

REDRESS

Ending Torture. Seeking Justice for Survivors

**Comments to the Trust Fund for Victims
in light of the Court's first
reparations decision**

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Introduction

REDRESS congratulates the Board Members on their election at the 11th Session of the Assembly of States Parties in November 2012 and welcomes the opportunity to present its observations at its Annual Board Meeting. REDRESS has been at the forefront of discussions on the establishment of a strong victims' mandate for the International Criminal Court and has been engaged in discussions on the establishment of the Trust Fund for Victims (TFV) ever since the idea was first conceived. We continue to be committed to working with the Board and the Secretariat to ensure the effective realisation of its important mandate.¹

The observations set out below are presented in the spirit of ongoing collaboration, and we hope that they are useful to the Board in the fulfilment their important mandate in support of victims of the most serious crimes of concern to humanity.

A. A focus on the Fund's reparative mandate

The Rome Statute framework provides a justice process that is reparative, as opposed to merely punitive and affirms the ability of victims to claim and be awarded reparation, following the conviction of an accused. The Trust Fund's dual mandate to provide assistance to victims independently of trials, as well as its function of facilitating and implementing reparations gives effect to the UN Basic Principles on Victims' Right to a Remedy and Reparation, which set out international standards on victims' access to justice and redress.² The Basic Principles are useful in that they clarify that, in the context of access to justice, victims are to be provided with information and protection, along side the provision of "proper assistance" and reparation that is "adequate, effective and prompt", but also "proportional to the gravity of the violations and harm suffered".³

In light of the Court's first decision on reparations in the case of *The Prosecutor v Thomas Lubanga*, rendered on 7 August 2012 ('the Reparation Decision'), the focus here is on the Trust Fund's mandate in relation to reparation, exploring issues concerning how implementation of reparations fits into the Court's overall mandate, by the decision and the current appeals.⁴

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

Submissions to the Board of Directors of the Trust Fund for Victims at their 4th Annual Meeting, 22 November 2007,

<http://www.redress.org/publications/REDRESS%20Submission%20Board%20VTF%20Nov%202007.pdf> ;

Comments to the Secretariat of the Trust Fund for Victims on its Preliminary Draft Guideline documents, 18 May 2007; Submissions to the Board of Directors of the Trust Fund for Victims at their 3d Annual Meeting, November 2006,

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

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

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

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

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

² The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147, 16 December 2005, E/CN.4/Sub2/1993/8.

³ Principles VIII and IX respectively on access to justice and reparation for harm suffered, *supra*.

⁴ *The Prosecutor v Thomas Lubanga*, case no. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012.

a) The Trust Fund's role as integral to the Court's mandate

At the outset, it is worth acknowledging that reparation is unlikely to repair all the harm suffered by victims. Nothing will give the children recruited by Thomas Lubanga, their childhoods back, scarred by months and sometimes years in armed groups, and subjected to sexual slavery, severe hardships, brutality and neglect. In this respect reparation will always be symbolic. While it may be impossible to restore the victim to the situation prior to the abuses, restitution of entitlements such as missed education and the provision of rehabilitation including physical, psychosocial as well as occupational rehabilitation may offer a form of redress.

At a superficial level reparative justice simply implies justice that provides reparation. However, a victim-centred process requires multi-faceted responses⁵ that holistically address victims' needs for information, their right to know what transpired through effective investigations, their requests for accountability, as well as providing compensation, rehabilitation or restitution and eventually fulfilling a sense of 'satisfaction.' The ICC Rome Statute addresses all these aspects. The role foreseen for the Trust Fund in the Rome Statute architecture is integral to supporting a victim-centred approach that together with the Court's outreach, investigations and judicial outcomes constitute justice.

The UN Special Rapporteur on Torture has emphasised that justice efforts "require a more victim-centred perspective that seeks an integrated long-term approach to adequate redress and reparation, including compensation and rehabilitation for victims," wherein victims are empowered and play an active role as a means of recognising and validating the traumatic experience they suffered.⁶

In this regard, trauma theory provides a number of fundamental insights into how victims might experience the justice process. Trauma implies a notion of tearing, rupture or structural breakdown. Instead of being identified as an experience that has consequences, trauma is considered as an open-ended process,⁷ in which the "description of the changing traumatic situation is the framework that organises our understanding of trauma."⁸ For many in this field, there is no "post" in trauma but only a continuing traumatic process, whereby those who assist victims will also become part of the traumatic situation and cannot operate outside of it.⁹ Because of the disorientation that ruptures and fragmentation generate, the *relationship aspect of healing is always more powerful and important than the aspect referring to the content [emphasis added]*. This also reflects REDRESS' experience of working with victims and victims' communities in the field. The qualitative aspects of the relationships, including genuine solidarity, timely and regular follow-up underpin victims' perception of the justice process.

This is particularly difficult issue for the Court and the Trust Fund, being so remote from victims, and potentially lacking a 'human face' that victims can build a trusting relationship with. However, it is a challenge that different entities within the Court may wish to consider, including the

⁵ Yael Danieli, *Massive Trauma and the Healing Role of Reparative Justice*, in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity. Systems in Place and Systems in the Making*. edited by Carla Ferstman, Mariana Goetz and Alan Stephans, p. 19, Martinus Nijhoff, Leiden 2009.

⁶ Juan Mendez, Special Rapporteur on Torture, *First report to the Human Rights Council*, 3 February 2011, A/HRC/16/52, para. 49.

⁷ Keilson, H. 1992. *Sequential Traumatization in Children*, Jerusalem: Magnes press, Hebrew University.

⁸ Becker, David. 2004. *Dealing with the Consequences of Organised Violence in Trauma Work*, Research Centre for Constructive Conflict Management, Edited version August 2004, p.5

⁹ *Idem*.

Prosecutor, Registrar and the Trust Fund when devising meaningful rather than opportunistic communications strategies with victims and victim organisations on the ground.

It is also critical that those working with victims receive training on trauma, understanding the importance of solidarity and empathy when interacting with victims. In Chile, those working with survivors explained the need for solidarity and “bonds of commitment” as part of a lively relationship, reconfirming the life of the patients, “in this sense, to cure means not so much to repair destruction, rather it emphasizes a willingness to share it.”¹⁰

Whichever form reparation takes, projects and services must be linked to recognition, fairness and dignity if they are to constitute reparation as opposed to “humanitarian assistance”. REDRESS considers that in order to achieve fair, effective and dignified reparation, it will be essential to ensure that the processes are victim-led engaging in a continued dialogue that empowers the beneficiaries.¹¹ Specific attention will be needed to ensure that victims themselves are involved, have a voice and are not side-lined in the consultation process in favour of more ‘organised’ actors.

b) Reparation v. Development

REDRESS supports the Trust Fund’s view that “it will be important to communicate the difference between reparations and development or humanitarian aid” to victims.¹² Reparation will need to be differentiated from assistance, development or humanitarian projects, in terms of its substance or the way it is communicated to victims. Maintaining the linkage with the justice process is the *raison d’être* of reparations. There is a significant value to acknowledgment of loss, damage, harm and suffering and the practice of various judicial or administrative bodies that are empowered to award reparation has shown increasing sensitivity in exploring the full extent of what the crimes have meant for the victims, from a multi-faceted and human perspective.

While certain forms of victimisation may be appropriately captured by collective awards, and certain forms of reparation may be most effectively distributed to beneficiaries through collective projects that provide services to affected communities or particularly vulnerable classes of victims, such as medical treatment, psychosocial counselling, skills training, education or income generation, it is important to ensure that the link to the specific harm suffered by victims is not lost.

As recognised by the Committee against Torture, development measures or humanitarian assistance should not be implemented as a substitute for redress.¹³ How such reparation will be owned by victims as their entitlement as a result of harm suffered will also play an important part in ensuring victims perceive them as such.

¹⁰ *Idem*.

¹¹ See the Nairobi Principles on Women and Girls Right to a Remedy and Reparation, 21 March 2007, <http://www.redress.org/downloads/publications/Nairobi%20Principles%20on%20Women%20and%20Girls.pdf>

¹² Trust Fund for Victims, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, Lubanga (ICC-01/04-01/06-2872), 25 April 2012, para 210.

¹³ UN Committee Against Torture, General Comment No 3, UN Doc CAT/C/GC/3 (2012) para 37.

B. Drawing the line: defining who will benefit

Trial Chamber I found Thomas Lubanga guilty of the crime of conscripting, enlisting and actively using children under the age of fifteen in hostilities. Other crimes, such as crimes of sexual violence and rape allegedly committed against enlisted children, were not included in the charges against Lubanga and consequently the Trial Chamber did not convict him for such crimes. The Chamber also declined to treat these as an aggravating factor for the purposes of sentencing. In its first Decision on the principles and procedure to be applied to reparation in the *Lubanga* case ('the Reparation Decision'), the judges tasked the Trust Fund for Victims with identifying beneficiaries, as well as defining the extent of the harm to be repaired and the forms that reparation will take.¹⁴ The decision has been appealed by both the participating victims¹⁵ and the Defence and a completely different approach could yet be adopted in months to come.¹⁶

Involving individual applicants

As it stands, the localities, extent of harm, and scope of beneficiaries are to be defined by the Trust Fund with the assistance of a team of multidisciplinary experts, rather than judges. Through a community based approach and consultations with victims and communities, the Fund is to develop proposals towards a reparation plan, subject to the review of a newly constituted Chamber.

The Chamber refrained from considering individual claims for reparation and ordered that they be transmitted to the Trust Fund which "may" consider them while devising its reparation plan. This is a specific point on appeal and victims' counsels have objected to the fact that the forms filled in by victims for the purpose of reparation will not necessarily be considered even if they constitute a positive right that victims decided to exercise in accordance with the Statute and Rules of Procedure. Should the current approach be confirmed on appeal, the Trust Fund may want to consider whether and how, victims who have so far participated and submitted reparation requests (with the risks involved in doing so) may be best recognised and included in the process.

¹⁴ Decision establishing the principles and procedures to be applied to reparations, *Lubanga* (ICC-01/04-01/06-2904) , 7 August 2012. The Chamber recommended that the Fund appoint a multidisciplinary team of experts to assist in that regard.

¹⁵ On 24 August and 3 September 2012, OPCV and the Legal Representatives of Victims appealed the reparation decision and argued that the Trial Chamber erred in law by 1) rejecting individual claims for reparations without consideration of their merits, 2) delegating its responsibilities to the TFV and the Registry, 3) leaving to a newly constituted Chamber to monitor and oversee the work of the TFV in relation to the implementation of reparations and 4) exempting the convicted person from any obligation in terms of reparation. Acte d'appel à l'encontre de la « *Decision establishing the principles and procedures to be applied to reparation* » délivrée par la Chambre de première instance I le 7 août 2012, *Lubanga* (ICC-01/04-01/06-2909) , 24 August 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1458961.pdf> ; Acte d'appel des représentants légaux des victimes, équipe V01 contre la "Decision establishing the principles and procedures to be applied to reparation" du 7 août 2012 de la Chambre de première instance I, *Lubanga* (ICC-01/04-01/06-2914), 3 Septembre 2012.

¹⁶ On 13 August 2012, the Defence sought to appeal the decision on reparations. It contested *inter alia* the broad approach taken by The Trial Chamber in relation to potential beneficiaries and the delegation to the Registry and experts of the evaluation of victims' harm, the determination of reparation measures and the identification of beneficiaries.¹⁶ The Defence also submitted that the Trial Chamber subjected the determination of factual issues where compensation is paid by the TFV to an incorrect, "wholly flexible", standard of proof. The Defence argued that such standard 1) did not allow the convicted person to respond to victims' allegations and 2) was not precise enough to allow a non-judicial organ to determine reparations. Requête de la Défense sollicitant l'autorisation d'interjeter appel de la « *Decision establishing the principles and procedures to be applied to reparation* » rendue le 7 août 2012, *Lubanga* (ICC-01/04-01/06), 13 August 2012.

Who are the victims?

Trial Chamber I gave some broad indications of who may be considered as victims for the purpose of reparation in the case. It stated that reparations may be granted to:

- direct victims, who suffered harm as a result of being enlisted, conscripted and actively used in hostilities under the age of fifteen ; as well as
- indirect victims, including family members of direct victims, along with individuals who intervened to help the victims or to prevent the commission of these crimes.
- legal entities, such as schools or hospitals may also be considered as victims for the purpose of reparation.¹⁷
- The Trial Chamber stressed that the needs of victims of sexual violence and gender-based violence must be taken into account when deciding on reparations.

However, the Chamber went on to say that “reparation should not be limited to "direct" harm or the "immediate effects" of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities, but instead the Court should apply the standard of "proximate cause".¹⁸ Perhaps this broad approach is an attempt to compensate for the extremely narrow charges pursued by the Prosecutor, which technically would restrict the class of victims deemed to be eligible beneficiaries.

The delegation of this role to the Trust Fund raises important questions regarding the process adopted in deciding to draw the line and how this process will be transparent, enable victim participation and ultimately, how it will be communicated to victims. In determining beneficiaries, the Fund will need to decide how far the chain of causation should flow. Should it adopt a ‘foreseeability test’? Clearly the sexual violence and inhuman treatment suffered by children recruited by Thomas Lubanga’s militia were foreseeable. However, it is not clear whether the broad notion of proximate cause could extend to persons who suffered at the hands of the children used in hostilities? Or even whether it could extend to children recruited by other armed groups than Thomas Lubanga’s UPC;¹⁹ to girls who were abducted only for sexual purposes by soldiers;²⁰ or even to children more broadly as schools were sometimes destroyed by the UPC in raids to abduct children, or where otherwise closed down because of the hostilities, which involved the abducted children.

In applying the standard of proximate cause, the Eritrea/Ethiopia Claims Commission stated:

Given this ambiguous terrain, the Commission concludes that the necessary connection is best characterized through the commonly used nomenclature of “proximate cause.” In

¹⁷ Decision establishing the principles and procedures to be applied to reparations, *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012, para 194- 196.

¹⁸ Causation concerns the question as to how closely a person’s harm needs to be linked to the crime for which a person was convicted by the Court in order for that person to be able to claim and receive reparations as ‘victim.’

¹⁹ The prosecutor has stated that “the fact that the Trial Chamber has held that reparations must flow from the crimes committed by the Appellant does not exclude claims where the harm suffered could in its own right have amounted to additional crimes attributable to him. Reparations will address the proximate consequences of the crimes that he has been found to have committed. By logical extension, if Thomas Lubanga’s child soldiers pillaged, murdered and raped, the individuals who suffered such harm as a result of the enlistment, conscription and use of these child soldiers should be permitted to apply for reparations.” Prosecution’s Response to the Defence Appeal against the “Decision establishing the principles and procedures to be applied to reparations”, *Lubanga* (ICC-01/04-01/06-2924), 21 September 2012 at para 38.

²⁰ Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations, *Lubanga* (ICC-01/04-01/06-2911), 29 August 2012, para 32.

assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question. The element of foreseeability, although not without its own difficulties, provides some discipline and predictability in assessing proximity. Accordingly, it will be given considerable weight in assessing whether particular damages are compensable²¹

Ultimately, where the Court or the Trust Fund draw the line could be considered arbitrary to victims and affected communities, given the narrowness of the charges and the vast extent of harm and deprivation suffered in Ituri at the behest of groups like Thomas Luganga's UPC. The challenge will be how to draw the line to ensure that claims based on harm that is too remote or speculative are excluded.²² If the Appeals confirm the Trust Fund's role in determining the class of beneficiaries and confirm the proximate cause standard, the Trust Fund may want to consider how to ensure a fair and accessible process to assess the full extent of the harm that should be repaired²³ and that its reasoning will be made public, and communicated in an accessible way to those affected.²⁴

It will not be a simple task. Expectations in Ituri are high and as recognised by the Trial Chamber itself, for many, the success of the ICC as a whole will to some extent be linked to the success of its reparation system.²⁵ While the decision is on appeal and implementation will not start until and unless this appeal, as well as the one against the conviction of Lubanga, the pressure is on to ensure that the first ever ICC reparation process is a success.

Funding vs Entitlements

REDRESS strongly believes that financial constraints should not come into play in the early stages of identifying the scope of beneficiaries and harm to be repaired. In that regard, the Trust Fund as a fundraising vehicle should adopt a flexible approach. In the first instance, the reparation plan should aim to meet international standards and best practice. Thereafter, after having established how best to repair victims, it may be necessary to prioritise, roll out portions of the plan in phases, identify short or long-term fundraising strategies or adopt other measures. This process should be as transparent as possible, so that victims do not feel short changed due to the lack of funds in terms of the recognition of what they have suffered or are owed.

²¹ Eritrea-Ethiopia Claims Commission, Preliminary Decisions, August 2001, December 2005 and July 2007, volume xxvi pp. 1-22, para 13, available at http://untreaty.un.org/cod/riaa/cases/vol_XXVI/1-22.pdf

²² War Crimes Research Office, *"The Case-Based Reparations Scheme at the International Criminal Court"*, 2010, page 37.

²³ it has been recognised that "the determination of a causal link between a purported crime and the ensuing harm is one of the most complex theoretical issues in criminal law", *Situation in Uganda*, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, at 14; see also War Crimes Research Office, *"The Case-Based Reparations Scheme at the International Criminal Court"*, 2010, page 37.

²⁴ See M. Goetz, *Reparative Justice at the International Criminal Court: best practice or tokenism?*, (Forthcoming, expected 2013).

²⁵ Decision establishing the principles and procedures to be applied to reparations, *Lubanga* (ICC-01/04-01/06-2904) , 7 August 2012, para 178.