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.
The Victims’ Rights Working Group has examined with interest submissions by states to the Bureau’s Working Group at its first meeting on 4 -5 May 2005 and the Report of the Facilitator and text of the draft Regulations, including proposed amendments. The following comments are intended to facilitate discussion of the Bureau’s Working Group at its second meeting on 3-4 August 2005.

I. Exclusion of the Board of Directors from attending the Working Group’s meeting

The Victims’ Rights Working Group was dismayed that members of the Board of Directors were unable to attend the first meeting of the Bureau’s Working Group because the Working Group had failed to provide the Board with sufficient notice to attend. Moreover, we are deeply concerned by reports that the Working Group does not intend to invite members of the Board to its next meeting on 3-4 August.

The Assembly appointed the expert Board of Directors based on their “high moral character, impartiality and integrity and… competence in the assistance to victims of serious crimes.” One of the first tasks of the Board was to “develop suggestions for the further criteria for the management of the Trust Fund for consideration and adoption by the Assembly of States Parties as soon as possible.” The Board completed this task promptly submitting detailed Regulations to the Assembly at its third session.

As the expert drafters of the original Regulations appointed by the Assembly, it is both essential and appropriate, given the impact of the process on their work, that members of the Board take part in any review of the Regulations conducted by states. The discussions of the Bureau’s Working Group would no doubt benefit from the expert input from Board members and explanation of the reasons for their decisions in preparing the original text. The exclusion of the Board from this process is undermining to the work of the Board of Directors who have demonstrated enthusiasm and commitment to making the Trust Fund a success. It goes directly against the Assembly’s decision at its first session to involve the Board in the preparation of the Regulations.

We insist that the Bureau’s Working Group ensure that representatives of the Board are immediately invited to attend the next meeting and all meetings of the Working Group providing them with reasonable notice to organize their participation. Furthermore, documents arising from the Bureau Working Group’s meeting should be prepared and submitted to the Board well in advance of its next meeting scheduled in September.

II. The need for a common vision for the Trust Fund

Submissions by states and the discussion of the Bureau’s Working Group in its first meeting, as reflected in the Facilitator’s report, illustrate that there are currently a range of views about the purpose and use of the Trust Fund. At one end of the scale, some states consider that the Trust Fund should be only a tool for fulfilling reparations orders

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1 Resolution ICC-ASP/1/Res.7.
2 Resolution ICC-ASP/1/Res.6.
of the Court when funds cannot be obtained from the convicted person. At the other end of the scale, some states believe that it can have an ambitious mandate as proposed by the Board of Directors to fulfil reparations orders and also offer assistance to other victims who are not the subject of reparation orders. Other states have demonstrated their willingness to find a compromise which links the work of the Trust Fund even more closely to the work of the ICC. The Facilitator’s report highlights a number of disputed provisions where resolution of this overriding issue is paramount in order to achieve consensus, in particular, Regulations 51 and 53.

The Victims’ Rights Working Group believes that it is important that the Bureau’s Working Group attempts to seek agreement on the overall vision of the Trust Fund before it focuses on finalizing its recommendations for the text of the Regulations. Failure to do so, could lead to ambiguity and inconsistencies in the negotiated text arising from unsatisfactory compromises that could seriously undermine the work of the Trust Fund. To that end, the Victims’ Rights Working Group welcomes the recommendations by some states to insert a new Part I into the Regulations that would “set out the objects and purposes of the Victims Trust Fund” and encourages the Working Group to take this opportunity to set out its clear vision for the Trust Fund.

The Victims Rights Working Group notes from the discussion that there appears to be three options for the vision of the Trust Fund:

**Option 1: The Trust Fund will exist to fulfil reparations orders of the Court.**

A few states submit that the Trust Fund should only be used to fulfil reparation orders of the Court pursuant to Article 75 of the Rome Statute. In doing so, they argue that anything more would violate the Rome Statute and the Rules of Procedure and Evidence, that the Trust Fund needs time to grow in resources to achieve a broader mandate and that the Board of Directors are unable to deal with the mandate they have proposed.

While a key function of the Trust Fund will be to pay reparations orders of the Court, the Victims’ Rights Working Group believes that to limit it solely to this task would be very damaging for the success of the Trust Fund and for the reparation functions of the Court. In particular, the Trust Fund would be limited to helping only those victims who are fortunate enough to have their crimes investigated and prosecuted by the Court and who are subject to reparation orders, ignoring the needs of all other victims in the situation under investigation. In the context of the focussed prosecution strategy adopted by the Office of the Prosecutor, the scope of beneficiaries could be very limited. The Trust Fund would be unappealing to donors from all sources, including individuals, who will want to provide assistance to a broad range of victims affected by the crimes not a potentially small pool of them.

The arguments put forward by states promoting this position should also be challenged. Firstly, there is no evidence in the Rome Statute or the Rules of Procedure and Evidence that the drafters of either instrument intended the Trust Fund to be limited solely to fulfilling reparations orders pursuant to Article 75. In fact, there is overwhelming evidence to the contrary. Firstly, Article 79 contains no specific reference to Article 75, instead it provides broad language that the Trust Fund shall be used “for the benefit of
Victims’ Rights Working Group, *Submission to the second meeting of the Bureau’s Working Group on Regulations of the Trust Fund for Victims, 3-4 August 2005, July 2005*

victims of crimes within the jurisdiction of the Court, and of the families of such victims.” Surely, if the drafters intended that the Trust Fund be used only to fulfil reparations orders it would have expressly stated so. Secondly, Rule 98(5) clearly provides for broader tasks of the Trust Fund beyond fulfilling reparations orders as set out in Rule 98(1)-(4): “other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of Article 79.” States which argue that any ambiguity in Rule 98(5) should be read so restrictively that other uses of the Trust Fund would be prohibited, give no weight to the obvious meaning of the text read in the context of the Statute and the Rules, and fail to take into account the work of the Preparatory Commission’s Working Group on the Rules of Procedure and Evidence. NGO observers of the Preparatory Commission’s Working Group note there was no demonstrated intention on the part of the Preparatory Commission to limit Trust Fund activities solely to reparation orders.

Secondly, recommendations that the Trust Fund should start off with small expectations and grow at the same rate as its resources are seriously flawed. It is important that the Regulations set out the long-term core functioning of the Trust Fund. In particular, it would be very difficult for the Trust Fund to take a limited approach now and then expand its work beyond reparation orders when resources have increased, which would be fundamentally unfair to those victims excluded in the short-term. There is no doubt that resources will be a major challenge for the Trust Fund, especially in its first years. This will need to be addressed through effective fundraising from all sources, creative measures to provide assistance to a broad number of victims using the limited resources and clear communication to victims of the Trust Fund’s limitations in providing assistance to them. It is better that the Trust Fund is seen to use its best endeavours to assist victims, even if those measures are small in the first cases, than to preclude it from helping victims generally. A number of NGOs, including members of the Victims Rights Working Group have pledged their support to assist in the fundraising effort.

Thirdly, while the expert Board of Directors have demonstrated an ambitious work plan for the Trust Fund, it is not unachievable if sufficient resources (which should not be excessive) are provided to the Trust Fund Secretariat to assist the Board in its work. Of particular importance is the need to establish an Executive Director for the Trust Fund Secretariat who will be able to manage the day to day work of the Trust Fund and to report and receive instructions from the Board. Although Resolution 6 provides that such a post should be considered “when the workload of the Trust Fund increases,” it is essential that such a post should be established at the earliest opportunity to ensure the early success of the Trust Fund.

**Option 2: The Trust Fund will exist to fulfil reparations orders of the Court and provide assistance to victims of genocide, crimes against humanity and war crimes.**

The Victims’ Rights Working Group has consistently called for a realistic mandate for the Trust Fund. In particular, we have not called for the Trust Fund to provide assistance to all victims of genocide, crimes against humanity and war crimes, which we believe
would be too ambitious. Instead, we have argued that there must be a link to the work of the Court, as set out in Option 3.

**Option 3: The Trust Fund will exist to fulfil reparations orders of the Court and provide assistance to victims of genocide, crimes against humanity and war crimes in situations within the jurisdiction of the Court.**

The Victims’ Rights Working Group welcomed the draft Regulations prepared by the Board of Directors as an ambitious but realistic vision of the Trust Fund, which was importantly linked closely to the jurisdiction of the Court. We believe this vision was largely realized in draft Regulation 51(b) and (c) which the Bureau’s Working Group will consider at its next session.

The Victims’ Rights Working Group’s vision of the Trust Fund is that it will work to fulfil the reparations orders and **additionally** (recognizing that it is impossible to provide individual awards outside reparation orders of the Court) provide assistance to victims of crimes within the jurisdiction of the Court. It will fund projects through established channels of assistance for the benefit of a broad range of victims of a situation before the Court and in exceptional circumstances where the Prosecutor decided not to proceed in the interest of justice or national courts acting complementary to the Court fail to provide reparations.

The Victims’ Rights Working Group believes the most appropriate trigger for providing assistance in a situation before the Court has been incorporated by the Board of Director’s in the draft Regulations. The decision of the Prosecutor to launch an investigation requires in Article 53(1) of the Rome Statute that there is “a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.” It would, therefore, enable the Trust Fund to act at an early opportunity following a finding by the Prosecutor that crimes have taken place. To address some concerns that a decision to launch an investigation could be overturned by the Pre-Trial Chamber, including through challenges to admissibility, a provision could be included in the Regulations, that if the situation arises where the existence of the crimes is challenged, the Trust Fund will postpone its activities pending a decision by the Court.

Some states are concerned that assistance during an investigation and in particular assistance in a situation not before the Court amounts to humanitarian assistance. It is important to stress that this is not the case. Humanitarian assistance is available to all persons in a situation. Trust Fund projects would instead be targeted at victims of genocide, crimes against humanity and war crimes, and their families. The form of assistance would be decided by the Board based on the most important needs of the victims based on consultation with victims, victims’ representatives, victims’ organizations, international organizations etc., as is set out clearly in the draft Regulations. It would require realistic but not excessive resources for the Board of Directors with the assistance of the Trust Fund Secretariat to implement and oversee the projects. Projects would be open to a broad range of victims identified through independent organizations, pursuant to criteria established by the Board, thereby ensuring that the Trust Fund is not seen as interfering with decisions of the Court about the status of individuals.
The timing of any such assistance has already been debated by the Bureau’s Working Group. Some states have raised concerns that any such assistance should not be provided pre-conviction. Waiting until after conviction would, however, result in serious delays in providing assistance to victims who in most cases will require prompt measures to address their suffering. It is further not clear whether the proposal to only provide assistance post-conviction would mean that all cases before the Court relating to the situation must be completed, including appeals, before the Trust Fund would be allowed to act. Such a provision could delay assistance to victims for decades and the Trust Fund would become obsolete with donors refusing to contribute given the uncertainty of their resources reaching the victims they wish to help.

III. A proposed solution for earmarking

Earmarking is extremely important to ensure maximum donations to the Trust Fund as it is increasingly recognized that donors want some level of control of how their money is used. The permissibility of earmarking is already accepted in Resolution 6 which sets safeguards to prohibit voluntary contributions which are not consistent with the goals and activities of the Trust Fund or which would result in a manifestly inequitable distribution of available funds and property among the different groups of victims. The Victims’ Rights Working Group understands that some states have continuing concerns on this issue. We believe that there are additional safeguards that would address these concerns, whilst still allowing a level of earmarking.

Firstly, instead of allowing donors to state the categories of earmarking, the Board of Directors may set categories that donors can select when they make a donation. The category shall of course be consistent with the goals and activities of the Trust Fund and apply to all situations the Trust Fund is working on. For example, in the existing situations before the Court, the Board of Directors could establish a category for rehabilitation of victims of sexual violence or child victims. The Board of Directors would be responsible for monitoring and opening and closing categories depending on the Trust Fund’s activities and the amount of funds available to other categories.

Secondly, in addition, the Regulations could place a limit on the percentage of a donation that a donor could earmark, for example, 50%. The 50% that is not earmarked would then be placed in the general funds of the Trust Fund and used under the instructions of the Board of Directors to ensure equal distribution of assets between all situations and groups. These additional safeguards would ensure efficient management of voluntary contributions, without need to assess and implement or reject a large number of unique earmarked donations and also ensure a fair and equitable distribution of assets for all groups of victims.