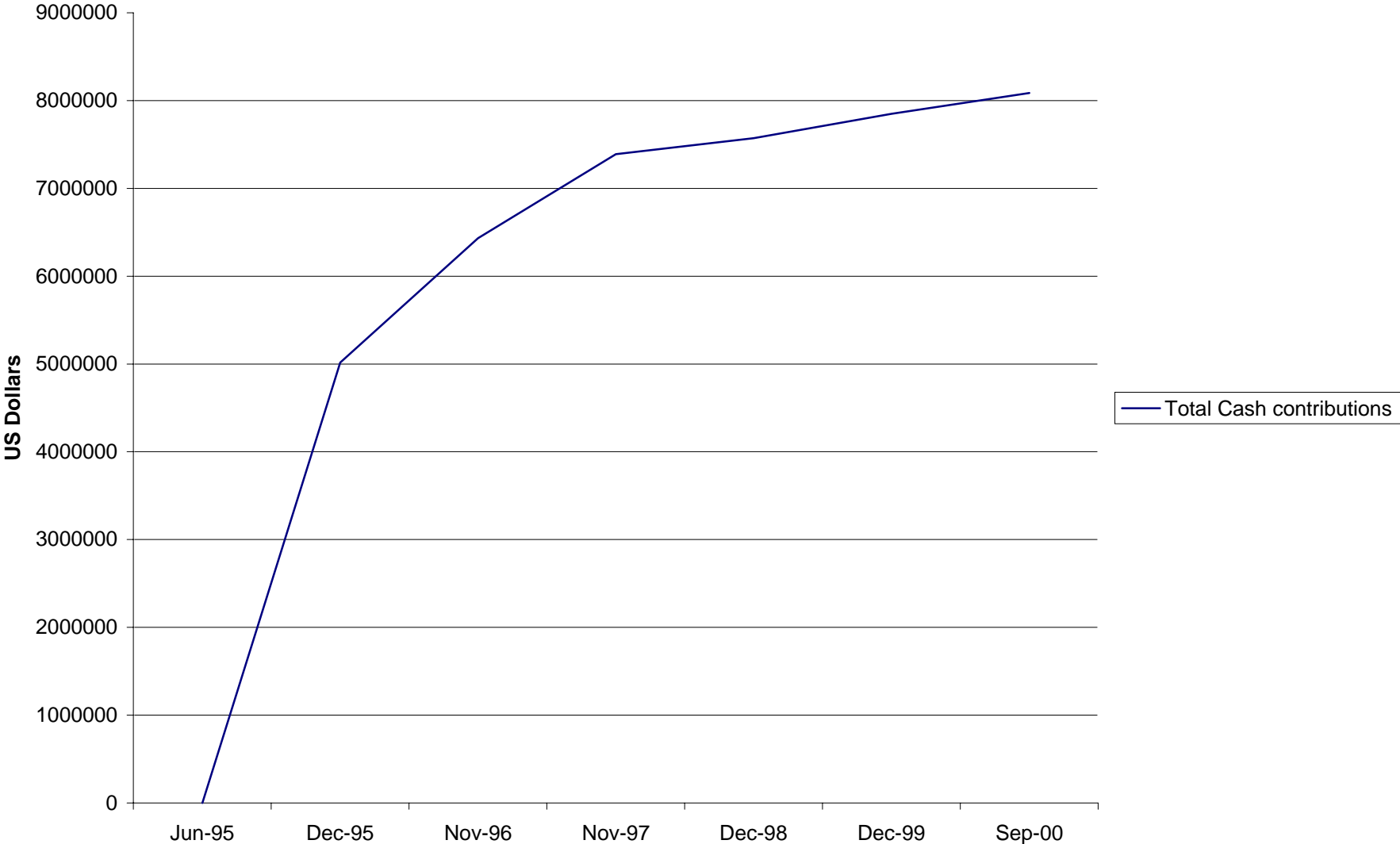


Table 4**Cash Contributions to the ICTR Voluntary Trust Fund as of 30 September 2000**

Contributor	Total Amount (US\$)
Belgium	2 705 450
Canada	734 850
Chile	1 000
Denmark	43 452
Egypt	1 000
Finland	182 983
Greece	20 000
Holy Sea	3 000
Ireland	237 704
Israel	7 500
Lebanon	3 000
Netherlands	2 995 531
New Zealand	34 792
Norway	49 983
Spain	150 000
Sweden	68 729
Switzerland	188 025
United Kingdom of Great Britain and Northern Ireland	372 000
United States of America	286 000
Total	8 084 999