

# REDRESS

*Seeking Reparation for Torture Survivors*

## **Submissions to the Board of Directors of the ICC Victims' Trust Fund at their Annual Meeting, The Hague, November 2006**

*REDRESS is an international human rights organization, with a mission to promote justice for victims of torture and other related international crimes. We work with individuals and groups of survivors to assist them in their efforts to access justice and obtain enforceable remedies; and we promote the development of national and international institutions capable of responding adequately and effectively to victims' needs and rights to justice.*

*REDRESS has actively worked on the International Criminal Court since pre-Rome and has informally coordinated NGO activity on victims' rights through the 'Victims' Rights Working Group' since this time. It has produced several reports on the Victims' Trust Fund as part of its advocacy on the Trust Fund Regulations, and has worked closely with other members of the NGO Coalition for the International Criminal Court (CICC) to see these Regulations adopted.*

### **Background**

1. At the time of writing, the Prosecutor of the International Criminal Court has decided to open investigations into three situations: Democratic Republic of Congo, Uganda and Darfur, Sudan. In Uganda and Democratic Republic of Congo, the Prosecutor has issued indictments of key individuals, which have focused on the forced enlistment of children (Thomas Lubanga Dyilo) and in the case of the Uganda indictment, a variety of counts amounting to crimes against humanity and war crimes, and investigations into the commission of further crimes within the jurisdiction of the ICC are ongoing. Public reports indicate the prevalence in all situation countries of indiscriminate attacks including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement.

2. In all of these situations, conflicts are ongoing, and the scale of victimisation has been identified as immense and the needs urgent. In all situations, the number of persons displaced is in the millions, a high proportion experiencing food and shelter insecurity. Children are in particularly difficult circumstances and sexual and gender based violence remains pervasive in all situations. The squalor and insecurity of IDP and refugee camps housing civilians has greatly impacted upon health and mortality rates, made worse by HIV/AIDS and other disease outbreaks.

3. These circumstances attest to the importance of the ICC Trust Fund for Victims, as a vehicle that may be used to provide solace to victims and to underscore the important connection between crimes within the jurisdiction of the Court and the suffering of victimised individuals and communities.

### **The use of “other resources of the Trust Fund” [Regulation 50(a)]**

4. Regulation 50 (a) provides that the Trust Fund shall be considered to be seized when the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families.

5. The Board is obliged to formally notify the Court of its conclusion and may proceed in accordance with Reg. 50 (a)(ii) and (iii) to the extent that the relevant Chamber has not informed the Board that a specific activity or project would pre-determine any issue to be determined by the Court, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. The Regulations do not confine the possible beneficiaries of “other resources of the Trust Fund” other than to require that they are victims in accordance with Rule 85 of the Rules of Procedure and Evidence or their families, that have suffered physical, psychological and/or material harm. In particular, the Regulations do not specify how closely connected beneficiaries must be to proceedings before the Court, nor is it specified at what stage in proceedings the Board may activate Regulation 50 (a).

7. Whilst the flexibility afforded by Reg. 50 (a) enables the Board to apply its voluntary resources to a diversity of situations, it is recommended that the Board consider adopting certain **administrative guidelines** to assist it in deciding on its appropriate activation. This will bring greater certainty and transparency to its decision-making process and will avoid unrealistic expectations from potential beneficiary groups:

- i. **Timing:** It is suggested that the Board begin to consider activating reg. 50(a) once a formal investigation has been formally announced the Office of the Prosecutor, indicating a reasonable basis to believe that crimes within the jurisdiction of the Court have been or are being committed, in other words, at the “situation” phase. The application of Reg. 50 (a) relates to the Trust Fund’s voluntary resources only, and not to other resources from fines, forfeitures or reparations orders which may ultimately be put at the disposition of the Trust Fund. Consequently, the use of voluntary resources would not ipso facto involve or relate to a particular accused or convicted person and in this sense would serve a humanitarian as opposed to legal/reparative function. International principles make clear that an individual’s status as victim is independent of any court process or conviction.<sup>1</sup> Prompt consideration of the activation of reg. 50

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<sup>1</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power , Adopted by General Assembly resolution 40/34 of 29 November 1985.

(a) would equally enable the Board to address the urgent needs of victims and their families which may not keep until after a conviction and reparation process.

- ii. **Deciding on whether it is necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families.** The Board will need to consider how it will arrive at a decision to activate reg. 50(a). In this respect, it is recommended that the Board, in the elaboration of its administrative guidelines, identify a series of usual steps that it would take prior to activating reg. 50(a) which might include:
- a. General assessment of the circumstances of victims and their families in “situations” before the Court as they relate to crimes within the jurisdiction of the Court, and consideration of ongoing programmes of assistance, having consulted with victims, their families as well as their legal representatives as well as any competent expert or any expert organization;
  - b. On the basis of such assessments, determining whether it is necessary to provide physical or psychological rehabilitation or material support and any priority areas for intervention. In this respect, it is recommended that the Board consider carefully its potential value-added, and take into account existing or expected programmes of assistance external to the Trust Fund. Victims of crimes under the jurisdiction of the Court will have a variety of needs, many of which cannot be met by the Trust Fund for Victims, whose general resources may be small and insufficient. Longstanding channels of assistance and care should have a primary role in addressing some of the needs. Also, under the provisions of the Statute and Rules of Procedure and Evidence, the Victims and Witnesses Unit is tasked with meeting some of the needs of victims and witnesses appearing before the Court and duplication in financing of core Court responsibilities should therefore be avoided.
  - c. Determine implementation strategies for the intervention which may consist of identifying an implementing partner to carry out the project or activity or publication of a call for proposals inviting applications from potential implementing partners.
- iii. **Individual applications to the Board.** The Board will need to consider whether it will entertain individual applications from victims and their families for the activation of reg. 50 (a). It is recommended that the Board **disallows individual applications from victims**, and restricts its use of its voluntary resources for projects and activities benefiting communities (as opposed to individual victims) for the following reasons:
- a. An individualised application process would overly complicate and confuse procedures for victims who may at the same time be applying to the Court to participate in Court proceedings and/or for reparations;
  - b. By its nature, the reg. 50 (a) process relating to the use of the Trust Fund’s voluntary resources is a non-judicial, non legal/reparative process. Instituting an individualised applications process may ascribe or be seen to be ascribing
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- to the Board a judicial function, which may negatively impact on the Court's processes;
- c. The most needy victims are unlikely to be the ones with the wherewithal to apply, and consequently a process which relies upon individualised applications from victims is unlikely to provide assistance where it is most needed.<sup>2</sup>
- iv. **Maintaining Fund Balances** - It is recommended that a certain reserve be maintained to safeguard the continuity of the Fund, given the difficulty of maintaining a consistent level of voluntary contributions year after year. A substantial reserve would also assist the Board to fulfill Reg 56, which provides that the Board "shall make all reasonable endeavors to manage the Fund taking into consideration the need to provide adequate resources to complement payments for [reparations] awards..."
- v. One option is to earmark a portion of estimated annual expenditures as a reserve for the following year. This is the approach taken by the UN Voluntary Fund for Victims of Torture - in accordance with UN rules governing voluntary contribution funds for humanitarian purposes, 15% of estimated annual expenditures must be earmarked as a reserve for the following year. Similar approaches have been taken with other claims commissions such as the UN Compensation Commission, which retains an adequate operating reserve consisting of an amount sufficient to cover at least one year's operating expenses,<sup>3</sup> and furthermore enables the Governing Council to decide, if there are insufficient funds to make payments, how to distribute the limited funds available.<sup>4</sup> In other cases, decision-makers have ensured a specified amount of capital prior to making any expenditures, with a view to maintaining all or a portion of the principal,<sup>5</sup> have otherwise made special use of accrued interest,<sup>6</sup> or have capped the percentage of funds to be used in settlement administration.<sup>7</sup> With the Iran-United States Claims Tribunal, for example, the United States Government agreed to transfer to a central bank all Iranian deposits and securities located in US banking institutions (with interest) which it had seized – half of this amount was then transferred to a special interest bearing Security Account, until the balance of the Security Account reached \$1 billion.<sup>8</sup> The funds

<sup>2</sup> Most domestic compensation schemes have provision to make some funds available for individuals with urgent needs which is usually limited to cases of extreme financial hardship. In the case of situations under investigation by the Court, it is submitted that the number of potential beneficiaries suffering from "extreme financial hardship" would militate against an individualized approach. Certain international trust funds do have procedures in place for extraordinary applications from victims, though they are of an exceptional nature and are not set up to deal with urgent needs on a large scale. For example, the UNVFVT allows individual victims of torture to apply for emergency assistance at any time, on an exceptional basis.

<sup>3</sup> Article 7, Priority of Payment and Payment Mechanism Guiding Principles - December 17, available at: [http://www.unog.ch/uncc/decision/dec\\_17.pdf](http://www.unog.ch/uncc/decision/dec_17.pdf). See also, the provisions relating to the National Fund of the Republic of Austria for Victims of National Socialism, where it is provided that "In order to assure equal payments of benefits to all those entitled, a portion of up to 5% of [\$150 million] may be held in reserve. If this portion of the amount was not, or not fully, used within one year after the entry into force of the present Federal Law, the remaining amount shall also be distributed in equal parts to those entitled to benefits" (New Section 2b(6) National Fund Law Amendment, available at <http://www.usembassy.at/en/download/pdf/nflt.pdf>).

<sup>4</sup> Article 9, Priority of Payment and Payment Mechanism Guiding Principles – December 17.

<sup>5</sup> For example, the German Foundation "Remembrance, Responsibility and Future" is endowed with a capital fund.

<sup>6</sup> For example, accrued interest to the Swiss Banks Settlement Fund was used to partially defray the cost of the claims process for the deposited assets class.

<sup>7</sup> See section on the expenses of the Board of Directors and the Secretariat, above. For example, the Swiss Banks' Settlement specified that administrative costs for the processing of claims should be capped at 1.5% of the total settlement amount.

<sup>8</sup> Articles 6 and 7 General Declaration, <http://www.iusct.org/general-declaration.pdf>.

in the Security Account are used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement and interest goes back into the Fund.

## Issues relating to awards to intergovernmental and nongovernmental organizations [reg. 73]

8. The Regulations foresee several forms of collaboration between the Board and intergovernmental and nongovernmental organizations: **consultation** with any competent expert or expert organization [Reg. 70]; **identify intermediaries or partners or invite proposals** for the implementation of the award [Reg. 71]; an **award for reparations against a convicted person be made through the Trust Fund to an intergovernmental, international or national organization** [Reg. 73].

9. The Regulations are silent on the potential role of intergovernmental and nongovernmental organizations in respect of the implementation of the Board's decisions on use of its voluntary resources in accordance with Reg. 50(a). It is presumed that the possible roles of such organizations would be regulated in a manner similar to what is set out in Regs. 73 and 74, aside from the proviso relating to oversight by the Court. As the Board's activity in this respect is not activated by order of the Court, it is submitted that it would be inappropriate for the Court to vet these activities of the Board. Instead, it would seem more appropriate for the Board to include, subject to any confidentiality requirements, the details of any collaboration in its Annual Report to the Assembly of States Parties. Most foundations include criteria such as audited accounts, recommendations from other organizations, a requirement that potential beneficiaries be legal persons and non profit making in accordance with applicable law, and rule out applications by organizations that are bankrupt or being wound up, are guilty of misconduct or misrepresentation or are subject to a conflict of interests.<sup>9</sup>

### Criteria to identify intermediaries or partners

10. It is recommended that the Board develop its criteria on the identification of intermediaries or partners, having regard to the extensive practice of international trust funds and donor agencies. In the practice of such bodies, applications may be solicited (in response to one-off or regular timed calls for proposals) or unsolicited (accepting broad applications from potential partners on the basis of generic guidelines). For example, the UN Voluntary Fund for Victims of Torture has established admissibility criteria on beneficiary agencies,<sup>10</sup> as has USAID.<sup>11</sup> The UN Fund has set out generic types of assistance that beneficiaries should provide in order to qualify for a grant from the Fund,<sup>12</sup> whereas some other funds have made specific reference to the need to show gender impact,<sup>13</sup> or

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<sup>9</sup> See, for example, the criteria of the European Commission in respect of human rights funding:

<http://ec.europa.eu/comm/europeaid/cgi/frame12.p>;

<sup>10</sup> See <http://www.ohchr.org/english/about/funds/torture/funddoes.htm>.

<sup>11</sup> [http://www.usaid.gov/our\\_work/cross-cutting\\_programs/private\\_voluntary\\_cooperation/conditions\\_ipvos.pdf](http://www.usaid.gov/our_work/cross-cutting_programs/private_voluntary_cooperation/conditions_ipvos.pdf).

<sup>12</sup> <http://www.ohchr.org/english/about/funds/torture/assistance.htm>.

<sup>13</sup> For example, the Board of the UN Voluntary Fund for Indigenous Populations has encouraged applications that are gender balanced and which nominate young people. [see Guidelines: <http://www.unhcr.ch/html/menu2/9/vfindige.htm>].

develop yearly or multi-annual strategies with precise frameworks for potential cooperation.<sup>14</sup> The latter approach would ensure the Board more control over the emphasis of projects and activities administered through intergovernmental or nongovernmental organizations.

11. The UN administered Trust Funds distribute resources “through established channels of humanitarian assistance” (Art. 1(a) GA Res. 36/151<sup>15</sup>). Assistance is provided through existing humanitarian organisations to projects or to initiate projects sponsored or administered by those organisations – the Trust Funds do not directly administer projects nor do they give assistance directly to individuals, outside of very exceptional circumstances.

### **Procedures to monitor the implementation of awards to intergovernmental or nongovernmental organizations**

12. In accordance with Reg. 72, the Secretariat is obliged to put in place procedures to monitor the implementation of a collective award. Foundations and government donor agencies have a wealth of practice in the monitoring of awards, which include annual audited reports by beneficiaries, ad hoc periodic field visits by foundation staff to include meetings with the target groups of beneficiaries.

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<sup>14</sup> As is the practice of the European Initiative for Democracy and Human Rights.

<sup>15</sup> <http://www.un.org/documents/ga/res/36/a36r151.htm>