

REDRESS

Seeking Reparation for Torture Survivors

Making the ICC relevant to affected communities

Report prepared for the 6th Assembly of States Parties
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*“mindful that during this century millions of children, women and men have been victims of unimaginable atrocities”
- Preamble of the Rome Statute*

REDRESS recommends that the Assembly of States Parties:

- Adopt language on the Court’s Strategic Plan in the omnibus resolution, requesting an update at the next ASP, in particular with respect to the role of victims within the Court and the Court’s vision relating to victims;
- Adopt language in the omnibus resolution that encourages States Parties to fully carry out their obligations under the Rome Statute, in particular, to adopt legislation and adequate practical measures that ensure that victims’ rights are realised at the domestic level and to cooperate in executing arrest warrants & undertaking asset tracing;
- Encourage States to attend side meetings on victims issues at the ASP;

Support Increased Information & Outreach

- Continue to stress the importance of outreach in public statements;
- Encourage the Court to relocate the outreach unit closer to affected populations;
- Ensure logistical / security support from UN and other bi/multilateral operations;

Support Meaningful Victim Participation

- Encourage in situ proceedings with bilateral and multilateral support;
- Encourage a vision in which giving effect to victims’ rights is understood as integral to the Court’s success;

Support Effective Legal Representation & Protection

- Approve the requested legal aid budget to allow for the changes approved by the Committee on Budget and Finance (CBF) at its 8th Session to be implemented, noting the importance of effective legal aid for speedy trials;
- Conclude agreements with the Court to relocate victims;

- Afford protection to victims through contributions to peace-keeping operations and other multilateral or bilateral actions;

Support assistance to victims in need

- Adopt Major Programme VI of the 2008 Budget, as approved by the CBF;
- Make regular contributions to the Trust Fund for Victims;
- Adopt the proposed amendment to the Regulations for the Trust Fund for Victims on earmarked funds;

Support Effective Reparation

- Undertake Asset Tracing, Freezing and Seizure in view of reparations;
- Encourage and support the Court to investigate “big fish” who bear the greatest responsibility for the victimisation of a wide scope of individuals and communities by facilitating intelligence-sharing and evidence-gathering and providing logistical support.

1. Making the ICC relevant to affected communities: The Celebrated role of victims in the ICC framework

The active role of victims in the International Criminal Court’s proceedings is innovative and integral to the Court’s mandate. At the *ad hoc* Tribunals for the former Yugoslavia and Rwanda, victims and affected communities were merely passive bystanders, often uninformed of the trial processes that most concerned them. At best, victims were brought in as prosecution or defence witnesses and without any further engagement. The ICC’s mandate is more outward-looking and seeks to be restorative as well as retributive; it engages victims and affected communities directly and integrally within the process, and seeks to provide victims with a remedy and reparation:

- The Rome Statute and Rules of Procedure and Evidence provide that victims should be informed about key decisions that concern them;
- Victims are able to participate in proceedings to express their views and have their concerns heard;
- The Rome Statute provides that victims’ safety, physical and psychological well-being, dignity and privacy shall be protected; counselling and support are available from the Victims and Witnesses Unit;
- Legal representation and assistance may be made available;
- Victims are also able to claim reparation, which may be channelled through the now established Trust Fund for Victims. The Fund may also support projects to assist victims in need during the course of ongoing proceedings.

This paper evaluates progress made with the implementation of the following key areas that were designed to make the Court relevant to affected communities:

- Information & outreach to affected communities
- Participation in proceedings
- Legal representation and assistance
- Protective measures for victims at risk
- Assistance through the Trust Fund for Victims
- Reparations

2. Information & Outreach to affected communities

The Rome Statute and Rules of Procedure and Evidence include instances in all phases of the proceedings where either the Prosecutor or the Registrar must inform or notify victims of key decisions. For instance, the Registrar is obliged to “notify victims about the decision to hold a hearing to confirm charges” in order to enable victims to apply to participate in proceedings.

However, if the Court is to be relevant to communities most affected by the crimes within its jurisdiction, there is a need to go beyond simply notifying communities of certain decisions. Instead, a sustained capacity to respond and engage communities on new issues as they arise must be assured.

Thanks to the ASP’s support of outreach at the 5th Session of the Assembly of States Parties, and as a result of the Court’s Outreach Strategy, situation-specific staff are now in place, local activities are being carried out and logistical support is generally available to engage with key audiences. Progress has been made in the Democratic Republic of Congo (DRC), Uganda and even Sudan. However, activities in the Central African Republic (CAR) have not commenced. The emergence of this new situation was not covered in the 2007 Budget and would require dedicated staff to progress to the level we are now seeing, for instance, in Uganda.

- **Uganda:** In Uganda the Court is demonstrating its ability to reach a variety of audiences and media, including by directly engaging with affected communities, holding events in IDP camps and using accessible street theatre. In Uganda, partners on the ground have observed a notable increase in the Court’s own activities in 2007, where previously local NGOs were organising the events and inviting the Court to speak, which often placed the NGO staff in a position in which where they were mistaken for the Court itself, jeopardising their independence. The improved security situation in Northern Uganda resulting from the on-going Juba Peace Process has restored a semblance of peace in the region and allowed access to war-affected areas. With the recent arrival of a new head of the Uganda field office, further progress is expected in 2008.
- **Sudan:** Activities have taken place outside the country due to the continuing challenges for the ICC to hold events in Sudan. These events appear to have been relatively successful, though relatively expensive to organise. Further activities targeting refugees in camps in Chad have been undertaken and the distribution of picture-based materials is in preparation. However, the security situation in Chad has deteriorated and this may impact on the feasibility, timing and ultimate success of future initiatives.
- **Democratic Republic of Congo:** The DRC is in “phase 4 security” according to the UN’s classification system. Consequently, outreach activities have been confined to Kinshasa and Bunia town, and do not extend to the vast rural areas beyond such locales where most of the victimisation is said to have occurred. Outreach activities rely heavily on classic media such as television and radio and less on interactive meetings with key stakeholders, the latter having the advantage of allowing for dialogue and frank exchange, for numerous questions to be posed and answered. While mass media has the advantage of reaching a significant portion of the population, the most affected communities are often in rural areas without television or radio, and are not being reached. As a result, many women, former child soldiers and other categories of the most vulnerable victims such as the elderly or destitute remain uninformed about the ICC. Furthermore, with continued security challenges and the head of the DRC field

office still under recruitment, further delays are expected before an adequate and sustained outreach and information campaign is fully in place.

In general it has been observed that Outreach field staff are not sufficiently empowered in decision making often making outreach less effective than it could be. This is due in part to posts having been classified at too low a level, given the political sensitivities and exposure that the outreach country head will have to deal with on a daily basis: country heads are classified at P2 level. Compounding this problem, coordination and regional management of the country heads is done by staff in The Hague. As a result, in-country activities are less equipped to respond to immediate communication developments as they arise in their respective political climates.

It is noted that numerous field activities were cancelled in DRC this year due to security concerns. Of-course every context is different and security concerns are paramount. However, as experienced at the Special Court for Sierra Leone, permanent ground presence of both security and empowered outreach staff can work together to devise workable and safe outreach activities, identifying risks and appropriate counter measures so as to ensure continuity of the Court's operations, including outreach as a core operation.

Monitoring and evaluation of the impact of outreach is also coordinated from The Hague. REDRESS believes that monitoring and evaluation should be 'bottom up' as far as possible, with core partners being involved at the country level. It is thus suggested that it would be more effective to relocate the head of the ICC's Outreach Section from The Hague closer to affected populations (e.g. Kampala). This would ensure the more effective management, responsiveness and evaluation of outreach activities.

Recommendations to the Court on Outreach

- Relocate the Outreach Unit closer to affected populations to ensure increased responsiveness to local developments as well as closer management and evaluation of country teams' performance;
- Ensure that all avenues are explored to reach affected populations outside main towns, enlisting where possible UN security services (e.g MONUC in DRC) for specific events. Given the prevailing security situation, the Outreach Section needs to be more creative in suggesting workable strategies to Security, and the two must work more closely together to determine actions to reach the most vulnerable populations that are sufficient and appropriate within the security context;
- Ensure that field based staff are sufficiently empowered in decision making and operations (i.e. the capacity to hold events and sensitisation campaigns should not be determined solely by Hague-based staff);
- 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 (e.g. decision to hold a hearing to confirm charges against Germain Katanga would require a meeting to be held in Bogoro, 20km from Bunia town, site of the victimisation). The ICC's Security detail needs to be made to understand the core importance of the ICC's outreach work. It needs to work more closely with the Outreach Section to identify the ways and means to make outreach happen within the current security context;
- Continue to develop monitoring and evaluation mechanisms that are integrated into the outreach activities themselves, involving core partners at local level as far as possible.

Recommendations to States Parties on Outreach

- Continue to stress to the Court the importance of outreach and support the Court's developing outreach activities;
- Encourage the Court to relocate its Outreach Unit closer to affected populations;
- Ensure security and/or logistical support from the UN and other bi-lateral or multi-lateral operations for outreach activities.

3. Meaningful Participation in ICC Proceedings

The Court's Rules of Procedure and Evidence define victims broadly as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court".¹ In order for a victim to be granted legal status within a Situation or Case, the individual will have to demonstrate to the Court that he or she has suffered physical, psychological or material harm.²

Scope of Participation: Fear of large numbers

The broad definition of victims and leading decision of Pre-Trial Chamber 1 of 17 January 2006 that granted victims the right to participate in the proceedings of the DRC situation³, would suppose that large numbers of victims can participate in the situation phase. Indeed, the definitions of genocide, war crimes and crimes against humanity presume inherently large numbers of victims. Large numbers must therefore be the inevitable starting point.

Some might suggest that the best way of dealing with the challenge of large numbers is to review victims' right to participate in the situation and make the criteria for victim participation at the situation and case phases more onerous. However, the Pre-Trial Chamber's decision, which closely followed jurisprudence from other Courts, such as the European Court of Human Rights, found that participation in the investigation phase was particularly appropriate because it is precisely at this time when victims' interests diverge most with those of the Prosecutor. In addition, there is an extensive experience and practice in both domestic and internationalised proceedings which the ICC should be more mindful of, on efficient methods to process large numbers of claimants.⁴ It is REDRESS' view that the modalities of participation need to be critically reviewed due to their impracticality and inefficiency both for victims and for the Court.

Amongst current challenges we raise the following concerns:

- Only 17 victims participating in 4 situations and 4 cases when victimisation is massive;
- Over 500 applications received and awaiting decision, many since mid 2006;

¹ Rule 85 of the Rules of Procedure & Evidence. This rule also outlines that victims may also include organisations or institutions that have sustained direct harm.

² Article 68(3) of the Rome Statute.

³ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber One, 17 January 2006. Case document ICC-01/04-101-Corr .

⁴ Some of these strategies are discussed in a recent Conference Report issued by REDRESS. 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:

<http://www.redress.org/reports/ReparationsVictimsGenocideSept07.pdf>.

- No decision taken regarding victim participation in the DRC situation since September 2006;
- No decision taken on victim participation in the Lubanga case since October 2006;
- Hundreds of pre-October 2006 applications are pending in the Lubanga case, with the trial due to start in March 2008;
- Application forms are 17 pages long, confusing and not available in local languages;
- A separate form must be filled for each individual victim applicant: a collective approach may be better suited as victims are represented collectively and will most likely receive reparation collectively;
- Limited training and support for intermediaries has resulted in forms often being submitted incomplete;
- No assistance provided by the Court to victims or intermediaries in completing forms;
- In the Lubanga case, the narrow selection of charges has severely curtailed the scope of victims entitled to participate: this has been difficult for victims to understand;
- Thresholds to prove identities and evidence of harm suffered are arguably too high: recent jurisprudence suggests that victims are expected to prove their identities and linkages to the relevant crimes to the same standard as the Prosecutor, namely “beyond reasonable doubt.” However victims are not bringing a case or evidence against the accused, they are merely participating in the case that the Prosecutor is bringing and therefore should have to establish their connection to the case to a lower standard, for instance the standard used in civil cases, namely that the facts are true “in the balance of probabilities”;
- Discrepancies exist between chambers on thresholds to prove identities, which in the case of the Uganda Situation does not sufficiently take into account the realities of war affected areas and the ability of victims to provide evidence of their identities (photo IDs are required in areas where photo IDs are not readily available), whereas in the DRC situation, a more flexible approach was adopted;
- Victims at the application phase have no legal standing before the Court and cannot provide observations to the Court on such precedents.

Recommendations to the Court on Victim Participation

- Continue to re-assess the Court’s Strategic Plan to ensure that giving effect to victims’ rights is understood as integral to the Court’s success;
- Ensure that the selection of situations and cases as well as the charges reflect the nature and severity of victimisation;
- Speedily deal with the backlog of victim applications;
- Review the modalities of participation to make it more efficient and inclusive;
- Review application forms, making them shorter and clearer;
- Consider collective applications from victims;
- Provide more frequent and extensive training to intermediaries and assist with the completion of forms as part of such training;
- Relocate the Registry’s Victims Participation & Reparations Section Field Staff closer to affected populations as far as possible;
- Ensure support and protection strategies for intermediaries;
- Harmonise and clarify remuneration and support to intermediaries.

Recommendations to States Parties on Participation

- Encourage in situ proceedings with bilateral and multilateral support;
- Encourage a vision where giving effect to victims’ rights is integral to the Court’s success.

4. Effective legal representation

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. OPCV has also actively supported privately funded victims with legal advice.

Minors under 18 are automatically considered 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. Some of the problems encountered to date include:

- No presumption of indigence for victims even in respect of those living in areas in which the average income is less than \$1 per day;
- Training and outreach should focus on local human rights activists as well as local lawyers. Local lawyers should be encouraged to work with local human rights activists from the start, which may reduce the incidence of incomplete and/or erroneous application forms;
- The Court's budget does not take into consideration the very different working methods that victims' counsel will need to adopt as compared to a defence counsel (defence counsel can take instructions from the accused in The Hague, victims are dispersed in remote areas and contacting them will require extensive logistical support and means).

Recommendations to the Court on Legal Representation

- Grant legal aid to applicant-victims where this will expedite proceedings;
- Adopt a presumption of indigence in areas where average income is less than \$1 per day;
- Foresee adequate budgets for victims' legal representatives, including sufficient travel budgets.

Recommendations to States Parties on Legal Representation

- Approve the requested legal aid budget to enable the proposed changes to be made to the legal aid system and note the importance of effective legal aid for speedy trials.

5. The best possible Protection

The Registry's Victims & Witnesses Unit has outlined three levels of protection: (i) the first is prevention; (ii) the second includes protective measures adopted by the Court to protect victims and witnesses during proceedings; and (iii) the third is the Court's Protection Programme, which includes the relocation of victims and witnesses that have been put at risk.⁵

Current issues relating to victims' protection include:

- Victims whose applications to participate in proceedings are pending (many are pending since mid 2006), who often are at risk merely by applying are not afforded any protection by the Court;
- Intermediaries who are indispensable to assist victims to participate are easily targeted in war affected regions and are not afforded any form of protection. This is the case despite the fact that often their protection requirements consist mainly of advice or referrals to other local actors who may be able to assist them;
- Application forms containing the full identity of victims, as well as their whereabouts, are forwarded to the Office of the Prosecutor and Public Counsel for the Defence as a matter of course, increasing potential risks, when in fact full disclosure is not necessary in terms of fair trial requirements because there is no accused in Situation proceedings. Furthermore, this added risk is being imposed at a time when protection is denied because the victims are not recognised as such by the Court;
- Photo-Ids are required in the Uganda situation to prove victims' identity, increasing the risk of applicants' identification by an accused or supporters of an accused. The more precise the documentation that is required, the higher the risk, due to the potential that it gets into the wrong hands, and ultimately into the hands of an accused;
- As victims who are applying to participate in proceedings are not bringing evidence against the accused, but instead providing evidence of their injury in view of obtaining reparation in the event that the accused is convicted, a lower standard of proof should be required of victims, reducing the need for full disclosure of their identities (i.e. the civil standard used in tort law of 'in the balance of probabilities' should be applied instead of the 'criminal' standard of 'beyond reasonable doubt'.
- At least 5 relocation agreements have been concluded with States, but these are insufficient to deal with the needs to relocate victims and witnesses.

Recommendations to the Court on Protection

- Harmonise and clarify remuneration and support to intermediaries working with victims.

Recommendations to States Parties on Protection

- Conclude Agreements with the Court to relocate victims;
- Afford Protection to Victims through contributions to peace-keeping operations and other multilateral or bilateral actions.

⁵ Presentations made by the Victims and Witnesses Unit to NGOs at the 5th Session of the Assembly of States Parties in November 2006, as well as the ICC-NGO biannual meetings of March and September 2007.

6. Assistance by the Trust Fund of victims in need

Reparations proceedings may occur only after a final finding of guilt by the relevant Chamber of the Court. However, the Victims' Trust Fund has in certain circumstances a wider scope of application; its Board of Directors may authorise the disbursement of funds if it is considered "necessary to provide physical or psychological rehabilitation or material support for the benefit of victims or their families". In order to provide such assistance, the Victims' Trust Fund must first notify the Court of its conclusion, and if the Court does not indicate that such activities would be contrary to a fair trial or otherwise prejudicial to ongoing proceedings, projects may be funded.

With the arrival of its Executive Director at the beginning of the year, the Trust Fund for Victims has become operational. During the course of 2007, significant headway has been made, including the development of a draft Programmatic Framework, Financial Framework and Communications strategy. These initiatives are in their early stages and REDRESS will continue to support and work with the Fund as these develop further. As a result of successful outreach, the Fund received some 39 project proposals from DRC and Uganda, and its Board decided to fund a number of them.

Currently the Fund is prevented from receiving earmarked funds from governments, and can only receive earmarked funds for up to one third of the contribution for an activity or project. These restrictions do not coincide with the realities of fundraising today where governments and other major donors increasingly wish to disburse funds on the basis of applications with specific thematic criteria and with stringent reporting requirements attached. Donors increasingly wish to see the impact of their contributions, requiring clearly defined projects with measurable objectives. Thus, a greater pool of potential donors would be opened up to the Fund if its capacity to receive earmarked funds is increased. There is however a danger that more earmarking may result in unequal distribution of projects. The Fund should therefore develop strategies to avoid unequal distribution of funds, and ensure that projects continue to be conceived by victims "bottom up" as oppose to becoming "funding led".

Recommendations to the Victims' Trust Fund on Assistance to victims in need

- Continue to develop the Programmatic Framework, making information about application criteria and priority areas easily accessible to potential applicants via the Court's website and field offices;
- Develop procedures to ensure that earmarked funds are equally distributed.

Recommendations to States Parties on Assistance to victims in need

- Make regular instead of occasional contributions to the Trust Fund for Victims;
- Adopt the proposed amendment to the Regulation 27 of the Trust Fund for Victims on earmarked funds;
- Adopt Major Programme VI of the 2008 Budget, as approved by the CBF

7. Reparation and the Trust Fund for Victims

Reparation is not just about compensation. Reparative awards can also include restitution, for instance of property or rights, rehabilitation, such as medical or psychosocial treatment, or satisfaction such as the building of a memorial or establishment of a commemoration day.

The ICC Statute enables the Court to make individual and/or collective awards of reparation, depending upon the circumstance. However, the ICC has adopted a procedure whereby victims who wish to apply for reparation must do so individually. This may create false expectations of individualised damage awards which reflect the actual level of pecuniary and non-pecuniary losses. It may also lead to missed opportunities for more appropriate collective measures to be conceived. If victims apply jointly, they are more likely to identify appropriate collective solutions; a purely individualised approach will not engender such collective problem-solving. In addition it is very inefficient.

In order to assist the future reparations processes, as well as ongoing assistance to victims, it would be useful for the Court to undertake research on the scope and extent of victimisation in the Situation countries. This may assist in the development of a One-court vision on the scope and type of reparation to be awarded in the future.

Recommendations to the Court on Effective Reparation

- Undertake victim mapping in all situation countries to examine the extent and types of victimisation;
- Develop a One-court vision to ensure consistency in approach between the Victims' Trust Fund and the Court on scope and types of reparation to be awarded;
- Develop categories of beneficiaries in relation to the crimes within the court's jurisdiction.

Recommendations to States Parties on Effective Reparation

- Cooperate by undertaking Asset Tracing, Freezing and Seizure in view of reparations;
- Encourage and support the court to investigate "big fish" who bear responsibility for wide scope of victims by facilitating intelligence, evidence and logistical support;
- Make regular as oppose to occasional contributions to the Trust Fund for Victims.

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.

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