



Ending Torture. Seeking Justice for Survivors

Comments on the OTP Policy Paper on Victims' Participation Under Art. 68(3) of the ICC Statute¹

February 2010

We are grateful for the opportunity extended to REDRESS and other organisations to comment on this Policy Paper.

We commend the OTP for developing this Policy Paper. We believe it will assist to harmonise approaches across the OTP in different situations and cases, and, as is specifically noted in the Policy Paper, to help 'ensure a clear and consistent approach of the Prosecution in its legal submissions and positions on victims' participation under Art. 68(3)'. The policy paper may also prove useful from a management perspective and for planning purposes to set goals and benchmarks to align with the policy positions and to monitor the progress in meeting the goals at regular intervals.

Furthermore, the Policy Paper provides an extremely useful summary of some of the main jurisprudence on victim participation.

The comments below do not cover every aspect of the Policy Paper. We have sought to highlight a few issues which are of central concern to REDRESS. We would welcome the opportunity to discuss these issues in further detail and would be happy to clarify any of the points raised below.

Important statements of principle

The Policy Paper sets out important statements of principle regarding the OTP's consideration of victim participation, e.g., as 'an essential feature of the Rome Statute system and a contribution to international justice'.² Victims' personal interests may often differ from that of the prosecution as victims will participate in justice processes for a variety of reasons and their objectives are similarly varied. It is vital therefore that their views are recognised in the proceedings and understood as important per se, and not subsumed by the views of the Office of the Prosecutor or any other party. The recognition by the OTP of this fact is welcomed.

We are similarly in agreement with the OTP in regards to its statement that participation is a right and not a privilege. Whilst Article 68(3) sets out important checks and balances on how participatory rights are to be exercised, fundamentally it is a question of 'how' the

¹ Draft as of 7 December 2009

² At p. 2.

rights are exercised and not 'if'. Furthermore, REDRESS shares the view that bureaucratic or resource-related concerns should not be used to restrict rights of participation. Indeed, it has always been REDRESS' position that the nature of the crimes before the ICC will invariably involve large numbers of victims, and the structures of the Court should be designed with this in mind (as opposed to limiting victim access to structures designed to handle only small numbers of individuals).

Requirements, timing and modalities of victims' participation

a) Victim status and reparations

We are in agreement with the OTP that 'indirect harm' is an area which requires further exploration and one that is likely to be further developed in the jurisprudence. Given the narrowness of many of the charges and the wide nature of the crimes, we would support a broad characterisation of the connection required between those entitled to participate in proceedings and seek reparations, and the crimes before the Court.

Regarding the requirement for links with the charges, we would welcome the opportunity to discuss further with the OTP its policy on reparations. In general terms, we are very supportive of a wide approach to remedies and reparations which reflects the gravity and severity of the crimes in the situations coming before the ICC and the wide constellation of victims directly and indirectly affected by the crimes. We see the role of the Trust Fund, working alongside the Court, as essential in this respect.

Regarding Court-ordered reparations, we are interested by the OTP statement that 'participation in reparations proceedings need not be limited only to those victims of the incidents selected for prosecution and for which the accused is convicted, as there are other victims of crimes allegedly committed by the same accused.' We agree with the factual point that there will be other victims of crimes allegedly committed by the same accused and that there should be some way for the Court to factor this in. Indeed, we would agree that not just victims who were recognised as participants at the trial phase should be entitled to participate in the reparation phase and claim reparations.

The view that victims of other crimes said to have been committed by the accused, not only those pursued by the OTP, should be able to claim and obtain reparations from the ICC, is consistent with our understanding of the views of victims' communities, some of whom have expressed concern about singling out former child soldiers, for example, as the sole recipients of reparations, as to do so would contribute to further ostracisation and resentment in the communities. However, from a procedural perspective, there are several issues which perhaps would need to be clarified. It is straight-forward that the Trust Fund can and has already applied its voluntary contributions for the benefit of victims and their families outside of the specific crimes under consideration by the Court, under the approval of the relevant chambers. With respect to Court-ordered reparations, in the absence of any policy framework set by the Court pursuant to Art. 75, a broad interpretation of the Statute could enable a Chamber to entertain reparations applications from victims which relate to harm said to have been caused by the accused/convicted perpetrator though unrelated to a crime considered by the Court in its findings on criminal liability. However, this would seem to require the Court to make a finding of liability (in addition to a finding of harm) which, if

the facts were not considered during the trial might be procedurally complex (in a sense there would be a second trial on facts which did not arise in the course of the criminal trial brought by the OTP). It also raises questions about whether and to what extent assets seized as part of fines/forfeitures could be applied to these 'other crimes.' REDRESS has no firm view at this point on the above, but would be interested to learn more about the OTP's policy in this regard.

b) Personal interests

With respect to the OTP's policy on personal interests, REDRESS' view is that the relevant Chamber should have the possibility to consider whether personal interests are affected on a case by case basis, and there should not be any pre-judgment of what types of personal interests may or may not satisfy the test. We do not agree that 'personal interest' has a specific meaning which excludes the general interest of the victim in the progress and outcome of the prosecution.

c) Participation during the various stages of the proceedings

Regarding the OTP's policy on participation during various stages of the proceedings, REDRESS considers it to be important to underscore that the Court has recognised the ability of victims to participate in specific proceedings at the investigation phase. In certain circumstances, this can be the most vital moment for victims to express their views and concerns.

REDRESS is in agreement with the OTP policy that victims who were authorised to participate in the pre-trial phase should automatically be admitted to the trial-phase (insofar as their interests are linked to confirmed charges), and its policy on participation in interlocutory appeals.

d) Modalities of victims' participation

i. Presentation of evidence and questioning of witnesses

REDRESS' view is that the ability of victims to present evidence is an important feature of the ICC system which should in principle be available at any stage of the proceedings, not only the trial phase. Indeed, having regard to recent proceedings relating to attempts to re-characterise facts, it would seem that ensuring the ability of victims to present evidence at earlier stages could have avoided the circumstances which arose, and the lingering views on the ground that the ICC's first case does not reflect sufficiently the gravest crimes. Whether an application by victims to present evidence is accepted should depend on the contents of the request and the proposed evidence and its probative potential vis-a-vis the determination of the truth, as long as it is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Whether this is 'rare' or 'exceptional' will depend on the applications made.

REDRESS agrees with the OTP that questioning of witnesses by legal representatives should focus on the interests of their clients, though these interests may, as indicated earlier, include issues of guilt and innocence.

ii. Access to records and evidence

With respect to victims' access to evidence, REDRESS' view is that what is important is that the victim participants have the wherewithal to participate meaningfully and effectively. We note the recent decision in the Katanga case in which it was noted '*La Chambre estime qu'afin de favoriser une participation effective des victimes au procès, les représentants légaux doivent pouvoir consulter l'ensemble des décisions et documents publics et confidentiels figurant au dossier de l'affaire, à l'exclusion de tous les documents classés ex parte.*'³

Conclusions

We are grateful for the opportunity to comment on the OTP policy and hope that the exchange will lead to more regular dialogue on issues of mutual concern.

³ PTC II, *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*, of 22 January 2010, ICC-01/04-01/07 para. 121.