



Victims and the ICC: Still room for improvement

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This paper sets out REDRESS' key concerns regarding the implementation of victims' rights before the ICC, and evaluates the progress made in these areas:

- The Victims' Strategy
- Information & Outreach to Affected Communities
- Meaningful Participation of Victims in ICC Proceedings
- Legal Aid for Victims
- Protection and Support for Local Intermediaries Assisting Victims
- Effective Protection of Victims
- Assistance through the Trust Fund for Victims and Reparations

1. The Victims' Strategy

The Court is in the process of developing a Court-wide strategy on victims, in response to Resolution ASP/5/Res.2 adopted at the 2006 meeting of the Assembly of States Parties. A first "DRAFT ICC Strategy in Relations to Victims" was released by the Court in August 2008 and preliminary consultations have been held with NGOs and states.

REDRESS is pleased that the Court is embarking on this strategic process. The process itself and the strategy, once finalised, will assist the Court to articulate a shared vision, mindful of the one-Court principle, and to identify key benchmarks for realising victims' rights under the Statute.

Recommendations to States Parties:

- Adopt language in the omnibus resolution that welcomes the efforts of the Court to develop a Court-wide strategy on victims and urges the Court to continue its consultations with States parties, NGOs and other stakeholders with a view to submitting its strategy *at the next meeting of the Assembly of States Parties*.

2. Information & Outreach to Affected Communities

To have the most impact the ICC's work must be understood in the communities most affected by the crimes within its jurisdiction.

The ICC has made some progress with outreach in recent years, and outreach activities are taking place in all countries in which official investigations have been opened. However, improvements are needed:

- i) **Targeted outreach is required for key events or Court decisions.** The recent decisions on the stay of proceedings and release of the accused in the Lubanga case underscore the importance of having sufficient and efficient outreach in order to pre-empt misperceptions that may otherwise arise, and to diffuse community tensions that may result from such misperceptions.
- ii) **Outreach and information must be accessible.** Grassroots organisations and intermediaries have consistently noted that more accessible information is needed. For example there is only one ICC outreach officer appointed to cover Ituri (DRC). As a consequence, outreach activities have been mainly confined to Bunia town and the surrounding area, and have not extended sufficiently to the vast rural areas where most of the victimisation is said to have occurred. Another consequence of this lack of human resources is that outreach activities have relied heavily on classic media such as television and radio and less on interactive meetings with stakeholder. Yet, in the most affected areas, television and radio are not accessible to all, and consequently not all are being reached. Many women, former child soldiers and other vulnerable victims such as the elderly or destitute remain uninformed about the activities of the Court. This leaves considerable room for manipulation from politicians and militia leaders on the ground.

Sufficient resources are needed to ensure that the Court can effectively meet its obligations to inform victims of specific decisions and give general information on the Court to affected communities.

It is recommended that the Assembly of States Parties:

- Continue to stress the importance of outreach in public statements;
- Adopt language in the omnibus resolution that encourages the Court to continue to enhance its field presence and contacts with affected communities in order to ensure the Court's continued relevance and impact in countries affected by ICC investigations and prosecutions;
- Ensure that sufficient resources are allocated to outreach activities in the field;
- Urge the Court to fill posts which are critical to the effective implementation of the Court's outreach strategy, in particular, the field positions;
- Ensure logistical/security support from States and UN and other bi/multilateral operations.

Recommendation to the Court:

- Ensure that all avenues are explored to reach affected populations outside main towns, enlisting where possible UN support for specific events; the Outreach

Section needs to identify the ways and means to make outreach happen within the current security context;

- Ensure that field offices are accessible as information points for the population (i.e. investigative and outreach activities may need to operate out of different locations);
- Develop clear action plans for informing victims of specific decisions as per the Rome Statute, in an expeditious and timely manner;
- Incorporate a programme of in situ hearings to engage local populations and make tangible the justice process.

3. Meaningful Participation of Victims in ICC Proceedings

Rationalisation and simplification

The participation of victims in proceedings is enshrined in the Rome Statute and developed in the Rules of Procedure and Evidence, the Regulations of the Court, and the Regulations of the Registry, as well as in the Court's jurisprudence. The nature of the crimes within the jurisdiction of the ICC makes clear that large numbers of victims are impacted and every effort should be made to ensure that procedures facilitate the participation and engagement of those affected. Large numbers must therefore be the inevitable starting point of strategies and systems for victim participation devised and implemented by the Court.

The status of applications gives rise to concerns about efficiency and purpose:

To date, the Court has received 960 applications by victims to participate in ICC proceedings from all situations. Of these, about 190 have been admitted in total. Of these 168 victims are admitted to participate in the DRC situation, 9 in the Uganda situation and 11 in Darfur; as to the cases presently before the ICC, 4 victims have been admitted to participate in the *Lubanga* case while 57 are now participating in the *Katanga/Chui* case, and 14 in the *Kony et al.* case. **770 applications** (out of 960 received), *i.e. more than 80 %*, are awaiting decisions, some since mid-2006. Out of the hundreds of ex-child soldiers who applied to participate in the *Lubanga* case, *only 4* have been admitted so far, while the warrant of arrest against the accused was made public on 17 March 2006, more than two years ago.

The Court should be looking at making the application process more efficient and working to make participation most meaningful for those affected, drawing on the extensive experience and practice in both domestic and internationalised proceedings on efficient methods to process large numbers of claimants.¹

Efficiency efforts should focus on:

a) **The application form** - this should be shortened, simplified and tailored to victims' realities on the ground. The Court has informally informed NGOs that it intends to revise its' 17 page application form;

b) **The evidentiary materials necessary to support the application** - Already, some Chambers have begun to revise evidentiary requirements to reflect the particularities of evidence available in the local context, e.g., whether it is feasible for victims to obtain photo identification cards or birth certificates. In addition, it is recommended that the Court consider

¹ See, REDRESS and Clemens Nathan Research Centre: *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making*, Report of Proceedings of a Conference at The Peace Palace, The Hague, The Netherlands, 1-2 March 2007, available at: www.redress.org/reports/ReparationsVictimsGenocideSept07.pdf.

further, the use of presumptions, and the extent to which the Victim Participation and Reparations' Section of the Registry can positively assist claimants;

c) **The system of transmission from the Registry to the Chamber** - should be streamlined with a view to tackling the severe backlog with victims' applications to participate in proceedings (some applications have been pending since 2006).

d) **Collective Applications for Collective Participation** - For victims not seeking to provide evidence of their individualised harm, consideration should be given to the possibility for victims to apply to participate collectively, e.g., to be accorded group rights to make general submissions before the Court which relate solely to their collective interests. This type of possibility might significantly reduce the administrative burden of the Court in reviewing individual applications from victims, the majority of whom are seeking only general rights to be heard during the pre-trial and trial phase.

4. Legal Aid for Victims

Under the ICC Statute, victims can be represented by a legal representative of their choice, which may be funded privately. If victims are indigent, the Court may assign a 'common legal representative' to represent them. Common legal representatives may be selected from a list of approved counsel or from the Court's Office of Public Counsel for Victims (OPCV), which is mandated to assist, support and represent victims if there are no conflicts of interest.

Minors under the age of 18 are automatically considered to be indigent and eligible for legal aid. However, all other victims must satisfy an inquiry into their financial situation. Many local organisations who have been sensitised by the Court's and others' outreach activities have begun to assist victims to apply to participate in the proceedings without the assistance of a lawyer. Legal aid is not granted during the application phase, and thus the forms, which are complicated and require legal understanding, are often incomplete, ultimately resulting in delays and extra work for the Court.

Legal aid for victims enables "meaningful participation". Without legal aid, most victims could simply not participate. It goes without saying that lawyers representing victims must be paid. These procedures involve a large amount of work and time, and no representative can realistically do this work on a *pro bono* basis, nor without recovery of costs, including travel to meet with clients and other related expenses.

As of early October 2008, only 47 victims had been recognised as indigent, out of the 190 victims admitted to participate in the proceedings. This represents only about 25% of the participating victims, whilst it has been recognised that individuals living in the affected communities are generally extremely poor.²

At present, eligibility of legal aid is determined on an individualised basis in which each victim is required to complete a 12 page financial information form, including queries relating to gross and net income, assets, bank accounts, vehicles etc. Victims must also sign a sworn statement in which they are required to pledge that they will cooperate fully with the Registrar in the investigation into their financial resources. On this basis, the Registry makes a temporary decision about the financial situation of the victim and might grant legal aid temporarily, pending the outcome of a financial investigation carried out by the Court, which would determine whether the victim was indeed indigent.

² Second Bi-Annual Meeting between the ICC and the NGOS, meeting with the Registrar, 29 September 2008.

An appeal which challenges this system and calls upon the Registry to adopt a system of presumptions of innocence in cases in which the applicants for legal aid come from poverty-stricken locations, is currently pending before the Presidency.³

Budgetary Concerns Regarding Legal Aid

The Court's budget for legal aid should reflect the very different working methods that victims' counsel need to adopt as compared to defence counsel (defence counsel can take instructions from the accused in The Hague, victims are dispersed in remote areas and consulting them at regular intervals and ensuring that their views are properly taken into account within the group representation requires extensive logistical support and means). The differing functions of victims' legal representatives will also impact on the nature and composition of the legal team, requiring some flexibility and creativity on behalf of the Registry to ensure that needs are met. REDRESS is concerned that certain general cuts to legal aid proposed by the Committee on Budget and Finance result from lack of understanding of the roles and responsibilities of legal representatives for victims.

Administration of the Legal Aid System

A related concern relates to the Court's administration of legal aid, and in particular the extent of time it takes for counsel to be paid for work undertaken and reimbursed for costs. There appears to be a general expectation that legal representatives meet all costs up front and are reimbursed, this is only feasible if the Registry is capable of responding to payment requests in a timely fashion.

It is recommended that the Assembly of States Parties:

- Ensure a sufficient budget to cover legal aid for victims;
- Adopt language in the omnibus resolution inviting the Court to review relevant national and regional/international systems providing legal aid for victims and to consult with relevant stakeholders with a view to presenting to the Assembly at its next session a strategy concerning legal aid for victims.

Recommendations to the Court:

- Foresee adequate budgets for victims' legal representatives;
- Undertake a review of procedures for determining indigence for victims participating in ICC proceedings. This system for victims should be specific to them and not a copy of the system for accused persons;
- Decisions on legal aid should be determined in a timely and expeditious manner.

5. Protection and Support for Local Intermediaries Assisting Victims

Local groups working at the grassroots level play an essential role in outreach, dissemination and sensitisation of victims, assisting victims in liaising with various organs of the Court, in completing the forms for participation and legal aid and helping victims to collect documents necessary for their applications to participate in proceedings. 'Intermediaries' also contact victims to inform them of decisions that concern them. They have the greatest access to victims, and can often go where Court staff are unable to go, for various reasons (lack of

³ *Situation in the Democratic Republic of Congo*, Request for Review of the Registrar's Decision of 28 March 2008 on the Application for Legal Assistance of 14 April 2008, ICC-01-04-494-tENG.

resources, security rules). Coming from very poor and often devastated contexts intermediaries accomplish an incredible work with very little means and taking great risks for their own well-being and safety.

However, in spite of their important role, and the continued reliance of the Court on them, the Court has not helped to finance their work or reimburse their expenses, nor has it stepped in to intervene when these associations have received serious security threats. On 13 May 2008, the Appeals Chamber⁴ indicated that:

Rule 81 (4) of the Rules of Procedure and Evidence should be read to include the words "persons at risk on account of the activities of the Court" so as to reflect the intention of the States that adopted the Rome Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons.

Despite this ruling, at the time of writing, almost 6 months later, intermediaries are not receiving protection from the Court.

The Court ought to clarify its relationship with intermediaries. Despite the importance of intermediaries, the Court should not excessively rely on them to accomplish core tasks within its mandate.

In view of the above, it is recommended that the ASP:

- Urge the Court to harmonise and clarify remuneration and support to intermediaries working with victims.

Recommendations to the Court:

- Clarify relationship with intermediaries;
- Provide financial support to intermediaries for work undertaken on behalf of the Court;
- Provide support and protection to intermediaries in the context of threats and reprisals they reside as a result of work undertaken on behalf of the Court or in respect of victims participating in Court proceedings;

6. Effective Protection of Victims

The Registry's Victims & Witnesses Unit has outlined three levels of protection:

- (i) Prevention;
- (ii) Measures adopted by the Court to protect victims and witnesses during proceedings;
- (iii) Emergency hotline (the Initial Response System/IRS) and the Court's Protection Programme, which includes the IRS and relocation of victims and witnesses that are at risk.

On 18 January 2008, Trial Chamber I found that victims at risk may be entitled to some measure of protection as soon as their completed application to participate has been received

⁴ Prosecutor v. Germain Katanga, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01-04-01-07-475-ENG, 13 May 2008.

by the Court.⁵ Despite this decision, victims' organisations have no reliable information as to what victims can request and expect from the Court.

Recommendations to States Parties:

- Adopt the budget for protection, as approved by the CBF;
- Adopt language in the omnibus resolution that calls upon States to enter into arrangements with the Court concerning, inter alia, witness and victims relocation and other protective measures for victims and intermediaries working with them;
- Afford protection to victims through cooperation by making available state's police forces when necessary, or forces from peace-keeping operations and other multilateral or bilateral actions, and through relocation agreements with the ICC.

Recommendations to the Court:

- Ensure that decisions on policies and the scope of protection are fully implemented;
- Ensure the protection of intermediaries under threat.

7. Assistance through the Trust Fund for Victims and Reparation

Assistance through the Trust Fund for Victims

The Trust Fund for Victims has been operational since the beginning of 2007 and it faces immense challenges: vast needs, large expectations and limited resources.

Progress has been made with the development of a draft Programmatic Framework, Financial Framework and Communications strategy and on 24 and 25 January 2008, the Board provided its first notifications of assistance projects to the Court in the situations of the Democratic Republic of Congo and Uganda.

The Trust Fund must be capable to identify through a transparent process, projects that resonate with local communities and that can also be practically implemented. The Trust Fund and the Court must also work together to find ways to speed up the implementation of projects once they have been approved.

Reparation

The ICC Statute enables the Court to make individual and/or collective awards of reparation to victims at the end of a case. Although none of the cases before the Court is currently close to the reparations phase, the question of reparation must be foreseen by the Court. Careful planning of procedures and consideration of the practice of other courts and bodies discussions is needed to ensure that the process can go smoothly.

Recommendations to States Parties:

- Continue to make regular contributions to the Trust Fund for Victims;
- Adopt language in the omnibus resolution to encourage the Board of Directors of the Trust Fund to continue its efforts to ensure that effective, efficient and transparent systems are in place to oversee its activities;
- Continue its assessment of the implementation of the Regulations at the next regular session of the ASP;

⁵ *Prosecutor v. Lubanga*, ICC, Case N° ICC-01/04-01/06-1119, Decision on victims' participation, 18 January 2008, para. 137.

- Share best practice with the Court on domestic reparations proceedings and mass claims procedures;
- Work with the Court to develop clear strategies on asset tracing, freezing and seizure in view of reparations, as well as the enforcement of reparations awards;

Recommendations to the Victims' Trust Fund:

- Continue to develop a strategy and a Programmatic Framework, in consultation with NGOs and other stakeholders and the Court, and ensuring effective, efficient and transparent systems.

Recommendations to the Court:

- Ensure adequate consultations with domestic and international reparations experts and claims adjudicators with a view to amassing best practice to prepare adequately and in a timely fashion for the up-coming reparations phase;
- Further to Article 75 of the Statute, and taking into account existing international principles on reparations, continue dialogue on the establishment of principles of reparations with a view to determining those aspects that can be clarified outside of specific cases, and exploring the range of options that may arise from the varied cases currently or likely to come in future before the Court.