

Victim participation after 20 years of the Rome Statute: A few reflections

Presentation during High-Level Rome Statute anniversary event organised by the Netherlands Ministry of Foreign Affairs¹

Excellencies, Judges, distinguished guests, it is an honour and privilege to address you on this historic occasion commemorating the 20th anniversary of the Rome Statute. I address you today on behalf of Redress and in our capacity as facilitators of the Victims Rights Working Group (VRWG).

Redress is an international human rights organisation that works to seek justice and reparations for survivors of torture and other international crimes. We focus on victims. We work directly with them and together with local grassroots victims' groups and other civil society organisations to advocate for victim-centric laws and policies.

The VRWG is a network of over 300 civil society groups and experts that advocated for key victims' provisions to be incorporated into the Rome Statute. The Group continues to advocate for respect for victims' rights and to ensure that victims' needs and concerns are met throughout the ICC's judicial process.

Background

When the International Tribunals for the former Yugoslavia and Rwanda were established to deal with the gross violations of human rights and humanitarian law that had taken place, victims were not invited as independent participants to the international justice table. They were only allowed to participate as invited guests of the Prosecutor. With the advent of the Rome Statute, victims were finally given a place at the table. The Rome Statute has afforded victims the opportunity, once their personal interests are affected, to participate in proceedings and to share their views and concerns. Victims also have the right under Article 15 of the Statute to make representations to the Pre-Trial Chamber concerning the Prosecutor's request for authorisation to begin an investigation. Importantly, the ICC provides for victims to obtain reparations

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for the harms suffered. The reparations provisions and the establishment of an independent Trust Fund for Victims are part of a comprehensive suite of provisions which reflect the unique role which victims enjoy as rightsholders within the Rome Statute system.

Today as we reflect, we are mindful of the fact that although hundreds of thousands of victims have suffered harm at the hands of those entrusted to protect them including security forces and leaders who have utilised power structures to keep them marginalised, to date only a small percentage of that number have engaged with the ICC.

In 2010, when the international community paused to take stock of the Court's achievements during the ICC's Review Conference in Kampala, Uganda, the then Registrar noted that 2,648 victims had submitted applications for participation and only 770 had been authorised to participate in proceedings. Today, over 25,000 have applied and more than 15,000 have been accepted. In its Proposed Budget for 2019, the ICC indicates that it expects that more than 7,500 individuals will apply for participation as victims in the various ongoing judicial proceedings. The growth is encouraging as it points to the unwavering belief by victims that the ICC can actually make a difference in their situation.

The benefits of victim participation are numerous. In 2013, a high-level panel organised by REDRESS and Amnesty International reviewed the system of victim participation at the ICC and concluded that allowing victims to participate meaningfully in the ICC's proceedings can, independently of any reparation outcomes, empower them and contribute to their healing. The Panel also recognised that "participation can strengthen the work of the ICC by establishing a strong connection between the Court and those most directly affected by the crimes it is investigating and prosecuting. Victims can provide important factual and cultural context regarding the crimes and their impact, which can also contribute to establishing the truth, as well as an historical record of events. Effective realisation of victims' rights may also help ensure lasting support for the ICC, act as a deterrent against future violence and inspire more victims and affected communities to demand justice, truth and reparation at the national level."

However, as often happens with dinners, it may be difficult to plan and to anticipate the needs and peculiarities of all guests, particularly if more arrive than was initially anticipated. Finding the middle ground between victims' expectations and the limited resources of the Court has not been easy and the

process has had to constantly evolve. In addition, the Court has had to identify modalities of participation that ensure effective and meaningful participation without compromising the rights of the defence and without reducing the participatory rights to mere symbolism. While there has been significant evolution in relation to the scope of victims' participatory rights within the last decade, there are several areas which will continue to require detailed consideration.

1. The Court must ensure that victims' participatory rights can be exercised in a manner that is meaningful and effective

Participation by victims necessarily involves two main issues- access and modalities. The Court's distance from victims implies that a system needs to be found to facilitate their engagement with the Court.

To exercise their rights in Article 68(3) effectively the Court must ensure that victims are: informed about their rights; informed about the ICC's proceedings; enabled to access the participation process and enabled to present their views and concerns to the Court. Effective systems must therefore be put in place, in particular: a clear and accessible application process; an effective system of legal representation and comprehensive outreach programmes. The system must be able to deal effectively with all victims falling within the mandate of the Court, regardless of the number or location of victims who may be affected by particular proceedings. The Court should also be able to accommodate the cultural factors and particular sensitivities at play in local contexts. Thus, the recognition that victims in Palestine and Georgia have different needs and expectations from victims in certain parts of Africa is critical to effectively managing the system.

In reality, the system of participation is likely to have meaning for victims only if: they understand the process, including its limitations; they are treated at all times with humanity and respect for their dignity and human rights; appropriate measures are taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families; they are able to follow the proceedings substantively; they feel properly consulted and represented by their legal representative; and they can see how their views are presented and actively considered by the Court.

2. Ensure sustained outreach to and engagement with victims and victim communities

More broadly, the participatory rights of victims raise questions about the timing, consistency and sustainability of the ICC's engagement with victims. How early should the Court engage victims and for how long should it keep them informed about the work particularly in protracted situations where there is no arrest.

Despite the importance of outreach and information for victims, the Court has not adopted a consistent approach to outreach and the dissemination of information to victims despite an increase in its field presence.

The important decision of the Pre-trial Chamber in the situation in Palestine recognising the fundamental importance of outreach and public information for victims of a situation, and not just victims involved in a case, is a step in the right direction. The judges have ordered the Registry to establish a system of public information and outreach activities among the affected communities and particularly the victims of the situation in Palestine. The Chamber has directed the Registry to establish a continuous system of interaction between the Court and victims, residing within or outside of Palestine, for as long as the situation in Palestine is assigned to a Pre-Trial Chamber. The question is what will that look like realistically? Is this sustainable and will be replicated in other situations?

3. Ensure prompt, appropriate and adequate reparations

The ICC is making considerable progress in consolidating its case law on reparations. However, victims' right to obtain redress at the ICC have so far fallen short of their expectations. There are real limitations to the number of victims who can and will actually benefit from ICC reparations for a number of reasons including the crimes charged, the geographical focus as well as insufficient evidence to support a conviction:

Only a fraction of the victims who have requested reparations from the ICC have benefited from an award. The reality is that most ICC defendants are found to be indigent, thus the burden falls on the Trust Fund for Victims to fill the gap. Relief under the Trust Fund's assistance mandate is the only hope for some of these victims, but the Trust Fund has to date only launched assistance programmes in Uganda and the DRC; and have announced, following the Bemba acquittal, plans to commence its previously delayed assistance

programmes in the Central African Republic. The Trust Fund plans to commence assistance projects in other countries including Cote D'Ivoire, Georgia and Kenya.

Significant time has been devoted to interpreting the legal texts which govern reparations and clarifying misunderstandings concerning the scope of respective roles; however, it is time for the Court and the Trust Fund to now move towards the next phase - the actual implementation of reparations for victims that have waited and suffered for a very long time.

Sustained funding is necessary to ensure that the Trust Fund can complement reparations awards since most convicted persons are deemed indigent. The Trust Fund aspires to raise €40 million in voluntary contributions and private donations by 2021, to implement and complement the payment of reparations orders and to expand the implementation of assistance programmes in as many situations as possible before the Court. Each year, the Trust Fund has only a fraction of what it needs to fulfil its mandates.

The Trust Fund must diversify its funding sources as the current dependence on voluntary donations is unsustainable. The Committee on Budget and Finance (CBF)- a subsidiary body of the ASP that advises on financial matters- has urged the Trust Fund to diversify its funding sources and develop its fundraising capacity. Raising funds from public and private sources must become one of the Trust Fund's priorities.

Beyond the important need to streamline procedural systems and develop strategies, the success of the ICC reparations system depends on a more holistic look at reparations within the broader context of complementarity. The Trial Chamber in the Katanga case noted that *'an order for reparations does not[...]relieve States Parties of the responsibility to award reparations to victims pursuant to other treaties or domestic legislation.'* Thus, irrespective of the ICC's approach to reparations, States Parties have a responsibility to afford redress to victims that have suffered serious violations of their rights.

As the Trust Fund begins the process of implementation, increased state cooperation will be required. In addition, more focus will have to be placed on the broader obligation of States to repair the harm suffered by victims within their countries as complementary to the ICC's efforts in this regard. The complementary role of national reparations programmes could significantly enhance the success of the ICC reparations system.

The Trust Fund is encouragingly pursuing this approach in Uganda engaging directly with Health and Local Government Ministries with a view to ensuring continuity of the services that it started under the assistance mandate.

The next 20 years

The next 20 years of victim participation at the ICC will no doubt present numerous challenges in addition to significant opportunities. The next 20 years should see a movement away from extensive focus on procedural processes and more emphasis on action. Victims have waited long enough for the ICC to work out procedures. It is time for the Court to ensure consistency in its jurisprudence and practice to provide certainty for victims in the way the Court will interact with them. The ICC must lean in and listen to victims, to their wishes and concerns and move beyond procedure and concretely realise the rights that victims have been granted under the Rome Statute.