



Ending Torture. Seeking Justice for Survivors

Intervention on the occasion of the 8th Annual Meeting of the Board of Directors of the ICC Trust Fund for Victims

21 March 2011

REDRESS welcomes the opportunity to present observations to the Board of Directors of the ICC Trust Fund for Victims (TFV). REDRESS has had the pleasure of following the work of the Trust Fund since its inception and has watched it grow and become operational in Uganda and the Democratic Republic of Congo.

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 of its objectives. We remain committed to working with the Board and the Secretariat to realise their important mandate to assist victims of the most serious crimes of concern to humanity.

Background

At the time of writing this paper, the Court's first reparations proceedings are becoming an increasingly real eventuality. Reparation may be awarded to victims in both the Lubanga case as well as the Katanga & Ngudjolo Case in 2012 - if the accused persons are found guilty and allowances are made for potential appeals to judgments on the merits. The victimisation relating to these first cases is multi-faceted and harms suffered will have wide-ranging impacts on the direct victims as well as their families, communities and societies.

Given the intense activity of the Trust Fund in implementing its assistance mandate and in preparing for eventual reparations, we have sought to identify and explore discrete areas that could pose particular challenges when the Chambers first order reparation. The interplay between the Trial Chamber and the Trust Fund, as provided in the relevant provisions of the Statute, Rules of Procedure and Evidence and Regulations of the Trust Fund are by no means straight-forward and REDRESS does not suggest to have answers to all of the issues that may arise in interpreting the provisions. The objective here is simply to contribute reflections in a constructive manner.

Combining entitlements & feasibility to ensure effective reparation for victims: reconciling Rule 98(3) & TFV Regulation 56

An area we have identified as being troublesome is the challenge in reconciling:

- a) the ability of the Court to award reparations either directly, or through the Trust Fund in accordance with Rule 98(3) of the Rules of Procedure,

with
- b) the language of Regulation 56 of the Regulations of the Trust Fund for Victims, which stipulates that the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98(3) and, in this light, may determine whether to complement resources collected through awards for reparations, fines or forfeiture with its “other resources”.

In trying to work through the provisions, particularly in the absence of Reparations Principles, which the Court must establish in accordance with Article 75 of the Statute, numerous issues are raised - from both a *judicial* and a *feasibility* point of view. We have found it helpful to consider how these provisions might best ensure effective reparation for victims from a *judicial* (or rights based) point of view and a *feasibility* point of view in turn.

The Trust Fund for Victims has an important role to play. The system of reparations before the ICC is inherently limited. The existence of the Trust Fund can help deal with some of these limitations.

As the Court may award individual or collective reparations or both, there is a potential tension between the right to have a judicial determination and recognition of the wrongdoing in terms of the liabilities incurred by the convicted person and corresponding entitlements of survivors; with on the other hand, the availability of funds, security concerns and the practical feasibility of implementing projects in post conflict environments, or in the case of DRC, environments where conflict is still on-going.

However, the ICC framework may provide solutions that can reconcile “entitlements” with “feasibility”. An important element that might constructively bind the two together in ensuring successful and effective reparation is due process and fairness. For many victims, whether it is a symbolic amount or a range of full and effective measures, what is often most important is the recognition, dignity and fairness of the process. Indeed, as Luc Walley explained in another Conference we organised on the experience of victims and witnesses in Universal Jurisdiction Cases (genocide cases in Belgium for instance):

[M]any victims are ill at ease when discussing reparation, especially when discussing monetary reparation. They fear that their fight against impunity will be interpreted as being purely motivated by monetary gain. The second issue is that very often financial issues are a bone of contention among victims.¹

To a large extent, a fair process can go a long way in providing a reparative result. Even if benefits or amounts disbursed are derisory or nominal in value, if the manner in which the figures or benefits were arrived at was right, there is a potential for victims to be satisfied.

¹ See Conference Report: *Universal Jurisdiction Trial Strategies: A Focus on Victims and Witnesses*, November 2010, http://www.redress.org/downloads/publications/Universal_Jurisdiction_Nov2010.pdf

1. Entitlements / Rights based approach

On the one hand, from a legal and rights-based perspective, it is important to consider the principle of *“restitutio in integrum”*, (that a wrong-doer must fully redress the harm done) in order to establish effective ways to redress the victim, as far as possible, to the situation prior to the violations. This includes multi-faceted measures that include medical, psychosocial, material, moral and other approaches.

On the other hand though, in the ICC context, (which can only determine liabilities on the basis of individual criminal responsibility against individuals, not States), the practicalities and feasibilities of providing a measure of reparation to the victims in a manner that is viable in difficult circumstances must also be carefully considered. For instance, measures of satisfaction, which can be so important, are difficult for a court to award directly as against an individual perpetrator. Demanding an apology for instance is legally problematic, given that the convicted perpetrator may never admit guilt.

From a judicial point of view, the logical approach to awarding reparation is to consider quantification of harm, based on a scale of assessment for different categories of harm. For instance, the *Inter-American Court of Human Rights*, which has awarded extensive reparations for serious human rights violations including large scale massacres in the context of civil conflict has developed a practice whereby it considers harm generally in 3 categories: Pecuniary damages, non-pecuniary and ‘other forms of reparation’ (satisfaction).

- a) With respect to Pecuniary damages, the Court will consider quantifiable loss and injury such as:
 - death or injury;
 - loss of homes, animals, livelihoods and possessions;
 - damage to property, expenses incurred, etc.

Quantifying death or injury will be based on loss of earnings, based on the minimum wage (if the victims were for instance rural agricultural farmers) in the victims’ country of residence, minus living expenses for the average life expectancy. For instance, in Guatemala \$5000 was awarded for each victim of a massacre (distributed to the next of kin).

- b) With respect to Non-Pecuniary damages, these principally aim at redressing anguish and suffering, or the moral harm that was inflicted. Here the Inter-American Court has awarded a lump sum ‘in fairness’ (in equity) to survivors who were also victims of the violations (persecution, etc.) and who are presumed to have suffered as indirect victims for the loss of family members. In the case of the Plan de Sanchez Massacre, \$20,000 was awarded for each surviving victim (a total of 317 victims were compensated in that case).

For victims to be able to be considered eligible for compensation before that Court, their claims generally need to be individualised; or sometimes a presumption is established that unidentified victims exist, and a procedure is set up to identify them thereafter.

- c) In addition to these first types of awards, which are largely compensation based, the Inter-American Court has also been pro-active at awarding “other forms of reparation”, these are generally collective in nature, and include rehabilitation services, public acts aimed at recognition, memory, acknowledgement, apology or aimed preserving culture or reducing stigma. Rehabilitation projects, have had both collective and individual

aspects - allowing individual victims to obtain services free of charge, but also constituting symbolic acts, addressing harm to the community.

While the example from the Inter-American Court includes a significant component of monetary compensation, the ICC's framework provides for the possibility of collective approaches to reparation, not necessarily to redress collective harms done (as the Inter-American jurisprudence has been developed), but in the sense of ensuring effective provision of individual reparation through projects or collectively disbursed services. Indeed, some who claim reparation may indicate that they would like specific individual measures, others may prefer collective approaches so as to encourage their reintegration into the community; and yet others may desire elements of both. In addition to the requests made by victims through the proceedings, the Court may presume that in addition to these victims others will exist in the same class, and that these too should benefit from reparation. In making its decision, it may make allowances for the specific requests of those who filed claims with the Court, but it may also wish to address the un-identified victims within the same 'class' or related 'classes'. In either respect, the exercise of identifying the scope of beneficiaries and establishing liability and corresponding entitlements would start with the relevant Chamber.

From a rights perspective, there is a significant value to a judicial acknowledgment of loss, damage, harm and suffering. The jurisprudence of various judicial or quasi-judicial bodies that are empowered to award reparation (with the Inter-American court in the lead), have shown increasing sensitivity in exploring the full extent of what the crimes have meant for the victims, from a multi-faceted and human perspective. Awards have included individual compensation, individual entitlements and access to free services as well as collective measures aimed, for instance, at redressing injury to the community.

In this regard the Trust Fund can be called upon by the Chamber to provide input in the reparations process. Indeed, the Trust Fund can play a very important role in bringing expertise to the attention of the Court during the reparations hearings, for example, in terms of demographic data, needs analysis, gender specific considerations or other issues such as security and publicity of the awards. The Trust Fund can be well placed to do this given its presence on the ground amongst victim communities and growing expertise in implementing assistance projects. In providing early input, the reparations process can become a seamless and virtuous circle, with the Court ordering reparations awards that the Fund has already had the opportunity to be involved in shaping. In order to be well placed to provide appropriate input to the Court, the Trust Fund should gather and consider best practice on reparations and integrate these into its work.

2. Feasibility

Preliminaries: Funding and payment of reparations is first and foremost the liability of the convicted person

In considering the implementation of reparations from the perspective of the Trust Fund for Victims, we try not to assume that there would be no monies collected from the accused/convicted person and deposited in the Fund. It is critical that the Court and in particular the Office of the Prosecutor's practice, along with cooperation from States, improves in this regard. Reparation is supposed to be funded by the wrong-doer and this is a fundamental principle of justice. We hope to have a panel on asset tracing at our upcoming conference planned for 12 May in the Peace Palace and will continue to raise this issue in our advocacy.

With respect to the role of the Office of the Prosecutor in this regard, it is hoped that greater efforts will be expended to seek to trace and link exploitation of natural resources and assets of

war lords, because such activities fund and fuel conflict that civilians are the direct victims of and enable perpetrators to remain at large and escape justice. In this respect, it is, from our point of view important to ensure that in communicating the Court's mandate on reparations, it is continually expressed that funding and payment of reparations is first and foremost the liability of the convicted person.

Turning to the reality of the first cases, where there appears to be no funds seized at all, awards made against the convicted person would remain unenforced, but for the existence of the Trust Fund. It is important to spell out what is owed by the individual in terms of his portion of liability for the suffering. When there are insufficient resources from the convicted perpetrator (the primary source for reparations), reparations may be funded through the Trust Fund's 'other resources', though this should be stressed as a secondary option, not an option that, through the limited action on asset tracing, turns into the primary option.

Feasibility

In a judicial context, reparations awarded against a convicted person, should not *per se* be based on whether there are or are not any funds. Feasibility must be examined, but it is in our view, a separate consideration. It is important for the Court to judicially determine reparations in line with the convicted person's liability for harm suffered, because legally speaking, reparation must correspond to the injury, and must be adequate and effective, as has been indicated in countless international law judgments on the subject.

From a feasibility point of view, it is perhaps a challenge to abstract the issue of resources from the need to devise plans that implement legal entitlements, based on the convicted persons' actual liabilities. Indeed, while the judicial approach starts with the establishment of liabilities and entitlements, non-judicial mass reparations programmes may start with a limited fund as their starting point. The ICC framework provides a **hybrid approach**, whereby the Court can establish liabilities, and the Fund will endeavour to complement awards against the convicted person. The amounts available will not be limitless, but the Trust Fund is nonetheless a fundraising vehicle so a flexible approach is necessary - and embodied in Regulation 56.

While some awards may be individualised, perhaps in terms of monetary compensation (e.g. for part of the award for the individuals who have made requests and participated in proceedings), others might be entirely collective and ordered through the Trust Fund in accordance with Regulation 98(3).

- a) If the award is quite precise and detailed, the task of the Trust Fund will be first to formulate a corresponding implementation plan (which may include the need to identify 'un-identified' victims within a specified class). In addition the Trust Fund may need to establish a specific fundraising strategy with respect of the award, or have other mechanisms to be able to show how it has "endeavoured" to complement the awards. Parallel to fundraising, there may be opportunities for partnerships with a range of entities who may be able to bring in-kind support (such as medical treatment, like Interplast), or contribute to publicising the award, awareness raising or reducing stigma).²

² For instance, the organization Witness.org worked with the Truth and Reconciliation Commission in Sierra Leone to produce a video version of the TRC's Report and Recommendations on reparations, as a significant portion of the beneficiaries were 'youth'. UNICEF also produced a children's version, in a format that could be used in schools as a resource.

- b) If on the other hand the award is quite open-ended, as some awards through the Trust Fund under Rule 98(3) could be, the Fund would need to come up with a fair and transparent process for establishing effective reparation for its draft implementation plan. The implementation costs and lack of funds collected from the convicted person, should in our view, be a separate consideration. In the first instance, the plan should aim to meet international standards and best practice on reparations given the judicial nature of the process. 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.

In achieving fair, effective and dignified reparation, it will be critical to ensure that the processes are victim led, not just at the start of the process, in terms analysing initial reparation requests that are made, but ensuring a continued dialogue that engages and empowers the beneficiaries. In this respect involving affected communities and ensuring meaningful consultations with victims will be critical. Whichever form reparation takes, it must ultimately provide victims with a sense of recognition, fairness and dignity.³ Projects and services must be linked to recognition, fairness and dignity if they are to constitute reparation as oppose to humanitarian assistance; and a key ingredient to ensuring recognition, fairness and dignity is process.

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.

³ Other principles, may also apply, such as gender empowerment, sustainability, non-stigmatisation, dignity and non-discrimination. It is hoped that some of these would appear as part of the Courts' reparation principles.