

## NGOs AND THE ROLE OF VICTIMS IN INTERNATIONAL CRIMINAL JUSTICE

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The evolving role of NGOs in international criminal justice  
An international seminar organised by the Forum for International Criminal Justice and Conflict  
at the initiative of the Norwegian Helsinki Committee and PRIO.  
*Menneskerettighetshuset (Human Rights House), Tordenskioldsgate 6B (2nd floor), Oslo*  
*Monday 2 October 2006 12:00 – 16:00*

### I. Introduction

The Redress Trust (REDRESS) is an international nongovernmental organization based in the United Kingdom with a mandate to assist survivors of torture and related crimes to obtain justice and other forms of reparation (including *inter alia* criminal sanction, civil redress, acknowledgement, apology). It is an organization that was founded by a survivor of torture and that is focused specifically on fostering survivors' rights. The organization takes legal challenges on behalf of survivors, works on standard-setting to develop the international system of laws and principles that recognize the right to a remedy, undertakes advocacy work and awareness raising, conducts research, in collaboration with local and international partners.

### II. REDRESS' work on the International Criminal Court

REDRESS became involved in advocacy initiatives in support of the ICC before the Rome Conference. It looked to the ICC as the institution which could make a real difference for victims of the worst crimes; an institution that could incorporate the best of the international standards relating to victims (such as the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Van Boven/Bassiouni 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); and the best of national practice (such as the ability for victims in certain civil law systems to participate actively in criminal proceedings and claim reparations).

REDRESS wanted to improve upon the model of the ad hoc international criminal tribunals, in which the victims' role was relegated to the mere object of the prosecution's case. In these ad hoc tribunals, victims had no other involvement in the proceedings and were often left dissatisfied and disaffected by the process. The tribunals were largely about the alleged perpetrators; victims came to testify and were often humiliated, but were not able to present their own views or perspectives.

REDRESS, together with other NGOs, lobbied for inclusion of victims provisions in the Rome Statute and Rules of Procedure and Evidence (including the ability for victims to be protected, to be able to participate in proceedings and to obtain reparations) and lobbied for the establishment of a trust fund for victims, to contribute practically to the reparations process and to victims' broader needs.

Once these provisions were in place, REDRESS' emphasis shifted to their implementation in practical terms. We worked and continue to work with court staff on how to effectively implement the provisions. In addition, we continue to work to build civil society networks internationally and locally to support the provisions and for victims' communities to make good use of them.

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### **III. Some of the key challenges for the ICC in respect of victims**

Firstly, given the mandate of the ICC, the Prosecutor's investigations and the situations and cases before the Court will often take place with the backdrop of ongoing conflict. This presents real challenges for the Prosecutor's investigation but also for the security and safety of victims and witnesses.

Second, the concerns of victims will not necessarily correspond in time to the Court's processes. Particularly with an ongoing conflict, the primary concerns of victims will be food and shelter and immediate security and freedom from further harm. The idea of participating in a criminal process is therefore removed from their daily reality. Further, conceiving of what appropriate reparations means is equally difficult – it will mean one thing in their present circumstances, and something quite different in 5 years time. Even if sufficient funds could possibly exist to 'repair' the harm done to victims, the victims involved in a particular case will not be a homogenous group and their expectations will also differ.

The huge number of victims affected by the crimes considered by the Court will pose further challenges, in particular how to ensure that the most vulnerable victims are able to participate, not just those who have the greatest access to lawyers.

The Court, when considering how best to implement the victims' provisions, is operating with a different set of principles and constraints. It will have budgetary concerns and will be interested in swift, streamlined results – where do victims' concerns fit here?

### **IV. The innovative features of the ICC in respect of victims**

The ICC is the first internationalized court that has really integrated a victim-friendly perspective into its core. The Statute:

- recognizes the right of victims to be protected and to be treated with dignity and respect throughout the process;
- enables victims to be active participants in the justice process; and
- allows victims to apply for reparations to the Court

These rights are designed to make the court more accessible to victims and more responsive to their needs. NGOs have played a significant role in advocating for this victim-friendly system, now that it has been established, it is important that we make sure that it works in practice.

#### **The right to participate**

Article 68(3) of the Statute provides that where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

In order to participate, an applicant must:

- fall within the definition of 'victim' of a crime within the jurisdiction of the statute;
- their personal interests have to be affected;
- there needs to be a connection between the harm that was suffered and the crimes before the court.

**When?** Victims may participate at stages considered to be appropriate (the exact time is not specified). Pre-Trial Chamber I has indicated that victims can participate very early on in the process even before an indictment. In its decision of 17 January 2006, in response to applicants' request to participate in proceedings in the DRC situation prior to the issuance of a formal indictment, the Chamber indicated that they could indeed participate though the manner of participation is necessarily restricted at that early phase. This relates to the 'the degree of connection between victim and crime' – obviously if the Prosecutor has not yet narrowed down the emphasis of the case in an indictment, this means that participation is not restricted to those victims affected by the crimes the prosecutor chooses to prosecute.

**How?** Victims may participate in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Well-recognised defence rights that participation should not unduly impede include the right to know the case against him/her and the right to a trial without undue delay.

### **The ability for victims to be represented by lawyers during the procedure**

The Statute allows for victims to be represented by counsel, this can be a counsel of their choice, however, like any other counsel appearing before the Court, they must satisfy basic requirements relating to competence and years of experience.

Owing to the fact that there may be many victims who would qualify to participate in proceedings, and that participation should not be prejudicial or inconsistent with defence rights or a fair and impartial trial, the Court has the possibility to appoint a 'common legal representative' to represent the interests of groups of victims. The code of conduct for counsel specifies the duties of counsel in respect of potential conflicts of interests between groups of victims. Where the counsel believes that the different points of view can be presented fairly to the Court, to inform clients of a potential conflict and seek consent for joint representation; where the conflict is divisive, to action, or to stop representation of one or several of the conflicting clients.

When considering the role of legal representatives for victims, it is useful to set out how this role differs from the role of defence counsel:

- the role of victims' legal representative is broader, but more diffuse;
- the clients may well be traumatized or have other special needs, there will be multiple clients, many of whom will be unfamiliar with the law;
- clients are likely to be spread out in different, hard to reach locations, often far from the counsel.

Funding for legal representatives is not 'as of right' as it is for accused persons. The budget of the Court provides some resources for private counsel to represent victims and has established an 'Office of Public Counsel for Victims' to assist these counsel, and on occasion, to provide representation. To date, because the numbers of applicants is still relatively low, funding has not yet posed a major problem, but it is likely to become one, once the system is fully operational. In this respect one can already see the strain on the Court, which has come up with an 'indigence form' – in which victims are asked to detail their gross and net wages (seemingly nonsensical for most victims coming from the countries currently before the Court) to prove their indigence in order to qualify for free counsel. NGOs had suggested that the Court apply a presumption of innocence, though this did not materialise.

### **Reparations and the Trust Fund for Victims**

The ICC can order reparations to or in respect of victims, including restitution, compensation and rehabilitation. Victims may apply to the Court for reparations and the applications will be considered at the end of the trial post-conviction. Judges also have the possibility to determine reparations on their own motion (recognising that not all victims will be able to apply).

The Court has the possibility to award both individual and collective reparations. There is likely only to be a limited amount of funds for reparations awards when compared with the rights and needs of victims, and therefore collective awards may be, at times, the only method to bring a certain measure of justice to victims.

The Trust Fund for Victims operates alongside the Court, and has a role in ensuring that victims who cannot enforce reparations awards (because the perpetrators have no assets) obtain some relief. Also there is a possibility for the Board governing the Trust Fund to apply some of its voluntary contributions towards projects for assistance to victims at a very early stage in the process (situation phase), so long as there is no objection from the Court.

Factors that will need to be taken into account in affording reparations:

- These are victims of the most serious crimes, yet they are mass crimes – how to come up with reparations that are ‘appropriate’ – that take into account the seriousness of the crime and the particular situations of victims, yet at the same time, that are realizable in practice?
- The Court is not mandated to consider the responsibility of states – the Court only has the ability to make awards against individual perpetrators.
- Will the Court restrict itself to making an award that reflects the funds it has been in a position to seize from perpetrators or will it make an award in the abstract, even if it is highly unlikely that it can be enforced? If it makes an ‘abstract’ award, it risks having an inequitable approach to victims, depending on the wealth of the perpetrator; on the other hand, if it makes awards that can’t be enforced, this risks drawing criticism from victims and the Court’s detractors alike.
- What capacity does the Court have to enforce its awards? The cooperation regime in the Statute requires states parties to cooperate, though it is not clear how effective this will be in practice.

### **Right to protection and support**

Protection includes:

- support for victims coming to testify in The Hague (logistical and psychological);
- protection of victims and witnesses – in the ad hoc international criminal tribunals, this has mainly been delayed disclosure of identity of witnesses, use of pseudonyms, and more extensive arrangements (relocation within or outside of country...).

In the ICC, the protection mandate extends throughout the process from initial investigations, through the trial and post-trial. This necessarily entails:

- how investigators interact with victims in the field – not to re-victimise the victims or expose them to further risks [training, gender sensitivity, security, information];
- how witnesses are treated during trials; how victim/participated are treated [privacy, dignity, support, prevent against abusive treatment];

- post-trial concerns – to ensure no reprisals [monitoring, support].

The central protection issues include:

- ongoing conflicts – how to ensure protection – Office of the Prosecutor cannot rely on local structures;
- protection of victims participating in proceedings – what is the scope of responsibility/mandate for the Court;
- outreach – role of Court is complex, needs to be explained, so victims understand it and the limitations, and potential repercussions

## **V. Tension between the traditional criminal justice approach and the more victims-oriented approach and how NGOs are handling this**

Some argue that victim participation and reparation is inappropriate for an international criminal court – the traditional view (particularly common law) of this is an emphasis on prosecutions, with victims' concerns as extraneous, secondary; they shouldn't impinge on the primary prosecutorial function. It is clear that there are a range of tensions evidenced already in the court procedure.

In general, the notion that victims are 'stakeholders' of justice, not just the prosecution witnesses has major implications. On first glance, one might think that the Office of the Prosecutor would support a greater involvement of victims in proceedings – it might help the prosecution case. However, in practice, the Office of the Prosecutor has arguably been the biggest detractor – because of the uncertainty it creates for the OTP and the perceived impact it has on the OTP's independence.

Victims of crimes are individuals with different needs and perspectives that are not necessarily aligned with that of the Office of the Prosecutor, with its own agenda, bureaucracy, and rituals, and limited by a restrictive mandate and budgetary and other resource constraints. Victims may wonder why the prosecutor is investigating crimes in one area but not in another – do 'their' crimes not matter just as much? Victims may be concerned to hear that the Prosecutor will not be investigating because it is ceding jurisdiction to local authorities – they may have no faith in local authorities, no understanding of the complementary role of the Court and the limitations on the Court's mandate. Equally, victims may wonder why an investigator questioned them about what happened, but there was no apparent follow up, (e.g. it did not lead to a prosecution). This may have been due to the fact that the crimes did not meet the definitions in the statute or did not relate to the primary perpetrators that the Prosecutor is choosing to prosecute; or perhaps the Prosecutor has decided not to call that particular witness to testify; or perhaps there was follow up but the victim didn't know.

### **Some of the more difficult tensions**

- The rights of victims to protection and rights of victims to participate v. defence right to know the case (redaction – confidentiality – defence right to know the case)*

This issue arose in the ad hoc tribunals in relation to witness testimony – the general balance between right of victims to be protected and accused's right to know the case. This will also arise in the course of ICC prosecutions in respect of prosecution witnesses. In the ICC, however, it is now *also* coming up in relation to victim participation. The defence and prosecution are now arguing that the defence should receive the unredacted applications of victims. The judges have maintained the redactions, though the issue needs to be closely monitored. The question really is whether the 'defence right to know the case' obligates knowing who the victim applicants are, when they are not necessarily prosecution witnesses.

ii. *Prosecutor's independence v. victims' interests*

It is the role of the Prosecutor to consider who and what to prosecute. The Office of the Prosecutor would never have the resources to prosecute all the foot soldiers involved in the perpetration of massive crimes, nor would it be capable of simultaneously investigating each and every crime falling within the jurisdiction of the ICC. The OTP has outlined its policy of focusing on the gravest of situations, and within those situations, on the responsibility of key individuals. But a key question now is – once the OTP has focused on particular individuals, does it have a further responsibility to ensure that the charges reflect the full extent of the crimes said to have been committed – or can it, for example, focus on crimes which might be easier or more expedient to prosecute, to get a few ‘quick’ convictions? Is its discretion absolute?

This has arisen in relation to the Lubanga case. Many NGOs were concerned about the limited scope of the charges in the case against Lubanga – solely focused on the recruitment of child soldiers. Many have queried why there was a failure to include sexual crimes, for example, given the apparent massive evidence of the UPC in such practices. The Prosecutor has argued against the participation of victims in the Lubanga case insofar as the victims fall outside of the scope of the crimes set out in his indictment, and this position has been upheld by the Pre-Trial Chamber. Consequently, victims have little opportunity to raise concerns about the narrowness of the indictment. But if charges remain so narrow, will the Court have the impact it is supposed to have?

iii. *Protection of victims v. their participation*

It is a challenge to investigate effectively in ongoing conflicts, and to protect victims and witnesses adequately in the process. However, a problem is the repeated use of the security environment and its potential impact on victims as a reason to delay hearings, prevent proceedings from moving forward or suspend investigations, as recently evidenced by proceedings in DRC and Darfur. The moment one says ‘victims need to be protected’, it is almost a taboo to question this. The OTP’s approach to the protection of victims and witnesses appears to be one of reducing the numbers of persons it needs to call as witnesses (and hence reducing the protection burden) by reducing the breadth of the charges. This approach of narrowing the involvement of those most affected in order to maximise protection [a “*negative protection*”] must be used with caution, given the detrimental impact it has on victims’ rights and ability to be involved in proceedings – either as witnesses or claimants. More dialogue on how to protect victims whilst positively enabling them to obtain justice, should be the primary objective.

**VI. What NGOs are doing in respect of these issues and where the gaps are, what more should be done**

In considering the role of NGOs it is important to stress that NGOs do not and cannot replace the Court – Court has its responsibilities – NGOs can assist but not replace.

- NGOs have been extremely effective at lobbying to get systems in place – at the international level, making recommendations on adequate systems of protection, calling for greater field presence; budget process; providing training to investigators; general outreach.
- NGOs have had reasonable success at working with Court officials to develop procedures to implement the Statute and Rules of Procedure and Evidence. This is an ongoing process; NGOs have brought experts to the Court with experience in claims processing and reparations. The Court is independent and will take its own decisions about process and procedures, but there has been reasonably good input and monitoring of the Court’s procedures.
- NGOs have been reasonably effective at broad outreach to make known the Court and its mandate.

- NGOs have assisted with the first ‘token’ participation of victims – to date, less effective at ensuring the involvement of mass numbers of victims though we are still at early stages and more analysis is required on why and how. The Registry appears to be taking a laissez-faire approach to victim participation. Arguably, it is not sufficiently encouraging it, as if it was afraid that if it engaged more and successfully encouraged more participation, that this would be too labour intensive and difficult to manage administratively and procedurally. It is for NGOs to encourage the Registry to take a more proactive approach, and to support the Registry’s work at a grassroots level. There is a range of experiences in different contexts of mass involvement of victims (e.g., truth commissions, claims commissions) and there are a variety of tried and tested methods to ensure that large numbers of victims can be accommodated effectively without causing undue burden to the system. More attention to the approaches of these bodies is therefore merited.

The main NGOs working closely with the Court work with partners based in situation countries. Often, the partners are human rights monitoring NGOs – not always working at the most grassroots level and not usually in the habit of representing victims before courts. At the local level, NGOs also play an important role as intermediaries for the Court in engaging with victims. The Court should do more to support the work of intermediaries and to recognize the needs of such partners to protection.

Many of the international NGOs working on the Court are adept at campaigning and advocacy yet less suited to impacting ongoing Court cases. This is sometimes a function of the mandates of the NGOs though where possible, greater involvement of NGOs to support victims to participate in the proceedings would be useful, and to engage in the Court more directly as amicus or otherwise commenting on the procedure. Further work needs to be done to help victims to organize themselves – it will then be easier for them to engage effectively with the Court.

NGOs have up until now been very supportive of the Court – inputs to staff have been to assist them to develop procedures. We are now coming to the stage where we can monitor the impact of procedures as they play out, and NGOs can be more vocal about issues/problems where they arise – either through traditional advocacy strategies, or more direct engagement in the Court process.

NGOs have impacted the ICC quite significantly in the area of victims rights. But there is much more to do. It is a question of changing mindsets – both at the Court and in the field, and a challenge of how best to do it:

- quiet diplomacy;
- building capacity of victims groups;
- loud advocacy;
- direct legal representation;

or some combination of the above.

The different types of mandates of NGOs impacts on their handling of these issues:

- broad human rights / international justice mandate;
- humanitarian mandate;
- victims’ mandate;

- legal mandate.

In respect of some of the tensions listed and yet others still, there will at times be a challenge for the NGO about different aspects of its mandate, for example:

- NGOs are generally supportive of the independence of the Prosecutor – but even the most staunch supporters of this were part of a joint statement calling on the Prosecutor to continue investigations in the Lubanga case.
- The question of the Ugandan amnesties: international justice NGOs focus on the illegality of amnesties under international law, something humanitarian NGOs working in Uganda have had more difficulty to do.