

VICTIMS RIGHTS WORKING GROUP

ADVOCATING FOR THE RIGHTS OF VICTIMS AT THE INTERNATIONAL CRIMINAL COURT

Draft Regulations of the ICC Trust Fund for Victims

Comments on the Proposals Submitted By Australia, Canada, Croatia, Japan, The Netherlands, New Zealand, Norway and the United Kingdom

The Victims' Rights Working Group (VRWG) was established in December 1997 by organisations that have promoted the interests and needs of victims in criminal justice and human rights bodies. Its main objective has been to raise the awareness of governments and others (e.g., the press, other NGOs and the public), in all relevant fora, about victims' issues, to ensure that the Statute and the Rules of Procedure and Evidence adequately provided for victims' rights to be protected and respected, and their needs and concerns to be met throughout the judicial process of the ICC. Particular attention has been paid to the need to ensure that the Court will render not only retributive, but also reparative justice, with the aim, *inter alia*, of preventing re-victimization, breaking cycles of violence and war, and providing reparations and rehabilitation for victims

Member organisations of the Working Group issued numerous position and background papers, participated in all meetings, and proposed texts for [re]drafting the Statute and the Rules. The VRWG continues to be represented at meetings of the Assembly of States Parties, is actively promoting the development of sound operational structures for victims at the Court and will continue to advocate for the rights of victims to be respected by participants in proceedings before the Court. For further information please see: <http://www.vrwg.org>.

I. Introduction

The Victims Rights Working Group (VRWG) continues to follow closely States Parties' deliberations on the review of the draft Regulations of the International Criminal Court Trust Fund for Victims (Trust Fund). The VRWG has issued a number of position papers detailing its support for the draft Regulations, which were prepared by the expert Board of Directors of the Trust Fund (the Board), and has asserted its desire to see the draft Regulations adopted at the next session of the Assembly of States Parties (ASP).¹

At the most recent meeting of the ASP Bureau's Working Group on the Trust Fund Regulations (the Working Group) in August, a '**compromise proposal**' was put forward by Australia, Canada, Croatia, Japan, the Netherlands, New Zealand, Norway and the United Kingdom (hereinafter "the Proposal"). It is possible that the Proposal will be presented at the next session of the ASP. The VRWG is seriously concerned about two recommendations that were made in the Proposal: firstly, on how the resources of the Trust Fund will be used; secondly, whether donors to the Trust Fund should be able to earmark their donations. Both of these recommendations deviate substantially from the vision put forward in the Draft Regulations prepared by the Board and Resolutions that the Assembly has adopted on the Trust Fund. If adopted, the Proposal would seriously affect the ability of the Trust Fund to act effectively for the benefit of victims and their families.

II. Use of Resources of the Trust Fund in Part III of the draft Regulations

The framework for the Trust Fund Regulations should reflect not only Rule 98 of the Rules of Procedure and Evidence. It should also reflect Articles 75 and 79 of the Rome Statute and ASP Resolution 6 on the establishment of the Trust Fund, adopted by consensus by the ASP on 9 September 2002.

The Proposal suggests that the International Criminal Court (the Court) should control the allocation and distribution of all of the Trust Fund's resources, including even the voluntary contributions collected independently by the Board. The VRWG is concerned that placing the Court in sole charge of these voluntary contributions will jeopardize both the mandate of the Trust Fund and the independence of the Court.

The Proposal goes directly against the decision of the Assembly to elect an eminent Board of Directors, with expertise and experience in victims issues, and tasked it to "establish and direct the activities and projects of the Trust Fund and the allocation of the property and money available to it..."² Since the ASP has already decided that the Trust Fund must be independent from the Court to protect the independence of both bodies, it would be entirely contradictory to now decide that the Court should determine how the Trust Fund's resources are to be used. The VRWG is concerned that granting control over the uses of these contributions to the Court would undermine the ability of the Board to fulfil the mandate of the Trust Fund.

Implementation of this Proposal would also threaten the independence of the Court. The Court would play no role in collecting these contributions, as they would be entirely separate from any seizure or freezing order or any reparations award it may have issued. It is difficult to see how the Court could make such orders to use such funds for the benefit victims. Indeed, the Court

¹ See, e.g., VRWG, Submission to the 2nd Meeting of the Bureau's Working Group on Regulations of the Trust Fund for Victims (July 2005) ; Comments on the draft Regulations of the Trust Fund for Victims (February 2005).

². ICC-ASP/1/Res.6 Annex, para. 7.

would no doubt have serious reservations about taking on such a role. The Board of the Trust Fund is the only body that can perform this function, subject to effective procedures and safeguards, whilst ensuring the independence of the Court.

By seeking to remove the power of the Board to make decisions regarding the uses of the Trust Fund's resources, the Proposal seeks to reopen the decision of the Assembly that the Board shall establish and direct the activities and projects of the Trust Fund and the allocation of the property and money available to it. This issue was debated at length by the Preparatory Commission and adopted by consensus by the ASP. To go back on this decision now, before the Board has had the opportunity to start working would effectively amount to a vote of no confidence in the expert elected Board since it would preclude them from carrying out the responsibilities assigned to them by the ASP.

The VRWG finds it difficult to understand the logic of the narrow vision of the Trust Fund set out in the Proposal, especially when the Trust Fund is faced with situations as complex as those currently under investigation by the Office of the Prosecutor. The VRWG would suggest that in order to operate effectively, the Trust Fund must be able to decide resource allocation on a flexible basis, using the accumulated wisdom and experience of the experts that comprise its Board. Such an approach would enable the Trust Fund to meet the demands of unforeseen situations, rather than forcing it to operate under rigid procedures that it is unable to influence and which are likely to limit the Trust Fund's effectiveness in meeting its mandate in both the short- and long-term.

If the Proposal were to be adopted by the ASP, the Board would be in the unenviable position of being able to help only the small minority of victims whose crimes are prosecuted by the Court. Such an approach would ignore the needs of all other victims in a situation under investigation by the Court. Furthermore, it is likely that even those victims who are eligible for reparations orders would have to wait years or possibly decades for the accused perpetrator of the crime against them to be arrested and convicted before a reparations order could be made. The payment of reparations awards would then have to wait pending any appeals against conviction or the reparations order. Can this truly be the vision of the Trust Fund that States Parties wish to endorse? How does such a vision implement the reparative function of the Court given that it sets providing justice for victims as one of its fundamental international goals?

The Proposal suggests that the only way to achieve transparency in the functioning of the Trust Fund is to reduce its scope of activity to rigid implementation of decisions taken by the Court. The VRWG is strongly convinced that this is the wrong approach. Transparency of the work of the Trust Fund should be achieved through clear guidelines on *how* decisions are to be taken, not on restrictions on the *type* of decisions that may be taken.

Recommendation: The Board of Directors should be entitled to determine, in line with the draft Regulations of the Trust Fund, the uses of voluntary contributions that it collects independently of the Court.

III. Earmarking

The Proposal seeks to exclude altogether the possibility for donors to earmark contributions to the Trust Fund. This contradicts Resolution 6 on the establishment of the Trust Fund, adopted by the ASP, which recognizes the potential for earmarking to the extent that it would not result

in a manifestly inequitable distribution of available funds and property among the different groups of victims.³

The Explanatory Note to the Proposal suggests that precluding earmarking would not deter contributions if the functions of the Trust Fund were precisely spelled out. It is not clear how this assumption was arrived at. Indeed experience shows that in a world of finite funds, donors will be more likely to donate to the Trust Fund if they are allowed some discretion, however limited, over where their funds are used. Donors like to know that their funds are addressing a need, and that there is a rational and transparent way in which such needs are assessed. The Proposal also ignores the reality that the restricted mandates of certain donors will prevent them from contributing to the Trust Fund, unless earmarking is permitted.

The Explanatory Note to the Proposal refers to the stated practices of the UN Voluntary Fund for Victims of Torture (Torture Fund) but fails to acknowledge that in the Torture Fund's actual practice, 'negative earmarking' (donors specifying that their funds cannot be used for specific purposes) is a regular occurrence. The VRWG is concerned that if 'positive earmarking' is not allowed for the Trust Fund, a similar pattern will occur and donors will seek to exert control over the use of their donations through such 'negative earmarking'.

The VRWG agrees that the Trust Fund must not be subject to accusations that it provides greater help to victims of some groups than others. Sufficient safeguards must be in place to ensure that such a situation does not arise. However, the VRWG maintains that adequate safeguards have already been incorporated into Resolution 6 establishing the Trust Fund, as follows:

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

The drafting of the Regulations of the Trust Fund should not be used as a forum for revisiting an issue that has already been debated at length or attempting to revise a solution that has already been reached by consensus. Instead, if states parties have concerns on this issue, they should focus on ensuring that the above provision is implemented satisfactorily. In this regard, the VRWG has made the following recommendation which, we believe, would address the concerns voiced by states.

Recommendation: In accordance with the draft Regulations, the ASP should allow a limited or capped percentage of donations that can be earmarked. The ASP should adopt clear criteria and practices to ensure equity and transparency in both the earmarking and allocation of funds.

Furthermore, to ensure that the Trust Fund can implement the safeguards fully and monitor the ongoing status of voluntary contributions, an Executive Director should be appointed to the Secretariat to carry out this function and to otherwise ensure the implementation of the instructions of the Board on a day to day basis, as provided for under Part I, Chapter II of the draft Regulations

³ ICC-ASP/1/Res.6 Annex, para. 10.