ADVOCATING FOR THE RIGHTS OF VICTIMS AT THE INTERNATIONAL CRIMINAL COURT

A victims’ perspective:

Composition of the Chambers for reparation proceedings at the ICC

April 2011

With the end in sight for the first two trials before the International Criminal Court, the first reparation proceedings will likely take place in the near future. The Victims’ Rights Working Group (VRWG) wishes, for the purpose of this paper, to focus on two discrete issues relating to the composition of the Chambers which might be tasked with hearing reparation proceedings. These matters are relevant given that some members of the Bench sitting in current cases at the trial stage could see their terms of office come to an end before the completion of trials, including reparation proceedings. These issues were raised in the margins of the 9th Session of the Assembly of States Parties in December 2010, namely, whether a full Chamber of judges is required to sit on reparation proceedings, and whether the judges hearing the reparation proceedings must be the same as those who heard the case. These issues have also been alluded to by the Committee of Budget and Finance during its fifteenth session,\(^1\) and could be a matter of discussion within the framework of the Study Group on Governance. The language of the omnibus Resolution adopted at the 9th Session of the ASP also refers to the issue.\(^2\) The VRWG would like to share these preliminary thoughts with the concerned sections of the Court ahead of discussions scheduled for the ICC-NGO Bi-annual Roundtable Consultations (4-7 April 2011).

1. **Should reparation proceedings be conducted by the same judges as at trial?**

The Statute provides that judges are elected for 9 years\(^3\) and cannot be re-elected, except in cases where a judge is elected to fill in a judicial vacancy for which the remainder of the predecessor’s terms is less than three years.\(^4\)

Article 36 (10) of the Statute states that judges “shall continue in office to complete any trial or appeal, the hearing of which has already commenced before that Chamber”. Article 39 states that

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1 ICC-ASP/9/15, Report of the Committee on Budget and Finance on the work of its fifteenth session, paras. 67-68
2 It requests “the Bureau to consider the view of the Committee on Budget and Finance that the Assembly might wish to provide guidance to the Court on the extension of the term of a judge, in particular, but not limited to, with regard to reparations proceedings, and to report thereon to the Assembly at its tenth session”, Resolution ICC-ASP/9/Res.3
3 The Statute provides that Judges shall hold term for nine years, unless they are elected at the first election by lot to serve for a term of either three or six years. A judge who is elected initially for three years will be eligible for re-election for a full nine years (Art 36 (9) of the ICC Rome Statute).
4 Art 37 (2) of the ICC Rome Statute
“[j]udges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.”

While Article 75 and Rules 94-98 on “Reparation to Victims” use the word “Court” as the entity empowered to conduct hearings and make decisions on reparation, Article 76, Rule 143 on “Additional Hearings on matters related to sentence or reparation” as well as Rule 144 on “Delivery of decisions of the Trial Chamber” all expressly refer to the Trial Chamber.

Article 76 provides a key indication that reparation hearings are to be held before the completion of the trial. It states that “[i]n the event of a conviction, the Trial Chamber shall consider the appropriate sentence [...]” and, unless there has been a guilty plea, “and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear additional evidence or submissions relevant to the sentence [...]. [A]ny representations under Article 75 shall be heard during the further hearing [...] and if necessary during any additional hearing”.

Rule 144 on “Delivery of decisions of the Trial Chamber”, provides that “decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the court, criminal responsibility of the accused, sentence and reparations shall be pronounced in public and, wherever possible, in the presence of the accused, [...] victims or legal representatives [...]”.

Furthermore, in accordance with Regulation 56 of the Court’s Regulations, the Trial Chamber can hear witnesses and examine evidence for the purpose of a decision on reparation at the same time as for the purposes of trial. This approach has been put into practice by the relevant Chambers of the Court, which have authorised the parties to question witnesses on the harm suffered by victims as a result of the crimes. It has been confirmed on appeal. This approach seeks to avoid having to call the same witnesses to testify again at the reparation stage, and it is based on both financial and efficiency considerations, as well as on the need to limit retraumatisation as a result of testimony.

Finally, Article 75 of the Statute, relating to reparation for victims, falls under Part 6 of the Statute, entitled “The Trial”.

Option 1: Trial judges conduct reparation proceedings as these are ‘part of the trial’

The provisions above clearly demonstrate that the Trial Chamber, which has heard the case, including any evidence relating to reparation during the trial, will also hear evidence and issue its decision on reparation on the basis that reparation proceedings constitute part of the Trial. This in turn would create an obligation for judges’ terms of office to be extended, as provided for by article 36 (10) mentioned above.

The VRWG highlights that such a scenario would also ensure that judges in reparation proceedings are fully familiar with the evidence already heard in a case. Depending on the scope of reparation proceedings, liabilities established at the reparation phase will be based on the facts proven at trial. Having the same Bench may therefore increase the efficiency (and reduce the length) of the reparation phase. Some Chambers have already been receiving unredacted reparation forms and are thus familiar with their content.

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5 Article 36 (10) and 39(3)(a) of the ICC Rome Statute.
8 Trial Chamber III in the Bemba case has received unredacted versions of the reparation forms submitted, see Notification of applications for reparations in accordance with Rule 94(2) of the Rules of Procedure and Evidence, 12 January 2011, ICC-01/05-01/08-1111, http://www.icc-cpi.int/iccdocs/doc/doc997345.pdf

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Option 2: Different judges conduct Reparation proceedings

In the unlikely event that the above-mentioned provisions above of the Rome Statute, the Rules on Procedure and Evidence and the Regulations of the Court were to be interpreted as not forming part of the “Trial”, it might allow for different judges to conduct reparation hearings.\(^9\) In such a case, should the mandate of a judge expire before reparation proceedings take place, there would no longer be a necessity for their term to be extended “to complete any Trial [...] the hearing of which has already started.”\(^10\) It could see the whole Chamber that sat on the Trial and heard the evidence being replaced by other judges for reparation proceedings.\(^11\) This approach would be similar to some legal systems where civil proceedings can be heard by a completely different court and are separate from the criminal process.\(^12\)

However, the VRWG submits that such an interpretation would be difficult to argue under the current provisions in the Statute and Rules which clearly envisage that reparation proceedings constitute part of the “Trial”.\(^13\) It would also entail a much longer reparation process and a degree of duplication, especially in the cases where the Bench has already received reparation evidence. Considering the complexity of the cases heard by the ICC, some witnesses, in particular victims who testified in person, might have to be recalled entailing extra costs and delays.\(^14\)

Instead, one might foresee that, if necessary, a new judge could be brought to sit on reparation proceedings should one of the judges in a Chamber request to be excused, be disqualified, resign or pass away as envisaged in the Statute and the Rules.\(^15\) In such a situation, another judge would fill in the vacancy (be it a newly elected judge to fill the judicial vacancy, an alternate judge, or another judge appointed as replacement by the Presidency).\(^16\)

Recommendation

Reparation proceedings should be conducted by the relevant Trial Chamber, recognizing that the reparation process in the Rome Statute forms part of the trial. Should a judge no longer be available, as opposed to a Judge whose term of office might expire, he or she should be replaced, allowing for efficiency while limiting the organizational demands.

2. How many judges should sit on reparation proceedings?

Article 39 (2) of the Statute requires that the functions of the Trial Chamber be carried out by three judges, as opposed to the functions of the Pre-Trial Chamber, which can be carried out either by three judges or by a single judge. Rule 144 on “Delivery of decisions of the Trial Chamber” suggests that key decisions concerning the core interests of the accused including admissibility, the jurisdiction of the court, criminal responsibility, sentence and reparation should all be dealt with by a full Chamber.

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\(^9\) In Switzerland for instance, while victims can file a civil claim as part of the criminal trial, the judge can require the victim to file the claim in a civil court if the claim is very complicated and would overwhelm the criminal trial. See Philip Grant: Switzerland, in REDRESS/FIDH, Universal Jurisdiction Trial Strategies, November 2009. Available at: [http://www.redress.org/downloads/publications/Universal_Jurisdiction_Nov2010.pdf](http://www.redress.org/downloads/publications/Universal_Jurisdiction_Nov2010.pdf)

\(^10\) Article 36(10)

\(^11\) All three Judges in Trial Chamber I were elected at the same time and for the same length of time.

\(^12\) Such as in the UK.

\(^13\) See above section on the presumption that reparation proceedings are part of the Trial.

\(^14\) In the Katanga case, two victims came to testify and present evidence, \textit{inter alia}, on the extent of the harm suffered. Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, 9 November 2010, ICC-01/04-01-07-2517, [http://www.icc-cpi.int/iccdocs/doc/doc964978.pdf](http://www.icc-cpi.int/iccdocs/doc/doc964978.pdf)

\(^15\) article 41 (1) of the Statute read in conjunction with Rule 33, 34, 38 and 39 of the Rules of Procedure and Evidence.

\(^16\) As provided for by article 41 (1) of the Statute read in conjunction with Rule 33, 34, 38 and 39 of the Rules of Procedure and Evidence.
Option 1: A Full Chamber

Three judges conducting reparation proceedings would ensure that various legal traditions and experiences are represented during reparation proceedings. Furthermore, the Court has not yet adopted principles on reparation as provided for under the Statute and it would seem that they may be decided upon on a case-related basis.\(^{17}\) This means that principles defined in the first reparation proceedings are likely to set important precedents. Thus having a full Chamber, at least for the first cases, would ensure a better thought-through approach to this matter and incorporation of principles of various legal traditions.

Option 2: A Single Judge

There have been suggestions that having a Single Judge would be more efficient.\(^{18}\) However, there is no provision in the Statute allowing for the function of the Trial Chamber to be undertaken by a Single Judge.\(^{19}\)

The VRWG submits that having a Single Judge might have time and budgetary advantages (the absence of one judge has delayed proceedings in the past since the Chamber cannot sit unless all three judges are present) though one judge might take longer to decide reparation proceedings. Furthermore, this could raise concerns for the rights of the accused/convicted person, given the liabilities that are likely to be established against him or her at this stage of the proceedings.

Recommendation

A full chamber should conduct reparation proceedings, at least for the first cases whilst the principles on reparation are being developed. Indeed, these decisions will not be easy and will set an important precedent. Only once the ground work has been set, and the process gone through at least a full cycle, could discussions around a modification of the structure to a single judge be considered.

Other general recommendations on these issues

The VRWG recommends that:

- Any decision made on the matter should bear in mind the framework established by the Rome Statute and the Rules of Procedure and Evidence, and should be made in the best interest of the victims and be respectful of the rights of the accused and a fair and impartial trial.

- States looking at the matter should take into consideration all implications, as opposed to only financial considerations. In particular and as far as cases currently being heard are concerned, they should take into account the efficiency considerations in respect of reparation evidence already received by the Trial Chambers.

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\(^{17}\) Article 75 (1) of the Statute provides that “the Court shall establish principles relating to reparations [...].”

\(^{18}\) Judge Fulford also suggested so during a presentation he made at the 9th Session of the ASP

\(^{19}\) article 39(2)b states that “the functions of the trial chamber shall be carried out by 3 judges