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VICTIMS AT THE CENTER OF JUSTICE

From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC

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Introduction

The Statute of the International Criminal Court ("ICC") grants victims the right to participate in proceedings where their personal interest is affected, remedying their earlier exclusion from international judicial proceedings. This feature of victim participation is considered one of the most innovative features of the ICC Statute as it is the first to grant victims the right to participate in international criminal proceeding¹. Under this novel feature, victims enjoy the right to be heard and considered, at stages of the proceedings determined to be appropriate, and the Court has the duty to effectively enable them to exercise this right. Among other relevant provisions, Article 68(3) of the ICC Statute enshrines victims rights to participate at the ICC:

*"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. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."*²

In recent years, the participation of victims has become an area of focus both within and outside the Court. Concerns were raised by various stakeholders over whether this unique feature of the ICC Statute is implemented in a meaningful manner, whether some experiences of victim participation have become reduced to being symbolic, and whether the ICC is making the most of victim participation³. If appropriately implemented, victim participation can provide an essential link between the Court in The Hague and the national level, be a first step in the reparation or restorative justice process, and give victims the right to participate in the fight against impunity⁴. As expressed by the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence:

"Victim participation implies the recognition of victims as rights holders, which is tremendously empowering for them and others[.]. Such participation manifests and strengthens the right to the truth [..]. Formalising methods of victim participation represents an acknowledgement that victims have played a crucial role not only in initiating procedures, but in collecting, sharing and preserving evidence... Victims' participation increases the likelihood that the needs of victims will be taken seriously in processes that have had a long tradition of treating them solely as sources of information, as "mere" witnesses..."⁵

FIDH has monitored the implementation of victims' rights before the International Criminal Court since the entry into force of the ICC Statute. But what was envisioned in Rome under the system of victim participation at the ICC continues to be tested. With the growing number of victims seeking to participate in the ICC, different judicial approaches on modalities for

1. See in particular articles 15(1), (2) and (6), 19(3), 68 (3), 53 and 75 of the ICC Statute; Rules 49, 104, and 92(1) and (2) of the ICC Rules on Evidence and Procedure.

2. Rome Statute of the International Criminal Court, Art. 68(3), July 1, 2002, 2187 U.N.T.S. 90

3. See M. Pena and G. Carayon, *International Journal of Transitional Justice*, Volume 7, Issue 3, Is the ICC Making the Most of Victim Participation?, (2013)

4. ICC Pre-Trial Chamber "The Statute [of the ICC] grants victims an independent voice and role in proceedings before the Court [...] The Chamber considers that article 68 (3) of the Statute also gives victims the right to participate in the fight against impunity[...]", (2006).

5. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff UN Doc. A/HRC/27/56, (2014), para.94

participation have been explored and the situation is constantly evolving. Identifying modalities for effective victim participation without compromising the efficiency of the proceedings and the rights of other parties is essential, but it must not risk reducing victim participation in proceedings as merely symbolic. Unfortunately, FIDH has noted with growing concern a series of misconceptions in relation to the purpose and exercise of victims' rights in judicial proceedings⁶.

Twenty years after the adoption of the ICC Statute, FIDH embarked on a consultation project with those representing or supporting victims access to and/or participation at the ICC on achievements, concerns and challenges to meaningful victim participation at the ICC.

6. See in particular FIDH Reports: Five myths about victim participation in ICC proceedings, December 2014; Enhancing victims' rights before the ICC, A View from Situation Countries on Victims' Rights at the International Criminal Court, November 2013; Cutting the weakest link, Budget Discussions and their Impact on Victims' Right to Participate in the Proceedings, October 2012; Victims' Rights Before the International Criminal Court : A Guide for Victims, their Legal Representatives and NGOs, April 2007.

A Court for Victims?

In memory of David, Boulissa and Myriam

by Gilbert Bitti⁷

Victims of crime are missing from the history of international criminal justice. Only in the role of the witness before the tribunals of Nuremberg, Tokyo, and those created decades later by the United Nations Security Council for the situations arisen in former Yugoslavia and Rwanda, have victims been afforded a place in judicial procedure.

How can we explain that procedures for these crimes involving thousands or even millions of victims exclude them at the same time? Is it a problem of legal culture? Is it the fear of what they have to say or their criticism? Is it the fear of the influence they might have on these procedures? Or is the explanation to be found in the very nature of the crimes that are often committed by the most powerful among us?



The International Criminal Court (hereinafter, the *Court* or the *ICC*) has done better than the international criminal tribunals that preceded it by enshrining the right of victims to participate in the proceedings, at once in a general manner in application of Article 68(3) of the Rome Statute (hereinafter, the *Statute*), and in particular instances in application of Articles 15(3) and 19(3) of the Statute.⁸ From a utilitarian view of victims before these international criminal tribunals, i.e. victims being instruments in the hands of the Prosecutor to prove *his or her* cases, we have moved to a more humanitarian regard for the victims in which they are considered subjects of law who must be protected, assisted, and heard and who must obtain compensation for damages suffered.

Bitti family picture - 1937

Non-governmental organisations (hereinafter, *NGOs*) have played a fundamental role in ensuring that international criminal justice finally takes victims into account; at the beginning of the Rome Conference, Representative Fiona McKay of the NGO Victims' Rights Working Group, declared on 17 June 1998:

"Punishing criminals is not enough. There can be no justice until justice is done to the victims. And to deliver justice to the victims, the International Criminal Court must have the capacity to respond to their rights and needs."

7. Former member of the French delegation during the negotiations on the Rome Statute within the Ad Hoc Committee (1995), the Preparatory Committee (1996-1998), then at the Rome Conference (15 June - 17 July 1998), as well as in the negotiations on the Rules of Procedure and Evidence in the Preparatory Commission (1999-2000); currently Senior Legal Adviser of the Pre-Trial Division of the International Criminal Court. Opinions expressed herein must be considered to belong to their author and do not reflect the views of the French Government or the International Criminal Court.

8. While Article 68(3) of the Statute enshrines the right of victims to participate generally at all stages of the proceedings, Article 15(3) of the Statute gives them a specific right to participate in the proceedings when the Prosecutor seeks authorisation from the Pre-Trial Chamber to investigate, whereas Article 19(3) of the Statute gives them the right to participate in proceedings concerning the jurisdiction of the Court or the admissibility of a case.

Representative McKay's statement has lost none of its pertinence. But does the Court today have the capacity to respond to the rights and needs of victims?

Along with NGOs, France has played a significant role in ensuring a new and, as far as possible, central place for victims before the ICC. Guaranteeing the rights of victims within this new jurisdiction was part of the instructions of the French delegation during all the years of negotiations, first on the Statute and then of the Rules of Procedure and Evidence (hereinafter, the *Rules*). In particular, the Paris seminar of April 1999 organised by France was essential for drafting Rules 50, 59 and 89-93 of these Rules concerning the participation of victims in the proceedings before the ICC.⁹ Within that delegation, this author was in charge of monitoring the victims' rights negotiations in particular and was happy to participate in the NGOs' efforts on their behalf.

Following difficult negotiations, the doors of the Court were finally opened to the victims. It is true that today they have their place in the procedure even if their role is still not well defined.

Now present in the proceedings, victims are also very present in the communication of the organs of the Court, so much so that the victims are at least as important to the Court as the Court is to them: the Court is to victims a means of access to justice, truth and reparations.¹⁰ It is also a means to improve their situation at the national level.¹¹ Victims represent for the Court a very powerful means of legitimising its actions.

While the applicable law before the ICC with regard to victims is a turning point in the history of international criminal justice, it is interesting to consider the practice of the ICC since the Statute entered into force in July 2002. Progress has been made, but the problems remain important and the needs immense. To illustrate, here are three themes of reflection: the difficulties related to the insufficiency of information provided to the victims; those related to the process of access to the Court; finally, those related to their participation in the proceedings.

1. Insufficient information provided to the victims

The founding texts of the ICC provide for various obligations to inform that weigh on the Court with regard to victims. Without this information, the right of victims to participate in the proceedings would be meaningless.

To begin with, when the Prosecutor plans to request authorization from a Pre-Trial Chamber to open an investigation pursuant to Article 15(3) of the Statute, he or she is under the obligation to inform the victims; this includes giving "notice by general means" pursuant to Rule 50 of the Rules so that victims may make 'representations' to the Pre-Trial Chamber.

Unfortunately, such a procedure is not applicable when the situation is referred to the Prosecutor either by a State Party to the Statute pursuant to Articles 13 (a) and 14 of the Statute, or by the United Nations Security Council pursuant to Article 13 (b) of the Statute since, in these cases, the Prosecutor may decide to open an investigation without the authorisation of the Pre-Trial Chamber.

In such cases Rule 92 (3) of the Rules specifies that the Court must notify the victims of its decision to hold a confirmation hearing pursuant to Article 61 of the Statute to enable them to apply to participate in the proceedings pursuant to Rule 89. Rule 92 (8) of the Rules specifies that

9. Ref. Report on the International Seminar on Victim Access to the International Criminal Court, held in Paris from 27 to 29 April 1999, PCNICC / 1999 / WGRPE / INF / 2, 6 July 1999.

10. ICC, Request under Regulation 46 (3) of the Rules of the Court, ICC-RoC46 (3) -01 / 18-37, Pre-Trial Chamber I, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', 6 September 2018, paragraph 88.

11. On the positive outcomes in Kenya for victims following proceedings before the Court, see Anushka Sehmi, 'Now that we have no voice what will happen to us?' Experiences of Victim Participation in the Kenyatta Case, *Journal of International Criminal Justice*, 2018.

the Registrar shall take the necessary measures to give adequate publicity to the proceedings and may request the cooperation of relevant States Parties and request the assistance of intergovernmental organisations. The problem is that this information publicising the procedure is both late and restricted.

It is late since it comes years after the opening of an investigation when the Prosecutor has already selected a case and this case arrives at the stage of the confirmation of charges before a Pre-Trial Chamber.

It is also restricted since it concerns only the victims of the case and not the victims of the situation. As an example, in the first case before the Court, the victims of the Thomas Lubanga Dyilo case are exclusively the victims of crimes committed in Ituri from September 2002 to August 2003, Ituri being a district of the eastern province of the Democratic Republic of the Congo (which has eleven provinces), and exclusively the crimes committed by the movement of the Union of Congolese Patriots provided for in Article 8(2)(e) (vii) of the Statute, namely the conscription or enlistment of children under the age of 15 into the armed forces and their active participation in hostilities in the context of a non-international armed conflict. In this way, this group of victims is infinitely more restricted than the victims of the situation in the Democratic Republic of the Congo, which group covers all victims of crimes within the jurisdiction of the Court, namely genocide, crimes against humanity and war crimes, as defined in Articles 6 to 8 of the Statute, committed throughout the territory of that country since July 2002.

It is true that the Chambers may also order the Registrar, pursuant to Rule 92 (8) of the Rules, to take the necessary steps to ensure adequate publicity of the proceedings at all times.¹² Pre-Trial Chamber I recently exercised this power in the situation in Palestine by ordering the Registrar to establish a system of communication between the Court and the victims, as well as more generally with the communities affected by the crimes falling within the jurisdiction of the Court.¹³

NGOs have consistently pointed out, since the beginning of the Court's activities, the lack of information provided to victims. REDRESS had already pointed this out in November 2009: "[...] the majority of victims of crimes prosecuted by the Court, women and girls, in particular, are still not aware of the Court's procedures."¹⁴ Not only was it difficult for the Court to reach the victims, especially in rural and remote areas, but all too often the victims were not given precise answers to their questions, particularly in relation to the steps to take in order to participate in the proceedings or in what concerned the Prosecutor's strategy.¹⁵

In recent years, the Assembly of States Parties (hereinafter, *ASP*) has also adopted several resolutions reiterating the need to provide victims and affected communities with sufficient information on the activities of the Court: "[...] in order to put into effect the unique mandate given to the International Criminal Court towards victims."¹⁶

12. The reference to the chambers refers to all the chambers of the Court, namely the Pre-Trial and Trial Chambers but also the Appeals Chamber.

13. ICC: *Situation in the State of Palestine*, ICC-01 / 18-2, Pre-Trial Chamber I, Decision on Information and Outreach for the Victims of the Situation, 13 July 2018.

14. ICC: Review Conference of the Rome Statute, Kampala, 31 May-11 June 2010, RC / ST / V / INF.4, *The Impact of the Rome Statute System on Victims and Affected Communities*. Working Paper Presented at the Kampala Victim Issues Review Conference, prepared and written by Eric Stover, Camille Crittenden and Alexa Koenig (University of California, Berkeley), Victor Peskin (Arizona State University) and Tracey Gurd (Open Society Justice Initiative), in coordination with the focal points designated by the Assembly of States Parties (Finland and Chile) and in consultation with a wide range of civil society actors and victims' representatives, as well as with the Court.

15. International Federation for Human Rights, ICC Review Conference: Renewing Commitment to Accountability, May 2010, p. 10.

16. See, for example: Resolution adopted at the Review Conference in Kampala, RC / Res.2, 8 June 2010, *The Impact of the Rome Statute System on Victims and Affected Communities*; most recently see ICC-ASP / 13 / Res.4, 17 December 2014, *Resolution on Victims and Affected Communities, Reparations and the Trust Fund for Victims*; ICC-ASP / 16 / Res. 6, *Strengthening the International Criminal Court and the Assembly of States Parties*, 14 December 2017, paragraphs 93-94.

The jurisprudence of Pre-Trial Chamber I in the situation in Palestine, as well as the resolutions of the ASP, are interesting but they are insufficient; it would be necessary to both increase the resources of the Registry of the Court and consider a reform of the Rules, for example a new Rule 92*bis*, to clearly establish the Registrar's obligation to create an information and communication system between the Court and victims and affected communities as soon as a Pre-Trial Chamber is seized of a situation under Regulation 46 (2) of the Regulations of the Court, or as soon as the Prosecutor publicly announces the opening of a preliminary examination.

2. The process for victims to have access to the Court

In accordance with Rule 89 (1) of the Rules, victims who wish to participate in the proceedings must make an application to the Registrar of the Court. The participation of victims in the proceedings is therefore considered to be an individual participation; this makes it complex for mass crimes, even though the legal representation of the victims may be collective.

Initially, a 17-page standard form was created for this purpose, which was thereafter reduced to 7 pages. The Chambers of the Court spared no effort in streamlining this process of access to the Court; beginning in 2012, the Chambers drew up a new form specific to certain cases, which was reduced to 1 or 2 pages.¹⁷

The 2016 Chambers Practice Manual contains a simplified process for admitting victims to participate in the procedure, which, following the evolution of the case-law on the subject, increasingly delegates to the Registry the verification of the criteria laid down in Rule 85 of the Rules.¹⁸ The most recent case-law in this area encourages the Registry to develop online forms as well as electronic forms which: "[...] tend to expedite the collection and processing of applications and foster wider victim participation, especially when access to potential applicants in the field is limited."¹⁹

All these developments are of interest but they have for the moment allowed the participation of only a limited number of victims in cases before the Court: between a few hundred (see for example, the Germain Katanga and Mathieu Ngudjolo Chui case) and a few thousand (see for example, the Jean-Pierre Bemba Gombo and Dominic Ongwen cases).

The process of individual victim admission remains cumbersome and the human and budgetary resources of both the Chambers and the Registry of the Court are and will very likely remain limited.²⁰ It will, therefore, be necessary to find other solutions for victims' access to the Court to allow the possible participation of tens or hundreds of thousands of victims in future cases.

One among many other solutions would be to no longer limit the participation process to a system of individual participation; rather, it would be necessary to allow victims' associations to participate, when victims agree to be represented by those associations in proceedings before

17. ICC, *Situation in the Republic of Côte d'Ivoire, Aff. The Prosecutor v. Laurent Gbagbo*, ICC-02 / 11-01 / 11-86, Pre-Trial Chamber I, Second Decision on Issues Related to the victims' application process, 5 April 2012; ICC, *Situation in the Republic of Kenya, Aff. The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01 / 09-01 / 11-460, Trial Chamber V, Decision on victims' representation and participation, 3 October 2012; ICC, *Situation in the Democratic Republic of the Congo, Aff. The Prosecutor v. Bosco Ntaganda*, ICC-01 / 04-02 / 06-67, Pre-Trial Chamber II, Decision Establishing Principles on the Victims' Application Process, 28 May 2013; ICC, *Democratic Republic of Congo, Aff. The Prosecutor v. Bosco Ntaganda*, ICC-01 / 04-02 / 06-449, Trial Chamber VI, Decision on victims' participation in trial proceedings, 6 February 2015.

18. Section B.I, pp. 20 to 23.

19. See ICC: *Situation in the Republic of Mali, Aff. The Prosecutor v. Al Hassan Ag Abdul Aziz Ag Mohamed Ag Mahmoud*, ICC-01 / 12-01 / 18-37-tENG, Pre-Trial Chamber I, Decision Establishing the Principles Applicable to Victims' Applications for Participation, 24 May 2018, paragraphs 32-33.

20. Approximately 18 people work in the Victims Participation and Reparations Section of the Registry, along with a few people in the field offices; this is little more than one person per situation in court (preliminary chambers are currently dealing with 16 situations). It is an understatement to say that this is very insufficient.

the Court. Here again, an amendment to the Rules could be envisaged: for example, a new Rule 89*bis* allowing victims' associations to participate in the procedure.

3. Victims' participation in the proceedings

The first question that comes to mind concerns the status of victims in Court proceedings and the distinction made by the Court in its practice between 'parties' and 'participants.' It must be emphasised that this distinction has no legal basis in the Statute and the Rules, is not really useful and causes great confusion.

Indeed, it serves little purpose to classify victims as 'participants' in the proceedings, as opposed to *parties*, a qualification most often reserved in practice for the Prosecutor and the defense, since the essential legal problem is not the qualification given to victims, parties or participants, but the procedural rights of victims. It is perfectly possible to envisage parties to the proceedings who do not have the same procedural rights. What is important is the procedural rights afforded to the various parties to the proceedings by the Statute and the Rules. In this way, characterising victims as parties to the proceedings would not increase their procedural rights; as an example, characterising victims as parties would not give them the right to appeal an acquittal, a right that is reserved for the Prosecutor by Article 81 of the Statute.

The only practical consequence under the Statute of the qualification as a party is the application of Article 82 (1) (d) of the Statute: if only the Prosecutor and the Defense can be qualified as parties, then victims cannot seek leave to appeal an interlocutory decision issued by a Pre-Trial or Trial chamber. But this is no longer the case since Pre-Trial Chamber II authorized a State, namely Jordan, to seek leave to appeal an interlocutory decision: if a State can be qualified as a party to the procedure for the application of Article 82 (1) (d) of the Statute, there is no justification in law to deny such a quality to the victims and to prevent them for this reason from seeking leave to appeal an interlocutory decision.²¹

But the status of victims in the proceedings is unfortunately not the only uncertainty; the ambiguity concerning their procedural rights, which the Chambers decide on a case-by-case basis, sometimes in a very limited way particularly in the first years of the Court, is a serious problem for the position of victims before the Court.

Progress, nevertheless, has been made in this area. The latest case law of the Pre-Trial Chambers on victims' procedural rights at the stage of the confirmation of the charges, adopted in the Ongwen case, gives victims a better procedural stance and, moreover, aligns itself with the case law of the Trial Chambers, generally more generous than the Pre-Trial Chambers with regard to the procedural rights of victims.²² It is time, however, to achieve harmonisation of the procedural rights of victims at different stages of the proceedings and do this in an equitable manner for all cases before the Court.

Efforts still need to be made to integrate victims more fully into the proceedings; the role of the Presiding Judges of Trial Chambers is essential for integrating them more effectively, notably by accepting in a more systematic manner the questions asked by victims' legal representatives, to the extent of course, where the questions asked are not repetitive. It is important to understand that what wastes time during the trials is not the participation of the victims but the lack of intervention by the Presiding Judges of Trial Chambers to stop the parties during long and boring questioning of witnesses, completely useless for reaching the truth.

21. ICC: *Situation in Darfur (Sudan), Aff. Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02 / 05-01 / 09-319, Pre-Trial Chamber II, Decision on Jordan's Request for Leave to Appeal, 21 February 2018.

22. ICC: *Situation in Uganda, Aff. Prosecutor v. Dominic Ongwen*, ICC-02 / 04-01 / 15-350, Pre-Trial Chamber I, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, 27 November 2015.

With regard to the legal representation of victims, it is important to respect the principle established by Rule 90 (1) of the Rules, namely the freedom of victims to choose their legal representative. It is essential to maintain a relationship of trust and closeness between the victims and their legal representatives.²³

The office of the public council for the victims²⁴ was created at the same time²⁵ and for the same purpose as its twin brother for the defense, the office of the public council for the defense²⁶ to assist external counsel, for the accused and for the victims, in finding their way into the procedural labyrinth of the ICC. This role is fundamental as the ICC's procedural system can be very confusing for lawyers who have practiced mainly in national courts. But these offices were not created to replace external counsel; this would be contrary to the principle laid down by Rule 90 (1) of the Rules, to which the Regulations of the Court are subordinated in the hierarchy of the texts applicable before the ICC.

Of course, the budgetary problem remains: the budget for legal aid is limited, especially for legal representatives of victims. The first, simple solution is to increase this budget, a solution that may not appeal to contributing States. Another solution would be to not pay the legal representatives of the victims on the same scale as the defense counsel: their role is indeed important, but it is not the same as that of the lawyers for the defense at least in the phase before that of reparations where the role of the victims' legal representatives becomes paramount since they are the plaintiffs at the instance.

Finally, beyond the uncertainty of victims' procedural rights, these latter should also be strengthened, especially in the early stages of the proceedings: it would be important for victims to be able to complain about the excessive length of preliminary examinations which Pre-Trial Chamber I has recently emphasized.²⁷ For the time being, victims may apply to the Pre-Trial Chamber to which the situation was assigned by the Presidency pursuant to Regulation 46 (2) of the Regulations of the Court; if the situation under preliminary examination has not been assigned to a Pre-Trial Chamber, victims must address the President of the Pre-Trial Division in accordance with Regulation 46 (3) of the Regulations of the Court.

Victims should also be able to complain to a Pre-Trial Chamber about the Prosecutor's choices, namely those relating to situations in which an investigation is to be opened, but also about those relating to the choice of persons to be prosecuted and the charges against them. All of these choices are crucial for victims and should integrate the interests of victims and the need for the Court to pursue cases sufficiently representative of the victimisation that took place in a situation under investigation.

For the time being, all the victims' attempts to challenge the Prosecutor's choices under Article 53 of the Statute have been rejected by Pre-Trial Chambers.²⁸ The human rights organisations have

23. On this issue, see the report of the NGO Human Rights Watch, *Who will defend us? The legal representation of victims at the ICC in the Ongwen case and beyond*, August 2017.

24. Regulation 81 of the Regulations of the Court.

25. This creation was an initiative of the judges of the ICC, the first judges of its history elected in 2003, in the Regulations of the Court adopted in May 2004 pursuant to Article 52 of the Statute; at that time, while this author was head of the Victims Participation and Reparations Section (at that time it was only one unit), the Presidency of the Court had entrusted me with the task of leading the Drafting Board for the Regulations of the Court, composed of jurists of the Court, to assist the judges in the drafting of these Regulations.

26. Regulation 77 of the Regulations of the Court.

27. ICC: Request under Regulation 46 (3) of the Rules of the Court, ICC-RoC46 (3) -01 / 18-37, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute", 6 September 2018, paragraph 84.

28. ICC: Situation in the Democratic Republic of the Congo, ICC-01 / 04-373, Pre-Trial Chamber I, Decision on the requests of the Legal Representative for victims VPRS1 to VPRS 6 regarding "Prosecutor's information on further investigation", 26 September 2007; see also ICC: *Situation in the Democratic Republic of the Congo*, ICC-01 / 04-582, Pre-Trial Chamber I, Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, 25 October 2010.

protested, among them the International Federation for Human Rights, following the decision of 25 October 2010 of Pre-Trial Chamber I, by a communiqué of 3 November 2010 which reiterated the *raison d'être* of the Pre-Trial Chamber:²⁹

Our organisations find it problematic that the Pre-Trial Chamber in fact refuses to assume its role of monitoring the decisions and omissions of the Prosecutor in the preliminary phase of the proceedings. The creation of this chamber during the adoption of the Rome Statute was specifically aimed at setting up a certain system for evaluating the decisions of the Prosecutor.

Conclusion

In his address to the United Nations General Assembly on 29 October 2018, the President of the ICC underlined what he termed the “prominent position that victims hold in the system created by the Rome Statute”.³⁰

Of course, everything is relative: if the position of the victims before the ICC is much better than the one they had before the international criminal tribunals that preceded it, where it was more or less non-existent, this position must still be greatly improved and the efforts that remain to be made are immense.

The role of NGOs in favor of victims has been and will remain essential: it is up to them, among other things, to make proposals for victims, in particular, to improve the texts applicable to the ICC, so that States can present them, discuss and if possible adopt them within the ASP. It is also their responsibility to use Rule 103 of the Rules to defend the position of victims in judicial proceedings before the Court by submitting briefs as *amicus curiae*.

For my part, I have been confronted with the stories of the victims since, when I was still a child, I listened to my grandfather David tell me how he had been denounced as a Jew during the Second World War by the Chief of the company in which he worked, then the visit of the gendarmes to his home warning him of his imminent deportation, and finally his deportation first to the transit camp of Drancy, in the Paris region. He also told me about the deportation of other family members, including his sister Myriam and his mother Boulissa, who did not return.

His stories and those of my father about his childhood during World War II will probably never leave me. My commitment to victims will always remain an important aspect of my life.

29. FIDH, DRC / ICC, 3 November 2010, “[Victims question the ICC about the lack of prosecution of Jean-Pierre Bemba for crimes committed in the DRC - The judges disagree that the Prosecutor’s investigation into the DRC is still open](#)”.

30. Speech to the United Nations General Assembly by Judge Chile Eboe-Osuji, President of the ICC, 29 October 2018, p. 14.



A large group of Rohingya who fled from military operations in Myanmar's Rakhine State, try to cross the border at Palongkhali in Cox's Bazar, Bangladesh, on 17 October 2017. ©Anadolu Agency

Victim participation in the pre-situation phase: insights from the Pre-Trial Chamber's Rohingya decision

by Wayne Jordash QC³¹ and Uzay Yasar Aysev³²

Introduction

On 6 September 2018, the Pre-Trial Chamber ('PTC') of the International Criminal Court ('ICC' or 'Court'), by a majority, issued a landmark decision ('Decision')³³ on a request for a ruling on jurisdiction submitted by the Prosecutor of the ICC ('Request') under article 19(3) of the Rome Statute concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh.³⁴ The PTC found that the Court may exercise jurisdiction over the crime of deportation because a legal element of the crime - the crossing of an international border - took place on the territory of Bangladesh, a State Party.³⁵ In doing so, the PTC went beyond the crime of deportation and pronounced on a critical precedent regarding the territorial jurisdiction of the ICC whereby if at least one legal element of any crime within the jurisdiction of the Court or part of such crime occurs on State Party territory, the Court may exercise jurisdiction over it.³⁶

The Decision was highly anticipated. Sympathy and attention on the plight of the Rohingya was not in short supply. However, there were no obvious routes to any form of domestic or international accountability for the grave crimes suffered by the Rohingya during or before the latest wave of displacements across the border into Bangladesh. Even though Myanmar's national laws allow for the adjudication and punishment of many of the crimes committed against the Rohingya, few would expect successful domestic prosecutions. They are extremely rare due to the overriding

31. Wayne Jordash QC is the legal representative of victims before the ICC for the Shanti Mohila (Peace Woman - 400 Rohingya women and girl survivors of gender-based and sexual violence and a wide range other crimes that forced them from their homes and into Bangladesh), and the managing partner of [Global Rights Compliance LLP](#).

32. Uzay Yasar Aysev is a legal consultant at Global Rights Compliance LLP, assisting Mr. Jordash with the representation of the Shanti Mohila before the ICC.

33. Request under Regulation 46(3) of the Regulations of the Court, ICC-RC46(3)-01/18, [Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute"](#), 6 September 2018, (Decision).

34. Application under Regulation 46(3), [Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute](#), 9 April 2018, (Request).

35. Decision, para. 73.

36. Decision, para. 64.

influence exercised by the executive branch of the government and the military over the national judiciary.³⁷ Internationally, Myanmar has effectively insulated itself from much judicial scrutiny by ratifying few international human rights instruments, and, even then, by refusing to accept their complaint procedures.³⁸ While there was a crescendo of voices calling for referral of the situation to the ICC,³⁹ this option remained unlikely, to say the least, due to the non-State Party status of Myanmar, as well as the unwillingness of China, a close ally of Myanmar and a permanent member of the UN Security Council ('UNSC') to expose Myanmar authorities to international justice.⁴⁰ These obstacles meant that the 700, 000 Rohingya refugees that had been displaced by the Myanmar military since August 2017 were effectively consigned to legal purgatory, unable to access any international justice, at least any that might lead towards effective penal accountability. In this context, the ICC Prosecutor's bold and innovative Request and the PTC's Decision stood in stark and splendid isolation, opening up a clear path to accountability for the Rohingya for a range of acts and grave crimes.

One of the overlooked aspects of the Decision is the key role played by two victim's groups through their legal representatives ('LRV'): victims of the massacre committed in the village of Tula Toli in Myanmar on 30 August 2017,⁴¹ and the Shanti Mohila (Peace Women), 400 Rohingya women and girl survivors of sexual and gender-based violence and a wide range of other crimes that forced them from their homes and into Bangladesh.⁴² The Shanti Mohila (Peace Women) are represented by the author's organisation, [Global Rights Compliance](#), in partnership with [Legal Action Worldwide](#). The women are largely widows that began meeting in the Kutupalong-Balukhali settlements, a Rohingya refugee camp in Cox Bazaar in Bangladesh, to discuss and offer each other support. On International Women's Day on 8 March 2017, they organized a rally for Rohingya women to protest the treatment of their people. Their cause attracted more than 250 women who marched for peace and justice. Encouraged, they decided upon fifteen clear demands that must be met before repatriation. Each is understatedly simple and connotes its own demand for legal rights: the official recognition of the Rohingya identity; the right to citizenship; freedom of movement in and out of their own villages and towns; the release of their loved ones from detention; the right to practice their religion and so on. Since December 2017, the LRV has worked with the women in Cox Bazaar, combining legal representation, legal information and psychosocial support to enable legal empowerment in furtherance of protection and dignity.

Through their focused submissions, victims played a pivotal role in pushing the envelope on the legal issues brought to the Court's attention in the Request. Not only did the LRVs enhance the Prosecutor's arguments on territorial jurisdiction and the transboundary nature of the crime of deportation, but they also went further by successfully arguing that other crimes (such as persecution) committed against the Rohingya may fall within the purview of the Court's jurisdiction.⁴³ Nonetheless, due to the unprecedented nature and the timing of the Prosecutor's request (prior to the existence of a 'situation' before the Court), there existed considerable procedural uncertainty as to how to proceed with victim participation. This prompted both the

37. International Commission of Jurists, [Achieving Justice for Gross Human Rights Violations in Myanmar: Baseline Study](#), January 2018, p. 3.

38. Myanmar has ratified the following international human rights treaties: (i) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); (ii) International Covenant on Economic, Social and Cultural Rights (CESCR); (iii) Convention on the Rights of the Child (CRC); Convention on the Rights of Persons with Disabilities (CRPD). See United Nations Office of the High Commissioner for Human Rights, [Ratification Status for Myanmar](#).

39. OHCHR, [Myanmar: UN expert calls for ICC to probe "decades of crimes"](#), 27 June 2018; The Guardian, [Rohingya crisis: 132 MPs across region call for Myanmar to be referred to ICC](#), 24 August 2018; Human Rights Watch, [UN Security Council: Refer Myanmar to ICC](#), 8 May 2018.

40. Reuters, [UN rights investigator calls for pressure on China, Russia over Myanmar abuses](#), 28 December 2017.

41. Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18-26, [Observations on behalf of victims from Tula Toli](#), 18 June 2018, (Tula Toli Victims Observations).

42. Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, [Submissions on Behalf of the Victims Pursuant to Article 19\(3\) of the Statute](#), 30 May 2018.

43. Decision, para. 79.

Prosecutor (initially)⁴⁴ and the Myanmar authorities (predictably)⁴⁵ to limit or oppose respectively the possibility of victim participation in the proceedings initiated through the Request.

The position taken by Myanmar authorities is unfortunate but no one can be surprised. Despite overwhelming evidence to the contrary, their military and civilian government insist that no crimes have been committed and they will continue to seek to obstruct any genuine enquiry or any redress. Any alternative posturing is a step closer to removing the impunity they have enjoyed for many years. The initial reluctance of the Prosecutor in the Request to accepting fully-fledged victim participation is the symptom of a more complicated phenomenon and one that bedevils victim representation throughout the international tribunal world, including at the ICC. It reflects a recurring anxiety that too many victims' rights or opportunities to participate or appear as real and effective actors in the proceedings risks undermining due process and creating a bottleneck in the flow of the proceedings.

However, as will be discussed in this article, not only do victims enjoy a statutory right to participate, but when conducted with care, they present a unique voice that, as with the Request, may provide input and views that assist the ICC in arriving at a legally sound place. In order to illustrate this point, the first part will dissect the arguments put forward by the Prosecutor and Myanmar authorities on the standing of the Rohingya victims to submit observations during the adjudication of the Request. The second part will reflect on the proactive role that the victims may play in assisting the Prosecutor and the Court in fulfilling their mandate of putting an end to impunity for international crimes.

1. Victims as passive or silent participants

Myanmar's position

In a press release opposing the admissibility of the submissions made by the LRVs in support and extension of the Request, the Myanmar authorities decried the role of the victims in the Request claiming that:

[T]he Court has allowed unsolicited victims' applications (something which, to date, has only ever happened in the context of a pre-existing "situation") which is a totally new development. This is worrying because the Court appears to have predetermined or, at least, acquiesced to a procedural mechanism which would normally be subject to due process... [S]everal groups have *de facto* joined the legal process and have filed detailed observations, without the Court even ruling whether their participation is appropriate under regulation 86... The unauthorised and unsolicited submissions of observations by these groups has had the effect of placing the Court in a difficult emotional bind. Rejection of their submissions on the grounds of a flagrant procedural irregularity would have left the ICC judges exposed to a charge of callousness."⁴⁶

The latter claim that the participation of the victims placed the judges into some kind of emotional bind may be readily dismissed. Judges are presumed to be able to act on the law and the facts and not be swayed by emotion. Indeed, the dissenting opinion by Judge Perrin de Brichambaut declining to deal with the substance of the Request on the basis that the Prosecutor's Request was submitted before the existence of a case and in an attempt to obtain an advisory opinion,

44. The Prosecutor later clarified/revised her position in her response to the submissions of the LRVs. See Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, [Prosecution Response to Observations by Intervening Participants](#), 11 July 2018, para. 15-17, (OTP Response).

45. Government of the Republic of the Union of Myanmar Ministry of the Office of the State Counsellor, [Press Release](#), 9 August 2018, (Myanmar Press Release).

46. Myanmar Press Release, paras. 15-16.

a process not envisaged by article 19(3),⁴⁷ was a timely reminder that process and procedure matters and may disincline a judge from the nub of an issue or the justice of the moment.

The first part of the argument requires more unpacking but has no greater merit. Essentially, the Myanmar authorities contended that the ICC's admission of the submissions of the LRVs without first fully assessing the status of the victims pursuant to regulation 86 (and consequently rule 89) was a 'procedural irregularity'. As an examination of the practice of the Court reveals, this is far from unusual, let alone unprecedented. The Court has previously accepted victim observations in the early stages of proceedings without a definitive judicial finding under rule 89 regarding their victim status. Rather, in circumstances where victim participation is narrowly defined in scope, the participation of victims may be allowed based upon a *prima facie* assessment of their status by the Victims Participation and Reparations Section ('VPRS').⁴⁸ This also applies to proceedings under article 19(3), the procedural pivot of the Request.⁴⁹ Rule 59, which governs the proceedings under 19(3), provides that victims who have communicated with the Court (including those who have only submitted applications⁵⁰ and, possibly, those who have provided the Court with information on crimes⁵¹) may submit observations to the Court, regardless of whether they have been recognised as victims by a Chamber.

In other words, despite the rather florid claims of Myanmar, the PTC's allowance of the victim's participation merely followed the established practice of the Court. The VPRS assessed the 21 applications filed to the Court on behalf of the two victims' groups by their LRVs and informed the PTC that the applicants satisfied the relevant criteria on a preliminary basis.⁵² Ultimately, the PTC relied on this assessment in receiving the submissions filed by the LRVs.⁵³ Curiously, despite extensive submissions of the LRVs on the matter, the PTC neglected to analyse the scope of victim participation under article 19(3). By not engaging with the arguments, the PTC missed out on an opportunity to clarify the scope of victim participation under this provision. However, it arrived at a sensible and pragmatic view concerning the Request, opting to find that the victims had the standing to submit observations pursuant to article 68(3).⁵⁴ The Chamber also referenced

47. Judge Perrin de Brichambaut held that article 19(3) cannot be applied prior to the existence of a case or an indication by the Prosecutor regarding her intention to proceed with an investigation. See Decision, Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut, paras. 4-8.

48. Two examples of this are the proceedings on the authorisation of a *proprio motu* investigation under article 15(3) and the review of the Prosecutor's decision not to initiate an investigation under article 53(3)(a). In relation to the proceedings under article 15(3), see Situation in the Republic of Kenya, ICC-01/09, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, 10 December 2009, paras. 7-8; Situation in the Republic of Kenya, ICC-01/09, Public Redacted Version of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and annexes 2 to 10, 29 March 2010; Situation in the Republic of Kenya, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras. 14-16; Situation in the Islamic Republic of Afghanistan, ICC-02/17, Order to the Victims Participation and Reparations Section Concerning Victims' Representations, 9 November 2017, paras. 13-14; In relation to the proceedings under article 53(3)(a), see Situation in the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13, Decision on Victims' Participation, 24 April 2015, (Comoros Victim Participation Decision), para. 12. See Situation in Uganda, ICC-02/04, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, (Uganda Victim Participation Decision), paras. 93-94. See also Tula Toli Victims Observations, paras. 81-87. *Prosecutor v. Kony et al.*, ICC-02/04-01/05, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, 21 October 2008, (Kony Article 19 Decision), p. 7. *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision requesting observations on the "Defence Challenge to the Jurisdiction of the Court", 16 August 2011, (Mbarushimana Decision), pp. 3-4.

49. Uganda Victim Participation Decision, paras. 93-94; See also Tula Toli Victims Observations, paras. 81-87. Kony Article 19 Decision, p. 7. Mbarushimana Decision, pp. 3-4.

50. See Kony Article 19 Decision, p. 7; Mbarushimana Decision, pp. 3-4.

51. Arguably, the concept of victims having communicated with the Court also includes victims 'whilst not having (as yet) been allowed to participate in proceedings, have nevertheless been in contact with the Court [under Article 15 of the Statute.] See Uganda Victim Participation Decision, para. 93.

52. Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, Information on Victims' Application Received in relation to the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" notified on 9 April 2018, 14 June 2018, paras. 10, 13.

53. Decision, para. 21, fn. 27.

54. Decision, para. 21.

rule 93 that provided an additional basis for its approach: as noted, rule 93 provided the PTC with discretion to accept observations presented by victims on any issue and at any stage of the proceedings.⁵⁵ In light of these clear precedents and the obvious interests of justice requirement on an issue of such import, Myanmar's views may be seen as what they were – an unprincipled approach designed to do nothing more than muddy the justice waters.

Prosecutor's position

That allegation cannot be leveled against the ICC Prosecutor whose Request rested on a well-spotted legal lacuna and a courageous attempt to traverse it to ensure a degree of accountability for the much beleaguered Rohingya. However, in her attempt to have the matter heard as efficiently and efficaciously as possible, she did indeed miss a legal trick. In her initial submissions on the matter, the Prosecutor took a rather narrow approach towards victim participation in the proceedings she had initiated before the PTC under article 19(3). The Prosecutor argued that:

Since the events triggering this request are not subject to a State or UN Security Council referral under article 13, and no relevant "situation" currently exists before the Court, it appears that no State or participating victim is *formally* entitled to file additional observations on this matter under article 19(3). Nonetheless, the assigned Pre-Trial Chamber may invite the Office of Public Counsel for Defence and the Office of Public Counsel for Victims [OPCV] to file observations, and States, organisations and other persons to request leave under rule 103 to file observations as *amicus curiae* [footnotes omitted].⁵⁶

Essentially, the Prosecutor's argument boiled down to the following: since neither the UNSC nor a State Party referred the crimes committed against the Rohingya to the Court, and as she has not yet officially commenced a preliminary examination, a 'situation' before the Court did not yet exist. Accordingly, there were no existing proceedings in which relevant victims could already have been registered to participate,⁵⁷ and, consequently, victims were not entitled to observations under article 19(3). Instead, if the PTC felt it appropriate or useful to invite (on an ad hoc kind of basis) any further view, then their views may be represented by invitation by the OPCV.

A reasoned reading of the relevant legal provisions did not support the Prosecutor's position. In arguing that the victims were not *formally* entitled to make observations pursuant to article 19(3), the Prosecutor merely referred to the wording of article 19(3) and a decision of the ICC Appeals Chamber, without offering any explanation whatsoever on how these authorities could be said to provide any support for her contention.⁵⁸ In fact, neither of these authorities lend any support to the Prosecutor's position. It is clear from the plain meaning and literal reading of article 19(3) that victims may participate in any and all proceedings related to jurisdiction and admissibility at any stage of the proceedings.⁵⁹ Similarly, the cited Appeals Chamber jurisprudence does not limit victim participation under article 19(3) to any specific phase of the proceedings. In fact, in the paragraph referenced by the Prosecutor, the Appeals Chamber explicitly refused to rule on

55. Decision, para. 21.

56. Request, para. 7.

57. Request, para. 16.

58. Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, (DRC Arrest Warrant Decision)", 13 July 2006.

59. Rome Statute, Article 19(3) reads: 'The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.' States or the UNSC may only submit observations under this provision if they have referred the situation to the Court under article 13. See Prosecutor v. Gaddafi & Al-Senussi, ICC-01/11-01/11, Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute", 4 May 2012, para. 12; Prosecutor v. Kenyatta et al., ICC-01/09-02/11, Decision on the "Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings", 20 September 2011, para. 9. A similar limitation does not exist for victims.

'the applicability of article 19(3) of the Statute in general.'⁶⁰ Rather, victim participation in those proceedings was deemed restricted solely due to their confidential, Prosecutor only, nature.⁶¹

Moreover, there is an even more fundamental flaw with the Prosecutor's reasoning: a 'pre-situation phase' does not exist under the ICC system. As highlighted by the PTC in the Decision, 'the statutory documents of the Court do not envisage a pre-preliminary examination stage.'⁶² The Prosecutor's review of the information submitted to her as well as the available open-source material in relation to the Rohingya crisis does not precede a preliminary examination, but are part of it, whether formally announced or not.⁶³ Accordingly, regardless of whether it was formally announced by the Prosecutor or not, the Request was adjudicated during the preliminary examination phase, (which is a part of the situation phase) where the participatory rights of the victims have already been recognised by the Court.⁶⁴

The Prosecutor's approach is striking: on the one hand, she went out on a limb to advance a (somewhat controversial but absolutely legally sound) Request that, as noted above, opened a door to accountability for victims that had previously been firmly locked; on the other, she urged an approach that would have placed the OPCV (that was unlikely to have had any meaningful contact with Rohingya victims at the time) in a position to file submissions on their behalf. To her credit, the Prosecutor quietly reversed course in her latter response to the submissions of the LRVs⁶⁵ but nonetheless her initial view that the Request might benefit from the views of the OPCV, relevant States⁶⁶ and *amici curiae*'s,⁶⁷ but not specific victim groups, is worthy of remark.

Ironically, the Prosecutor's position may be worthy of remark because it may have been nothing more or less than a result of reflexive anxiety over the possibility that the expansion of the victims' rights and opportunities to participate or appear as real and effective actors in the proceedings may risk undermining due process and swift resolution of complex issues. While victim participation is generally recognised as one of the most innovative aspects of the ICC, victims are often not perceived as active agents in the proceedings. Rather, they are perceived as passive participants who are not expected to have any real effect in judicial proceedings beyond voicing their views and concerns as an end in itself. Some lawyers, academics and even the Court staff hold the 'steadfast view that strengthening victims' role in criminal procedure taints the rights of the defence whereas others point to procedural difficulties of such involvement, referring mainly to the potential for delays, escalation of costs and other inefficiencies.'⁶⁸ In a

60. DRC Arrest Warrant Decision, para. 30.

61. DRC Arrest Warrant Decision, paras. 30-31.

62. Decision, para. 82.

63. Decision, para. 82.

64. See Rome Statute, Article 15(3); *Prosecutor v. Kony et al.*, ICC-02/04-01/05, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 1 February 2007, para. 15; Situation in the Republic of Cote d'Ivoire, ICC-02/11, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, 6 July 2011, paras. 7-10.

65. OTP Response, paras. 16-17.

66. The PTC invited both Myanmar and Bangladesh to submit observations on the Request. See Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for Ruling on Jurisdiction under Article 19(3) of the Statute", 21 June 2018; Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, Decision Inviting the Competent Authorities of the People's Republic of Bangladesh to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 7 May 2018.

67. The PTC received submissions from five *amici curiae*. Guernica 37 International Justice Chambers, Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules), 18 June 2018; Women's Initiative for Gender Justice et al., Joint Observations Pursuant to Rule 103 of the Rules, 18 June 2018; Canadian Partnership for International Justice, Amicus Curiae Observations on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 18 June 2018; Bangladeshi NGOs, Amicus Curiae Observations by the Bangladeshi Non-Governmental Representatives, 18 June 2018; International Commission of Jurists, Amicus Curiae Observations by the International Commission of Jurists (pursuant to Rule 103 of the Rules), 18 June 2018.

68. Redress, The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future, October 2012.

study where the author interviewed the staff of the ICC, the majority of the respondents seem to have perceived the role of victims before the ICC in terms of (emotive or narrative) expression ('telling their story') or receiving information about their rights and procedures of the Court.⁶⁹ In a similar line of thought, Judge Christine Van den Wyngaert, who has regretted the experience of victims at the ICC, has noted that 'it may well be that victims' participation in criminal trials of the kind that are held before the ICC, i.e., trials with massive amounts of victims, cannot be more than symbolic...'⁷⁰ The position that the Prosecutor adopted in the Request may be another manifestation of these anxieties – an approach that works for and even appropriates the voices of victims but is reflexively focused on these floodgates concerns.

Of course, it is certainly true that victim representation, under certain circumstances, may stand at odds with judicial economy. It takes creativity and good planning and management to organise and optimise the participation of hundreds, if not thousands of victims, before any judicial process. However, the same also applies to work to ensuring that victims are 'a vital actor in the justice process rather than a passive recipient of services and magnanimity.'⁷¹ It takes an equally well thought out approach to ensure these aims, and the benefits to the process may well indeed be judicial economy and creativity. As discussed below, and as the participation in the Request of the two victims groups show, the victims may be uniquely placed *in the first instance* to provide a distinct voice that may aid the search for the right legal approach in furtherance of the ICC's mandate.

2. Victims as proactive actors

As the Shanti Mohila have forcefully shown, if given an opportunity, survivors are not merely passive recipients or beneficiaries of legal action conducted by others. The first of the Shanti Mohila's 15 demands is a demand for justice that was forged prior to legal advice or representation. This demand for justice, at the forefront of the Shanti Mohila's embryonic campaign, led them to seek assistance from the LRVs in requests for lawyers and advice on how to access justice and what were the available international legal options. In response, the LRVs advised on the possibility of engaging with a number of international and domestic mechanisms, the most prominent of which was the ICC.

Thus, their journey to legal empowerment began with determined intent. As they described to their lawyers in the bamboo huts in Cox's Bazar: my husband was killed and they (the military) burnt my house"; "my son was taken away and I don't know where he is"; "I was attacked and they cut my son with a knife". How, they asked, could they not be involved with the ICC? Once given access to legal information and an opportunity to have their accounts documented in a manner consistent with international standards (including with appropriate psychosocial support), this demand for justice at the ICC was given legal form. Once the Decision was rendered, the ICC provided two stages of the proceedings (the preliminary examination and investigation phases) and two main activities for this to be elaborated and for the resolute voices of the Rohingya to be heard and amplified. Essentially, there are:

Making observations

In addition to proceedings under article 19(3), the Statute recognises further scenarios where the victims may make representations before the Court at the preliminary examination and investigation phases. These are: (i) Prosecutor's request for authorisation to initiate an investigation under article 15(3), (ii) review proceedings under article 53(3),⁷² and (iii) any other judicial proceedings where

69. Jo-Anne Wemmers, 'Victims' Right and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate', *LJIL*, 23, 629-643, pp. 636-638, 642.

70. C. Van den Wyngaert, *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 *CASE W. RES. J. INT'L L.* (2012) 475-496, p. 495.

71. *Court's Revised strategy in relation to victims*, ICC-ASP/11/38 (n 20) para. 7.

72. See Rule 92(2), and Comoros Victim Participation Decision, para. 7.

their personal interests are affected under article 68(3).⁷³ By making focused submissions in these instances, victims may bring original perspectives and arguments to the attention of the Court. This is evidenced by the observations submitted by the LRVs during the adjudication of the Request. Not only did the PTC, in granting the Request, relied on the arguments advanced by the LRVs on the legal questions raised therein,⁷⁴ the LRVs managed to expand the scope of the Request by successfully arguing for the possibility of crimes committed against the Rohingya other than deportation coming within the jurisdiction of the Court.⁷⁵ Consequently, the PTC found that the Court may look into the commission of additional crimes, such as persecution or other inhumane acts, if it can be demonstrated that a part of these crimes or at least one of their legal elements occurred on the territory of Bangladesh.⁷⁶ Undoubtedly, this broader finding strengthens the Prosecutor's hand in determining the breadth of her preliminary examination and at the later stage of the proceedings if she elects to investigate and charge these crimes, or others.

Evidence and information gathering

The role of the victims may play at the preliminary examination and investigation stage is not limited to making submissions before the Court. Victims may also contribute positively to the early information and evidence gathering activities of the Prosecutor. This is especially relevant during the preliminary examination phase where the Prosecutor's (investigative) powers are significantly curtailed.⁷⁷ During this phase, the Prosecutor is empowered to conduct desk analysis of the information provided by States, UN, NGOs and other reliable sources, or receive written or oral testimony at the seat of the Court.⁷⁸ She may not, for instance, deploy her staff to the situation country to conduct on the ground investigations by taking statements from victims and witnesses until a full investigation is launched under article 53 of the Statute, a process that may not crystallise for many years.⁷⁹ This delay may have significant ramifications for the documentation of evidence and the quality and effectiveness of the subsequent investigations. As highlighted by the PTC in the Decision, '[w]ith the lapse of time memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist and thus the prospects that any effective investigation can be undertaken will increasingly diminish.'⁸⁰ The passage of time may mean victims "who have suffered trauma may have particular difficulty in providing a coherent, complete and logical account."⁸¹

By establishing a practical collaboration and division of labour with the Prosecutor in the preliminary gathering of information, victims may be peculiarly placed to assist in protecting against these deleterious effects.⁸² The Court cannot monitor the victims' activities outside the framework of judicial proceedings before the ICC and, therefore, victims are free to engage in

73. Situation in the Democratic Republic of the Congo, ICC-01/04 OA4 OA5 OA6, Judgement on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, (DRC Appeal Decision on Victim Participation), para. 56; Situation in the Republic of Kenya, ICC-01/09, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2010, (Kenya Victim Participation Decision), para. 9.

74. See, for instance, Decision, paras. 64-64, 71.

75. Decision, paras. 74-79.

76. Decision, para. 79.

77. Morten Bergsmo *et al.*, Article 15, in Otto Triffterer & Kai Ambos eds., *The Rome Statute of the International Criminal Court: A Commentary*, Third Edition, 2016, (Triffterer), p. 730.

78. Rome Statute, Article 15(2).

79. The preliminary examination of the Prosecutor in relation to the situation in Afghanistan has taken up to ten years. The preliminary examination on Nigeria has been ongoing for almost eight years. For more examples, see OTP, Report on Preliminary Examination Activities 2017, 4 December 2017.

80. Decision, para. 68.

81. Decision, para. 86.

82. See Regulation 52 of OTP Regulations which requires the Prosecutor to "constructively engage with the legal representatives of victims in order to promote the efficient conduct of proceedings."

preparatory enquiries and evidence gathering at the preliminary examination stage.⁸³ In fact, the Court has already recognised the useful role that victims may play in the preservation of evidence during the preliminary examination and investigation phases.⁸⁴ Accordingly, LRVs may conduct essential documentation activities with their clients at the preliminary examination phase by gathering and collating the available information/evidence and mapping potential victims and witnesses and crimes. The information/evidence may then benefit the Prosecutor in many ways, particularly aiding her (relatively small) team of investigators to understand the crime base and even the linkage evidence and the identity of the various participants in the events.⁸⁵ Of course, any such assistance must meet international standards of documentation but in circumstances of massive violations spanning months or even years if done well it represents a significant saving and sharing of resources to get the job done.

In sum, victims may assist the Prosecutors much vaunted positive complementarity strategy. A significant part of the OTP's efforts at the preliminary examination stage is directed towards encouraging, where feasible, genuine national investigations and prosecutions by the States who may exercise jurisdiction over the crimes within the purview of the preliminary examination.⁸⁶ It is true that, under the current circumstances, it is unlikely that such proceedings will be undertaken in Myanmar in the near future. That being said, it is also true that circumstances may change. Moreover, Bangladesh, as well as any other State under the principle of universal jurisdiction, may exercise jurisdiction over the crimes committed against the Rohingya.⁸⁷ Through their documentation activities, victims may assist the Prosecutor in identifying and selecting and prioritising the relevant cases that will and will not be tried at the ICC. The Prosecutor may then use this information to cajole and support the relevant local authorities into initiating and conducting proceedings against the perpetrators. Given that the ICC may only be a last resource court, this would allow the Prosecutor, in collaboration with the victims, to achieve the maximum level of accountability for any crime within the jurisdiction of the Court.

Conclusion

The debate on victim participation has become far too defined by fear about the 'rights' of victims and how the expression of them may interfere with the smooth administration of justice. This focus appears to have created unnecessary anxiety and undermined victim's agency with regard to the ICC. An effective victim participation model is not only beneficial to the victims themselves, but also to the Court's mandate. As the Shanti Mohila have shown, regular access to lawyers, including survivor-centred approaches in refugee camps, can lead to the legal articulation of survivor's voices that bring new arguments to the debate, providing a novel basis for any final legal or factual assessment necessary for the advancement of the law and the search for the truth.⁸⁸ In this sense, the Decision represents an eloquent illustration of the benefits of the empowerment of victims, both in terms of substance and procedure, as well as showing how victims, as principal constituents of the ICC, may play a crucial role in the fight against impunity.

83. Uganda Victim Participation Decision, para. 42.

84. See Rome Statute, Articles 56 or 57(3)(c); See Uganda Victim Participation Decision, para. 96-101; Kenya Victim Participation Decision, para. 12; Situation in Uganda, ICC-02/04, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 19 December 2007, para. 31.

85. This can be done through either article 15(2) or 42(1) of the Statute. See DRC Appeal Decision on Victim Participation, para. 53; Additionally, Regulation 16 of the OTP Regulations provides that the Prosecutor 'shall...seek and receive the views of the victims at all stages in order to be mindful of and take into account their interests.'

86. ICC OTP, Policy Paper on Preliminary Examinations, November 2013, para. 100-101.

87. IICI, Myanmar-Specific Guidance for Practitioners, March 2018, pp. 17-18.

88. David Donat-Cattin, Article 68: Protection of victims and witnesses and their participation in the proceedings, Triffterer, p. 1687.



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Victims' Representations in Afghanistan: Unprecedented Challenges and Lessons Learned

by Kyra Wigard, Guissou Jahangiri, Zia Moballegh ⁸⁹

Introduction

When the Prosecutor of the International Criminal Court ('ICC' or 'Court') opened a public preliminary examination into the situation in Afghanistan in 2007, expectations were high and unprecedented.⁹⁰ Much hope was invested in the opening of the process of possible ICC proceedings, as Afghanistan and its people were hoping to turn the page on one of the worst chapters of their history: the Taliban terror and years of civil war. Until then, the focus of the newly found Court had been mostly on African countries and investigations into individuals alleged to have committed the gravest crimes were also limited to Africans. When the 2016 annual Preliminary Examination report of the Office of the Prosecutor ('OTP') stated that a decision on the finalization of the preliminary examination of Afghanistan would be made "imminently", civil society actors reinforced their efforts to press for a comprehensive investigation into the situation and the need for the ICC to make a decision as soon as possible.⁹¹ They undertook frequent missions to the Court's seat in The Hague to participate in open and closed meetings

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90. Afghanistan has been a State Party to the International Criminal Court (ICC) Statute since 10 February 2003. In relation to the crimes committed in the context of the armed conflict in Afghanistan that were allegedly committed on the territory of other States Parties, the Rome Statute entered into force on 1 July 2002 for Poland and Romania and on 1 August 2003 for Lithuania.

91. The conclusion of the Preliminary Examination report on Afghanistan states: "The Office is concluding its assessment of factors set out in article 53(1)(a)-(c), and will make a final decision on whether to request the Pre-Trial Chamber authorisation to commence an investigation into the situation in the Islamic Republic of Afghanistan since 1 May 2003, imminently." Office of the Prosecutor, [Report on Preliminary Examination Activities \(2016\)](#), para. 230.

with representatives of the Court, but also with representatives of States Parties, journalists, and other stakeholders. However, the word “imminent” became the topic of much discussion when, with the start of the 2017 summer recess, the Prosecutor still had not made a decision. Finally, on 7 November 2017, the ICC Prosecutor announced she would request the Pre-Trial Chamber (‘PTC’) to authorise the opening of an investigation. On 20 November 2017, she filed the request to open an investigation into the alleged crimes committed by several actors in Afghanistan, including international forces (members of the US forces and of the CIA), Afghan authorities, and members of the Taliban and affiliated armed groups.⁹²

After the OTP publicly notified its request to open an investigation into the Afghanistan situation, the ICC pre-trial judges gave victims from 20 November 2017 until 31 January 2018 to submit “representations”, that is to share their personal views, as individuals or groups, on the opportunity of the opening of an investigation and its scope as defined by the OTP. Afghan and international NGOs working on crimes in the Afghanistan situation and in support of victims of these crimes have been solicited by the Court to reach out to victims and collect their views and information about their identities and victimisation in a very short period of time, including the OPEN ASIA/ Armanshahr Foundation, the Transitional Justice Coordination Group, International Federation for Human Rights, and the Center for Constitutional Rights. The process was complicated, stakeholders being confronted with many challenges throughout the victim representation stage. Despite these challenges, victim representations on behalf of a great number of victims were submitted by 31 January 2018, with an overwhelming majority in favour of the Prosecutor’s request to open an investigation.⁹³

Despite the short time period in which victims were able to submit representations, it is possible to deduce a number of key challenges and conclusions related to the interaction between the ICC and victims and their legal representatives. The record numbers of victims that have interacted with the Court at this early stage in the situation of Afghanistan provide all stakeholders with invaluable lessons that should guide them through the next phase, should an investigation be authorised.⁹⁴

1. The Decade-Long Preliminary Examination

The opening of an ICC preliminary examination in 2007 served as a first step to change the narrative that dominated the armed conflict in Afghanistan. After 9/11 and the involvement of international forces in the armed conflict in Afghanistan, much focus was put on the escalation of violence and terror, but very little attention was paid to possible avenues of accountability for those committing war crimes and crimes against humanity. In 2007, the situation was confusing as peace was announced, but the war continued and foreign troops were occupying the country. Even if in 2007 many people did not know about the Rome Statute and their government’s obligations to it, the general population believed that a transitional justice process needed to be on the agenda.⁹⁵ That year, the Afghan Parliament also passed the National Stability and Reconciliation law, “to prevent the prosecution of individuals responsible for large-scale human rights abuses in the preceding decades. The amnesty law states that all those who were engaged in armed conflict before the formation of the Interim Administration in Afghanistan in December

92. See Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp.

93. See for example: Kathy Gannon, “Afghans submit 1.17 million war crimes claims to international court”, *The Independent*, 17 February 2018.

94. For the purpose of this paper and as a result of the representation stage, the focus is primarily on victims in Afghanistan, and the diaspora to a lesser extent.

95. See David Knaute, How and why truth and justice have been kept off the agenda; A literature review on transitional justice in Afghanistan, Armanshahr/OPEN ASIA Report, Nov 2015.

2001 shall “enjoy all their legal rights and shall not be prosecuted.”⁹⁶ In this context, expectations from the ICC became even more significant from the outset of the preliminary examination. It was seen as a mechanism of last resort in the absence of any political will in Afghanistan to deal with the past and the present crimes.

It finally took a new Prosecutor (Fatou Bensouda took office in 2011) and a decade-long analysis to consider whether the situation in Afghanistan would warrant a full ICC investigation. By 2017, the OTP had received a total of 125 communications pursuant to Article 15 of the Statute in relation to this examination.⁹⁷ Shortly after the Prosecutor filed the request in November 2017, the Pre-Trial Chamber informed the Registry that victims had until 31 January 2018 to “provide their views, concerns and expectations, to the ICC Judges that are considering the Prosecutor’s request”.⁹⁸ Simultaneously, from December 2017 onwards, Afghanistan also entered its most violent year since the start of the conflict in 2001 and the “deadliest recording year for civilians”.⁹⁹ The UN Assistance Mission in Afghanistan (UNAMA) reported that 1,692 civilians were killed during the first six months of 2018 – “the most recorded in the period over the last decade since the agency began documentation”.¹⁰⁰ The climate in Afghanistan has therefore not improved much since the opening of a preliminary examination a decade ago. In fact, it could be argued that the situation has gotten much worse. It is in this climate of continued conflict in Afghanistan that the victim representation stage took place. The ICC Registry also reported “that the [...] challenges represent a significant reason for low levels of victim representations in comparison to the vast number of victims in the country.”¹⁰¹ Despite these enormous challenges, victims still overwhelmingly stated they were in favour of the opening of an ICC investigation in Afghanistan and submitted their representations.

2. A Two-Month Long Victim Representation Stage

Article 15 (3) of the Rome Statute allows for the possibility for victims to make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence, to complement the Prosecutor’s request in any way they seem fit. The victim representation stage in the case of Afghanistan was vastly different from the last situation in Georgia with a similar victim representations phase.¹⁰² Indeed, the representation stage in the situation in Georgia was shorter (limited to 30 days), but victims were already organised to some extent as a consequence of cases filed at the European Court of Human Rights, for example. In addition, the ICC investigation in the context of an international armed conflict in Georgia has a temporal scope of roughly three and a half months. For victims in Afghanistan, this was therefore not only an opportunity to share their views and concerns, but it was an important step to influence and nourish the focus and scope of OTP possible investigation. The information submitted in the representations to the judges forms a first step in establishing a direct line between victims and their legal representatives and ICC judges. The significance of this step cannot be overstated: in the case of Georgia, for example,

96. Human Rights Watch, “[Afghanistan: Repeal Amnesty Law](#)”, 10 March 2010.

97. Office of the Prosecutor, “[Report on Preliminary Examination Activities 2017](#)”, 4 December 2017, para. 230.

98. This process commenced pursuant to Regulation 50 of the Regulations of the Court on 20 November 2017 and ended on 31 January 2018, the deadline set by the ICC Judges for victims to submit representations. To help facilitate this process, the Victims Participation and Reparations Section (“VPRS”) of the ICC Registry prepared a [template representation form](#) which was available on the ICC website during the process, in a number of languages, until 31 January 2018.

99. See also CNN, “[Deadliest recorded year for Afghan civilians](#)”, 2018.

100. The UN Assistance Mission in Afghanistan (UNAMA) reported that 1,692 civilians were killed during the first six months of 2018 - the most recorded in the period over the last decade since the agency began documentation (Aljazeera, [Afghanistan: Civilian deaths hit record high](#), says UN, 15 July 2018).

101. [Annex I](#), Red to the Final Consolidated Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017 (‘Annex 1’), ICC-02/17-29-Anxi-Red, 20 February 2018, para. 13.

102. With regard to Georgia, the Pre-Trial Chamber received the representations by or on behalf of 6,335 victims on this matter. International Criminal Court, “[ICC Pre-Trial Chamber I authorises the Prosecutor to open an investigation into the situation in Georgia](#)”, 27 January 2016.

victims' representations led the pre-trial judges to expand "the scope of the investigation to include additional crimes allegedly committed within the jurisdiction of the ICC."¹⁰³

The Registry created a special representation form for Afghanistan for victims and their legal representatives. Both individuals and groups of victims could use this form and the Registry made the form available online to be submitted either online or via post. Guidelines as to how to fill out the form were also made available on the Court's website.¹⁰⁴ The Registry made the form and guidelines available in English, Dari, Pashto, and Arabic until 2 February 2018.¹⁰⁵

The Pre-Trial Chamber ordered the Victims Participation and Reparation Section ('VPRS') of the Court to "(i) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations; (ii) receive and collect victims' representations, be it collective or individual; (iii) conduct a preliminary assessment, as set out in this order, whether the conditions set out in rule 85 have been met; and (iv) transmit incoming representations on a rolling basis, possibly every two weeks, together with a brief preliminary assessment."¹⁰⁶ Due to a lack of resources, no field presence in Afghanistan, and security constraints, further outreach by the Court to interact with victims was extremely limited. As a result, and notwithstanding the PTC order, the VPRS of the Court relied heavily on the support of a number of intermediaries of key civil society actors to reach out to victims during the representations phase rather than having its own "active" general outreach strategy.¹⁰⁷

At that point, civil society in Afghanistan was facing two significant obstacles in the country. One was the climate created by the prevailing "peace" agenda, which had been carefully engineered and separated from justice discussions. This agenda appeared primarily focused on a ceasefire and a non-transparent deal with the Taliban and separated the discussion from any form of transitional justice and victim-oriented initiatives.¹⁰⁸ The "peace" agenda discourse and inaction both by the government and its institutions alongside its international political and funding allies had created an extremely difficult environment for NGOs in Afghanistan. The second obstacle was to raise awareness about the ICC process and mobilise the communities with extremely limited resources and limited space for civil society, as many NGOs could never muster financial support to reach out to the people. It proved difficult to put the victim representation process on anyone's agenda in Afghanistan. A group of committed organisations and individuals who cofounded the Transitional Justice Coordination Group played a pivotal role during this phase in reaching out to victims in Afghanistan as well as to those in the diaspora all over the world.

In total, 686 representations were introduced on behalf of approximately 6,220 individual victims and a further 12 representations were introduced by individuals and by organisations on behalf of approximately 1,163,950 victims and 26 villages. Finally, another representation was submitted by an organisation reportedly on behalf of approximately 7 to 9 million people.¹⁰⁹

103. Including sexual violence, arbitrary detention of civilians, and torture of prisoners of war. Nika Jeiranashvili, *"The Georgian Experience: A Story of How the ICC is Failing Victims in its First Case Outside Africa"*, 10 May 2018, IJ Monitor.

104. International Criminal Court, *"Afghanistan situation: How victims and their representatives can submit their views to ICC Judges"*, 20 November 2017.

105. *Annex I*, Para. 6.

106. Pre-Trial Chamber III, *"Order to the Victims Participation and Reparation Section Concerning Victims' Representations"*, ICC-02/17-6, 9 November 2017.

107. VPRS also specified in Annex 1 its "targeted approach", rather than opting for and facilitating general outreach activities such as trainings on the ICC and the representation process. *Annex I*.

108. This meant for example that the Afghanistan Independent Human Rights Commission (AIHRC) mapping of conflict was banned from being issued and published.

109. See *Final Consolidated Registry Report on Victims' Representations*, para. 28-29.

3. Key Challenges in the Interaction between Victims and the Court

One of the main challenges faced by both victims and the Court was the security situation in Afghanistan. Interacting with the Court as a victim during this phase could pose serious security risks to individuals and their families and communities. Similarly, it was difficult for the VPRS to interact directly with victims in Afghanistan due to their security situation and possible risks. This is also reflected in the final VPRS report, where victims, for example, voiced fears of retaliation and concerns for their identity being discovered due to them naming specific events and/or attacks.¹¹⁰ In turn, there were also challenges for civil society actors in Afghanistan trying to encourage victims to submit representations.

Another challenge was the lack of outreach done by the Court. In their final report, VPRS identified “that without a visible Court presence in Afghanistan and in the Afghan media, there was no clear voice on behalf of the Court to fill the vacuum in national and local media.”¹¹¹ Outreach in Afghanistan is all the more vital now that the situation in the country makes it more difficult for people to have access to information. Not only is there often no (or no stable) internet connection, but there is also little knowledge among local media about the Court, which made outreach during this short phase almost impossible in the different parts of the country. VPRS also reported these infrastructural challenges. It was highlighted that “limited internet access, geographical distances and difficulties in accessing remote areas, especially considering the season in which the Article 15 process took place, had a negative impact on the number of victims reached.”¹¹²

The representation phase also laid bare some linguistic challenges. Not only are there different official languages in Afghanistan (Dari and Pashto), there is also a high level of illiteracy in the country that made it sometimes impossible for victims to fill out a representation form. VPRS also identified this as a factor potentially leading to low numbers of victim representations.¹¹³ Especially women in Afghanistan are disproportionately affected by illiteracy, which could have had an impact not only on the number of representations, but also on the types of crimes reported. In addition, the overwhelming majority of representations (over 90%) has been presented by or on behalf of men and the Registry noted that “out of the 165 individual representations, only 10 were introduced by or on behalf of women.”¹¹⁴ Furthermore, it noted that women, despite clearly having suffered harm as per the information submitted in the representations, in some cases were not listed as victims on behalf of whom the representations were submitted.¹¹⁵ Violence against women and children has been consistently underreported in Afghanistan and sexual and gender-based violence against women, girls, and boys has been largely unrecognised in national judicial fora, while it is a specific priority for the OTP.¹¹⁶ The representations illustrate the lack of awareness of these crimes as crimes that fall within the Court’s jurisdiction and the need for more attention especially for this group of victims.

Another challenge that came to light is of a cultural nature. The VPRS reported that “according to the observations of organisations met by the Registry, the concept of victim in Afghanistan is in

110. [Annex I, para. 46.](#)

111. [Annex I, para. 12.](#)

112. [Annex I, para. 12.](#)

113. [Annex I, para. 12.](#) The literacy rate in Afghanistan is estimated at about 31% of the adult population (over 15 years of age) according to the UNESCO Office in Kabul, [Enhancement of Literacy in Afghanistan \(ELA\) program](#).

114. [Annex I, para. 35.](#)

115. [Annex I, para. 35, footnote 25.](#)

116. See the OTP’s Policy Paper on Sexual and Gender-Based Crimes: “The Office pays particular attention to the commission of sexual and gender-based crimes at all stages of its work: preliminary examination, investigation, and prosecution. Within the scope of its mandate, the Office will apply a gender analysis to all crimes within its jurisdiction, examining how those crimes are related to inequalities between women and men, and girls and boys, and the power relationships and other dynamics which shape gender roles in a specific context.”, [Executive Summary under](#), 4, June 2014.

most cases understood to only cover victims of murder.”¹¹⁷ Most of the representations submitted were collective and often only referred to victims of murder.¹¹⁸ Furthermore, the VPRS identified a “low understanding of criminal justices processes and little awareness of international justice processes” and “low levels of trust in judicial institutions”.¹¹⁹

The common thread running through these challenges for victims in this Article 15 process was the limited time period during which they were able to submit their views to the judges. Yet, victims in Afghanistan had more time compared to the situation in Georgia where victims were given 30 days.¹²⁰ Even though this period is in line with the Statute and the Rules, the challenges that follow from this limited time period became extremely clear in Afghanistan, even though victims were given an extension until 31 January. The time limit of the representation phase, therefore, can be identified as a factor in all the other challenges identified in this article. Yet, it should be pointed out that there had been no outreach activities by the Court prior to this phase. On a practical level, this entailed that a considerable amount of time of representation stage had to be used to explain notions such as: the existence, purpose, and jurisdiction of the Court; the preliminary examination; what a possible investigation would and could cover; what types of crimes the OTP can investigate; what a “victim” is in the meaning of the Rome Statute; who could be investigated and prosecuted; etcetera.

The representation stage as a whole showed that the interaction between most victims and the Court during this phase was a direct consequence of the cooperation between the VPRS and intermediaries of key civil society actors in and outside Afghanistan. The victim representation phase therefore clearly stood on itself and was only able to build on the direct advocacy efforts by civil society actors, like Armanshahr/OPEN ASIA, TJCG, and others, in the period preceding the Prosecutor’s request. The combination of challenges posed an unprecedented task for the Court to interact with victims and the lack of ‘readiness’ before the representation phase to interact with victims offers some valuable lessons to take into account if an investigation in Afghanistan is opened.

Despite these challenges, an overwhelming majority of the victims’ representations indicated support for an ICC investigation in Afghanistan. The Registry identified that the main motivating factors for victims were: “investigation by an impartial and respected international court; bringing the perceived perpetrators of crimes to justice; ending impunity; preventing future crimes; knowing the truth about what happened to victims of enforced disappearance; allowing for victims’ voices to be heard; and protecting the freedom of speech and freedom of the press in Afghanistan.”¹²¹ Therefore, victims overwhelmingly appealed to this mechanism of last resort to put accountability front and center in Afghanistan, in the absence of domestic political will and ability to deal with the past and the present crimes.

117. [Annex I](#), para. 24.

118. An example of this would be a family or community that would submit a collective representation covering the murder of a family member by an armed group and identifying that murdered family member as a victim. This representation would therefore exclude any other type of harm the other family members may have suffered as a result of this murder.

119. [Annex I](#), para. 12 (v-vi).

120. 30 days is also the time period in accordance with rule 16 of the Rules and regulation 50(1) of the Regulations. For the Georgian Victim Representation phase, see ‘[Report on the Victims’ Representations Received Pursuant to Article 15\(3\) of the Rome Statute](#)’.

121. [Annex I](#), para. 39.

Conclusion: the Year-Long Pending Request¹²²

The difficulties in approaching and reaching victims of alleged crimes during the victim representation stage combined with the current security climate in Afghanistan are likely to only offer a glimpse of the challenges faced in the case of an actual investigation, especially when taking into account the surge of violence in 2018 and the attacks dominating the October parliamentary elections.¹²³ However, and despite these vast challenges, the record numbers of victims who overwhelmingly voiced their support for the opening of an ICC investigation indicate an unprecedented demand for justice by victims of the ongoing armed conflict in Afghanistan.

The concerns voiced in the submitted representations affirm some complications and they have not been able to reflect on a number of crimes, on different victim communities, on female victims, on sexual and gender-based violence, and on certain regions. Nevertheless, the victim representation stage has already provided the Court and others with some invaluable lessons when it comes to interacting with victims in Afghanistan. The representations stage has illustrated that the ICC had to depend on intermediaries due to limited outreach and no field presence, amongst others, and that cultural tradition will have to be taken into account when investigating different types of crimes.

The, inevitably limited, role the ICC can play in Afghanistan requires careful considerations from the Court, and all other stakeholders, on how to best interact with victims at any stage, also pre-trial. The victim representation stage has laid the groundwork for this interaction between the Court and victims providing all with some key lessons. Moving forward, it should, therefore, be a priority that a meaningful reciprocal relation is nourished and the victim representation stage can serve as a foundation when it comes to victims and their legal representatives.¹²⁴

122. As of 26 November 2018, the Prosecutor's request is still pending, thereby reaching its one-year 'anniversary' – an unprecedented time period needed by the PTC to deliberate.

123. See for example, BBC NEWS, "[Afghanistan election: Voters defy violence to cast ballots](#)", 21 October 2018; Al Jazeera, "[More than 50 people killed during Afghanistan elections: UN](#)", 6 November 2018.

124. In the case an investigation is authorised.

The Challenges for Legal Representation of Victims of U.S. Torture on the Territory of Afghanistan and other States Parties at the International Criminal Court

by Katherine Gallagher¹²⁵

As is now well-known, in the aftermath of the September 11th attacks in the United States, the Bush administration mobilized assets across the U.S. government to launch an aggressive, multi-faceted and ultimately long-term response that included a global rendition, detention and interrogation program. Bolstered by the Congressional Authorization for Use of Military Force,¹²⁶ George W. Bush, Vice President Dick Cheney and other senior U.S. civilian and military officials, including government attorneys, constructed a two-part strategy: a military response managed by the Department of Defense (“DOD”) under Secretary of Defense Donald Rumsfeld and a covert, counter-terrorism response led by the Central Intelligence Agency (“CIA”) under the leadership of Director of Central Intelligence George Tenet.¹²⁷

While the military and counter-terrorism responses overlapped in time, space and objective,¹²⁸ it was the CIA-led covert operation that constituted the primary response to the attacks of September 11th, and it was through the secret CIA detention and interrogation program that, like many others, Sharqawi Al Hajj and Guled Duran were captured, detained – both directly by the CIA and through proxy-State CIA detention – interrogated and subjected to brutal, long-term acts of physical and psychological torture.¹²⁹

Individuals subjected to serious violations of international criminal law, including torture, cruel, inhuman and degrading treatment, and denials of fundamental rights arising out of the operation of an international network of prisons by the CIA and the DOD, including on the territory of Afghanistan and other States Parties of the International Criminal Court (“ICC” or “Court”), have been pursuing justice and accountability in various forums for much of the last fifteen years; in the case of Al Hajj and Duran, those efforts include seeking release from detention, as both men

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126. On 18 September 2001, President Bush was empowered by Congress to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” those attacks or who harbored said persons or organizations “to prevent any future acts of international terrorism against the United States by such nations, organizations[,] or persons.” Authorization for Use of Military Force, Pub. L. No. 107–40, § 2(a), 115 Stat. 224 (2001).

127. The U.S. also sought the participation of international allies and institutions, including the U.N. and NATO, to support its efforts, particularly in relation to the military response in Afghanistan and in developing legal and political regimes to track terrorist organizations and financing.

128. The overlap between the two responses is evident through *e.g.*, CIA operatives and special forces on the ground directing the Northern Alliance with CIA’s Tenet having been authorized to spend up to \$1 billion to secure allegiances among Afghan factions (see George Tenet, *At the Center of the Storm: The CIA During America’s Time of Crisis* (Harper, 2007), at p. 175); the movement of detainees between CIA-run facilities and DoD detention sites.

129. Both Victim Al Hajj and Victim Duran are referenced in the Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program Executive Summary*, Declassification Revisions, 3 December 2014.

continue to be held at the U.S.-run detention facility at Guantánamo Bay. To date, no senior U.S. official has been held liable for their role in committing, ordering, soliciting, facilitating, aiding and abetting or otherwise contributing to the commission of torture and other crimes falling within the Statute of the ICC.¹³⁰

On the contrary, under three successive administrations, the United States has demonstrated it is unwilling to genuinely investigate or prosecute allegations of torture and other serious violations, shielding the conduct – the underlying policies – of high-level U.S. officials from scrutiny. Furthermore, the U.S. has made repeated efforts to block victims of its detention and interrogation policies from seeking justice in U.S. courts and has interfered with proceedings initiated in foreign courts, including those brought under the principle of universal jurisdiction.¹³¹ Finally, the Bush and Obama era policies favoring impunity for torture have not only been widely supported under the current administration, but the risk of reviving these policies is particularly acute and real under the presidency of Donald Trump.

It is against this backdrop that the Prosecutor's request to open an investigation into possible international crimes committed in Afghanistan since May 2003, as well as to related crimes on the territory of other States Parties since July 2002 must be assessed and understood.¹³² In the 181-page Request, the Prosecutor provided detail for three distinct areas of investigation: acts committed by members of the Taliban and affiliated armed groups; acts committed by members of the Afghan National Security Forces; and acts committed by member of the U.S. armed forces and members of the CIA. This is the first time alleged crimes by U.S. actors would be investigated by the ICC.¹³³

And it is for this reason that Shaqawi Al Hajj and Guled Duran (the "Victims") represented to the Pre-Trial Chamber that such an investigation would serve the interests of justice in that it would make clear that no one is above the law regardless of power or position; that those who bear the greatest responsibility for serious international crimes will be held accountable and will not enjoy global impunity; and that all victims of serious crimes can and will have their claims heard and adjudicated by an independent and impartial tribunal.¹³⁴

As will be explained below, however, such an investigation raises a particular set of issues that will require various organs of the ICC to respond with a measure of flexibility and creativity, while demonstrating a fierce commitment to the underlying principles and purposes of the Court.

From Preliminary Examination to Investigation Request

The Office of the Prosecutor ("OTP") made public its preliminary examination on Afghanistan in 2007. While earlier OTP Preliminary Examination reports made brief reference to alleged crimes by "international forces" among its more detailed summary of alleged crimes by the Taliban or

130. Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90.

131. For an analysis of the U.S. accountability efforts – or lack thereof – see, e.g., CCR and European Center for Constitutional and Human Rights ("ECCHR"), "Response to the Submission from the United States in Relation to the Criminal Complaint pending against David Addington, Jay Bybee, Douglas Feith, Alberto Gonzales, William Haynes and John Yoo," Audiencia Nacional, Spain Case No. 134/2009 (April 2011); CCR and ECCHR, "Complaint against the United States of America and the Kingdom of Spain: Interference with the Independence and Impartiality of the Judiciary," to United Nations Special Rapporteur on the independence of judges and lawyers, 19 January 2012.

132. *Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber III, 'Request for authorisation of an investigation pursuant to article 15',* 20 November 2017, ICC-02/17-7 ("Request").

133. Because the alleged crimes occurred on the territory of Afghanistan and also on the territory of at least Romania, Lithuania, and Poland, which are all States Parties to the ICC, investigations can proceed in regards to crimes committed by U.S. actors - even though the U.S. is not a party - in addition to Afghan, Taliban, or related forces. See ICC Statute, Art. 12(2)(a). See also *Request under Regulation 46(3) of the Regulations of the Court*, Pre-Trial Chamber I, 'Decision on the "Prosecutor's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,"' 6 September 2018, ICC-RoC46(3)-01/18, ¶¶ 44-48, ¶ 64.

134. See ICC Statute, Art. 53(1)(c).

government forces,¹³⁵ it was not until the 2014 report that the Prosecutor identified “torture or ill-treatment of conflict-related detainees by US armed forces in Afghanistan in the period 2003-2008 forms” as “another potential case identified by the Office.”¹³⁶ In relation to these alleged crimes, the OTP indicated that it was “analyzing the relevance and genuineness of national proceedings” – complementarity – as well as gravity.¹³⁷

Days after the Prosecutor released her 2014 report, as the Thirteenth Session of the Assembly of States Parties Session got underway in New York, the U.S. Senate Intelligence Committee released the 525-page Executive Summary of its “Study on CIA Detention and Interrogation Program,” widely known as the “Senate Torture Report.”¹³⁸ The 2016 OTP Preliminary Examination Report concluded that a reasonable basis to believe that U.S. armed forces and CIA officials had committed war crimes, including torture, in furtherance of a policy existed and indicated that it would be making a decision on whether to pursue authorization to open an investigation “imminently.”¹³⁹ However, it was a full year later that the OTP lodged its request with the Pre-Trial Division.

On 20 November 2017, the Prosecutor sought authorization to open a three-part investigation into alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003.¹⁴⁰ Notably, the investigation would cover not only serious crimes in the context of the armed conflict in Afghanistan but also crimes committed since 1 July 2002 on the territory of other Member States of the ICC where the crimes have a nexus to those committed in Afghanistan, including (but not necessarily limited to) Romania, Poland and Lithuania – all known to have hosted CIA black sites. The Request seeks authorization to investigate *inter alia* war crimes of torture, cruel treatment, rape and other sexual violence by members of the U.S. armed forces and/or the CIA of detainees in Afghanistan and at other locations, principally in 2003-2004.¹⁴¹

Victims and Their Representations

The particular challenges, and views and concerns of victims of crimes arising out of the U.S. detention and interrogation program will be discussed herein; the challenges for victims in and from Afghanistan to submit their representations are addressed in another article in this publication.

Upon filing of the Prosecutor’s Request, the Registry initiated the process for victims to submit their representations, pursuant to Regulation 50 of the Regulations of the Court. The Pre-Trial Chamber set a deadline of 31 January 2018 for victims to present their views on the opening of an investigation, including the scope of the investigation. Within a day of the Prosecutor’s Request, the Registry’s Victims Participation and Reparations Section (“VPRS”) initiated contact via e-mail with a range of civil society actors and attorneys whom it learned worked with or represented potential victims of the Situation in Afghanistan, informing them of the procedure for victims to submit their representations, including the author. Upon request, the Registry translated the

135. For example, the 2011 Report on Preliminary Examination Activities identified the alleged crimes in Afghanistan as civilian deaths by the Taliban and pro-government forces, torture “by various forces,” attacks on humanitarian targets and the United Nations, child recruitment, and attacks on protected objects including hospitals, mosques and girls’ schools. Office of the Prosecutor, Report on Preliminary Examination Activities 2011 (13 Dec. 2011), ¶¶ 24-29.

136. Office of the Prosecutor, Report on Preliminary Examination Activities 2014, (2 Dec. 2014), ¶ 94. It found: “Certain of the enhanced interrogation techniques apparently approved by US senior commanders in Afghanistan in the period from February 2003 through June 2004, could, depending on the severity and duration of their use, amount to cruel treatment, torture or outrages upon personal dignity as defined under international jurisprudence.” *Id.* At ¶ 95.

137. *Id.* at ¶ 96.

138. See *supra* n. 5.

139. Office of the Prosecutor, Report on Preliminary Examination Activities 2016, (14 Nov. 2016), ¶ 230.

140. In addition to alleged crimes by U.S. actors, the Prosecutor seeks authorization to investigate crimes against humanity and war crimes alleged to have been committed by members of the Taliban and affiliated armed groups, and Afghan National Security Forces.

141. Request, ¶ 4.

Representation form into Arabic, the preferred language for some victims, particularly in relation to alleged crimes arising out of U.S. detention.

Potential victims detained in Guantánamo learned of the possibility to file victim's representations through existing counsel. The Registry has not had any direct contact with the men detained there. CCR submitted victims representations and a supporting narrative in support of the ICC Prosecutor's Request concerning two men detained at Guantánamo, namely Sharqawi Al Hajj and Guled Hassan Duran, both of whom it represents in U.S. federal litigation.¹⁴² Both Victims have been held for more than a dozen years without charge after transfer to Guantánamo from detention centers operated by the CIA, including on the territory of Afghanistan after 1 May 2003, and had been either detained in or transited through other ICC States Parties after 1 July 2002. Potential victims detained in Guantánamo learned of the possibility to file victim's representations through existing counsel. The Registry has not had any direct contact with Al Hajj and Duran, and indeed, neither has the author, who serves as their legal representative at the ICC but does not represent the men in their U.S. litigation. The author, who was empowered to file the views and concerns of Al Hajj and Duran, has not had access to either man.¹⁴³ Because of their ongoing detention at Guantánamo and the restrictions on communication in place by the detaining authority, the two men were not able to assist in the preparation of their representations; accordingly, the information provided in their VPRS forms and incorporated and expanded upon in an accompanying 55-page narrative is based exclusively on publicly available sources including Victims' declassified filings in their respective cases in U.S. courts. The Victims' Representation details the treatment that the men endured in proxy-detention in ICC State Party Jordan, CIA black sites and DOD facilities, including in Afghanistan. The filing elaborates on the importance of an ICC investigation into these international crimes, and elaborates on the suggested scope of the inquiry to ensure the investigation captures the full liability of those who bear the greatest criminal responsibility. It also addresses issues of admissibility including complementarity.

The Victims

Sharqawi Al Hajj was born in 1974 in Ta'izz, Yemen. In 2000 Mr. Al Hajj traveled to Afghanistan, fled to Pakistan after the U.S. bombing campaign began in 2001, and, in February 2002, was captured in Karachi during a joint American and Pakistani operation. From Pakistan, Mr. Al Hajj was transported on a CIA-operated flight to Amman, Jordan, where he was detained for twenty-three months by Jordanian authorities acting under the authority of, and for the purposes of collecting information for, the CIA. (Jordan has been a State Party to the ICC since April 2002.) Mr. Al Hajj was subjected to repeated acts of physical and mental torture while in detention in Jordan, and was hidden during visits from the Red Cross. He was transported by the CIA from Jordan to Afghanistan on 8 January 2004, where he was held first in the CIA-run "Dark Prison" for approximately five months, and then was detained in a DOD facility at Bagram Air Base. Mr. Al Hajj was subjected to repeated acts of physical and mental torture in both locations in Afghanistan; in 2011, a U.S. federal judge adjudicating his habeas corpus claim found that Sharqawi had been subjected to "patent ... physical and psychological coercion" in Jordan and Kabul and a second U.S. federal district court refused to rely on statements attributed to Mr. Al Hajj "in light of the abusive circumstances of [his] detention" and because he had "recently been tortured" while detained in Jordan and Afghanistan.¹⁴⁴ In August 2004, Mr. Al Hajj was transferred to the U.S.-operated detention facility in Guantánamo Bay, where he remains detained. Mr. Al Hajj has never

142. See *Al Hajj v. Trump*, Case No. 09-cv-745 (D.D.C.); *Duran v. Trump*, Case No. 16-cv-02358 (D.D.C.). In both habeas corpus cases, the Victims are represented by other attorneys at CCR who have security clearances and operate pursuant to *inter alia* applicable statutes, regulations and protective orders. Accordingly, the Victims' Representations included the following disclaimer: "Habeas counsel for Sharqawi Abdu Ali Al Hajj and Guled Hassan Duran have no involvement in this matter and do not confirm or deny any statement or other aspect of this matter."

143. The author has neither the security clearance nor signed any protective orders required to provide her direct access to the Victims. See *id.*

144. See *Abdah v. Obama*, 708 F. Supp. 2d 9, 14 (D.D.C. 2010).

been accused of any act of violence, and has never been charged with any crime. Mr. Al Hajj suffers from the physical and psychological effects of his torture and is currently experiencing acute health issues: his counsel in U.S. habeas proceedings filed an emergency motion for a medical evaluation in September 2017, following a precipitous decline in his health after several weeks on a hunger strike (Mr. Al Hajj's weight was 47kgs) because of growing despair over his ill health and indefinite detention – itself a form of torture. That motion has yet to be ruled upon; on 26 October 2018, Mr. Al Hajj's habeas counsel filed a motion for a status conference to apprise the court of serious concerns about his declining mental health, but no date has yet been set.

Guled Duran, a Somali citizen, was born in 1974. Mr. Duran was captured on 4 March 2004 by Djiboutian security forces as he was transiting through the airport en route from Mogadishu, Somalia to Sudan, where he was to receive medical treatment. (Djibouti has been a State Party to the ICC since November 2002.) The Djiboutians turned Mr. Duran over to CIA personnel. After a few hours of interrogation, Mr. Duran was loaded on to a plane, shackled and strapped down to the floor of the plane, and flown to an unknown location, making one stop en route. Until 2006, when he was transferred to Guantánamo, Mr. Duran was imprisoned in the CIA's secret prison network, where myriad forms of physical and psychological torture have been documented, but little information about his location and treatment during that time has been made publicly available. Based on a report by the International Committee of the Red Cross ("ICRC"), it is known that Mr. Duran spent at least some of the time between his capture in March 2004 and his transfer to Guantánamo Bay in September 2006 detained in Afghanistan.¹⁴⁵ Moreover, the ICRC report establishes that Mr. Duran was subjected to "a combination of physical and psychological ill-treatment with the aim of obtaining compliance and extracting information," transfer "to multiple locations" in a manner "that was intrusive and humiliating and that challenged the dignity of the persons concerned," being subjected to "continuous solitary confinement and incommunicado detention throughout the entire period of [his] undisclosed detention, and the infliction of further ill-treatment through the use of various methods either individually or in combination, in addition to the deprivation of other basic material requirements" – conditions "that amounted to torture and/or cruel, inhuman or degrading treatment."¹⁴⁶ Mr. Duran was named as a so-called "high-value detainee"; however, he denies having any link to al-Qaeda, and he has never been charged with a crime or tried for any terror-related offense. He remains detained at Guantánamo without charge.

Scope of the Investigation

While the Victims fully support the Prosecutor's Request, they observed that the articulated scope of the proposed investigation into U.S. and other international forces unduly narrow in three fundamental respects:

- (1) the proposed investigation specifically encompasses only part of the crime-base; in addition to detention/interrogation-related torture in Afghanistan and in CIA-run locations, the investigation must also include CIA-run extraordinary renditions and proxy detentions that involved conduct on the territory of a State Party as well as continuing crimes that began on the territory of a State Party and were or are ongoing at Guantánamo;
- (2) the Request identifies only a subsection of crimes that fall within the Situation; additional war crimes (i.e., Art. 8(2)(e)(xi) – medical experimentation) and crimes against humanity (i.e., Arts. 7(1)(e) (deprivation of liberty in violation of fundamental rules of international law), 7(1)(f) (torture), 7(1)(g) (rape and other forms of sexual violence), 7(1)(h) (persecution) and 7(1)(i)(enforced disappearance)), which reflect both the attack against a civilian population and the policy aspect of the multi-faceted

145. International Committee of the Red Cross, ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, February 2007 ("ICRC CIA Detainee Report").

146. *Id.* at 4-5, 7.

detention and interrogation program, should also be investigated for the purpose of any future case(s);¹⁴⁷ and

(3) the proposed investigation encompasses only some categories of persons who bear the greatest responsibility for the crimes; the investigation should explicitly include U.S. civilian and military leadership, and private contractors.

In so doing, the Victims clarified that they are not seeking a significantly larger investigation, but rather, a more fulsome analysis of the criminal conduct currently encompassed in the Request.

Response to the Request: Silence from the Court and Attacks from the United States

ICC

The immediate steps taken by various sections of the ICC following the Request gave many victims hope that the long delay of justice, exemplified by a decade-long Preliminary Examination, was over. Within two weeks of receiving the Prosecutor's Request, the Pre-Trial Chamber issued an "urgent" order requesting additional information regarding potential crimes by international forces, which was provided forthwith; the Pre-Trial Chamber issued a second Order for the Prosecutor to provide additional information in February 2018, which it did four days later.¹⁴⁸ Within days of submitting their Victims' Representations, the Victims received confirmation from the Registry via their legal representative that their Victims' Representations were received and transmitted in their entirety to the Pre-Trial Chamber. On 16 March 2018, the Pre-Trial Chamber considering the Request was reconstituted. VPRS informed victims of this development in early April.¹⁴⁹ Since that time, however, there has been no activity by the Pre-Trial Chamber and no outreach by the VPRS or other relevant sections of the Court.¹⁵⁰

Prior Article 15 requests by the Prosecutor were ruled upon within months.¹⁵¹ In the Situation of Afghanistan, the one-year anniversary of the Request passed without any acknowledgment by any organ of the ICC.¹⁵² Victims deserve a decision, and indeed, an investigation of the alleged crimes committed against them.

United States

The United States made its strong opposition to the Request clear in a statement issued during the Sixteenth Session of the Assembly of States Parties. It expressed "serious and fundamental concerns" with the Request, stating that it "will regard as illegitimate any attempt by the Court to

147. The suggested framing of the alleged criminal acts as crimes against humanity avoids the risk that the investigation and any subsequent prosecutions might reinforce the so-called "war on terror" paradigm advanced by the United States in the aftermath of the September 11th attacks; the U.S. response which spawned the detention and interrogation program at issue has entailed a counter-terrorism effort that has extended far beyond any armed conflict, as understood under international law, or "battlefield." It is a global campaign of anti-terrorism operations without any defined end, better understood as a law-enforcement effort than a military mission. See ICRC, "International humanitarian law and the challenges of contemporary armed conflicts," 32nd International Conference of the Red Cross and Red Crescent (Geneva, Switzerland, 8-10 Dec. 2015) at 18 ("As repeatedly asserted, the ICRC considers that, from a legal perspective, there is no such thing as a 'war against terrorism'").

148. These filings can be found at the [ICC situation page for Afghanistan](#).

149. Victims Al Hajj and Duran made a supplemental submission to the Pre-Trial Chamber on 4 April 2018, informing it of the nomination of Gina Haspel as Director of the CIA, and urging a positive decision on the Request without further delay, in light of the risk of repetition and the foreclosure of any possibility of domestic accountability evident with such an appointment. Haspel, who had been identified in their Victim Representation, had overseen a CIA blacksite in 2002.

150. In response to a query by the author on behalf of the Victims on the status of the pending Request and whether additional submissions could assist Pre-Trial Chamber II in arriving at a decision, VPRS wrote in November that there have been no procedural developments and there is currently no information on when a decision will be issued.

151. In the four former authorization requests, a decision was rendered relatively soon after the request: 50 days for Burundi; 102 days for Cote d'Ivoire; 106 days for Georgia; and 125 days for Kenya.

152. *But see* "The Long Wait for Justice: Will the ICC Investigate Crimes in the Afghanistan Situation?" Joint Press Release of FIDH, Armanshahr/Open Asia and CCR, 20 November 2018.

assert the ICC's jurisdiction over American citizens."¹⁵³ Echoing arguments it raised two decades earlier during negotiations of the Rome Statute, the U.S. argued that any exercise of jurisdiction over non-Party nationals without the States' consent or Security Council action under Chapter VII violated fundamental principles of international law. The U.S. lamented the fact that the Prosecutor relied upon U.S. government reports, including the Senate Torture Report, as a basis for deciding to initiate an investigation – without acknowledging that those government reports did not result in the prosecution of *any* senior U.S. military or civilian officials, or any private contractors, which is precisely why the ICC, as a court of last resort, is acting.

In April 2018, John Bolton was named as U.S. National Security Advisor. As a senior official in the administration of George W. Bush, Bolton had led that administration's anti-ICC efforts nearly fifteen years earlier: Bolton oversaw the United States "unsigned" of the Rome Statute¹⁵⁴ and the conclusion of more than 100 so-called "Article 98" bilateral agreements, which sought *inter alia* to prohibit States from extraditing any American citizens present on its territory to the ICC without the consent of the United States.¹⁵⁵ Indeed, Bolton had an op-ed in the *Wall Street Journal* on the day the Request was filed, in which he wrote that the U.S. should "welcome the opportunity...to strangle the ICC in its cradle. At most, the White House should reply to [the ICC prosecutor] with a terse note: 'Dear Madame Prosecutor: You are dead to us. Sincerely, the United States.'"¹⁵⁶ Mr. Bolton repeated that sentiment as National Security Advisor in a speech to the conservative Federalist Society on September 10th.¹⁵⁷ This attack was even more extreme: not only did Bolton threaten to punish any country that aided such an investigation, the US threatened to ban, sanction, and prosecute ICC *judges and prosecutors* if the court opened the Afghanistan investigation, or any inquiry into Israel or other US allies. This is a direct attack against the independence of judges, lawyers and the rule of law – and was addressed as such in a statement issued by the ICC in response to the Bolton speech.¹⁵⁸

Donald Trump echoed John Bolton two weeks later in his speech to the U.N. General Assembly where he derided the ICC as a "global bureaucracy." He declared that the United States "will provide no support in recognition of the International Criminal Court. As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority."¹⁵⁹

Notably, Bolton also threatened to sanction or prosecute any "company or state that assists an ICC investigation of Americans."¹⁶⁰ For the 123 Member States of the ICC who are obligated to cooperate with the Court,¹⁶¹ Bolton's threat puts them in the position of choosing between the ICC – and the rules-based international order it reflects – and United States. As for what was meant by "company," civil society groups as well as legal representatives could find themselves facing sanctions or even criminal prosecutions for supporting justice and accountability efforts – a stunning prospect, as much of the international community prepares to gather in The Hague for the Seventeenth Session of Assembly of States Parties to mark, and celebrate, the 20th anniversary of the Rome Statute.

153. [Statement on Behalf of the United States of America](#), 16th Session of the Assembly of States Parties, 8 December 2017.

154. U.S. Dep't of State, International Criminal Court: [Letter to UN Secretary General Kofi Annan](#), 6 May 2002.

155. For background on the U.S. use of Article 98 ("Cooperation with Respect to waiver of Immunity and Consent to Surrender") agreements, see, e.g., Mark Kielsgard, *War on the International Criminal Court*, 8 N.Y. City L. Rev. 1 (2005); Ben Batros, [To Undermine the ICC, Bolton's Targets Extend Way Beyond the Court](#), Just Security, 24 Sept. 2018.

156. John Bolton, *The Hague Aims for U.S. Soldiers*, WALL STREET JOURNAL, 20 Nov. 2017.

157. [Full text of John Bolton's Speech to the Federalist Society](#), 10 Sept, 2018. Bolton declared the ICC to be an "illegitimate, unaccountable, and unconstitutional foreign bureaucracy" in a [speech to the Zionist Organization of America](#) on 5 November 2018.

158. See ["The ICC will continue its independent and impartial work, undeterred," Press Release, CC-CPI-20180912-PR1406, 12 September 2018.](#)

159. [Remarks by President Trump to the 73rd Session of the United Nations General Assembly](#), 25 September 2018.

160. *Id.*

161. See ICC Statute, Part 9: International Cooperation and Judicial Assistance.

John Bolton concluded his September speech by advising that the United States will “consider taking steps in the UN Security Council to constrain the court’s sweeping powers.” It can be understood that the United States will seek to invoke (or have another State invoke) Article 16 of the Rome Statute to have any investigation into the Situation in Afghanistan and related crimes deferred for a renewable 12-month period, pursuant to a Security Council resolution adopted under Chapter VII of the U.N. Charter. Such an outcome not only be a serious blow for all the victims of the crimes reflected in this Situation – for Afghanistan and its people, who have borne decades of impunity and are still enduring the commission of serious crimes including widespread attacks on civilians, and for the victims and survivors of the U.S. torture program – and for the United States itself, where President Obama’s plea to “look forward not back” instead potentially opens the door to repetition under Donald Trump, who campaigned on a promise to “bring back a hell of a lot worse than waterboarding.”¹⁶² It would also be a serious blow to the independence and legitimacy, if not the future, of the Court.

Looming Challenges and Recommendations

The ICC is intended to be a court of last resort for the most serious human rights violations, the place to go when no other court or country has prosecuted the most serious crimes, including war crimes and crimes against humanity. It is the appropriate venue to investigate and adjudicate the crimes outlined in the Request, alleged to have been committed by the Taliban and affiliated groups, Afghan National Security Forces, and U.S. actors. The Pre-Trial Chamber should grant the Prosecutor’s Request to authorize an investigation without further delay. In order for such an investigation to proceed effectively and in such a manner that those who bear the greatest responsibility face prosecution in The Hague, at a minimum, the following issues must be addressed:

- Accessing Victims of U.S. Crimes

One of the primary challenges that the ICC – and indeed, legal representatives without U.S. security clearances – will face during the investigation stage is accessing those victims of the U.S. torture program who are currently detained at Guantánamo for interviews and for potential appearances as witnesses at any subsequent proceedings. And critically, victims must be able to freely communicate with their legal representatives and the Court in order to receive information and present their views and concerns, and participate in the proceedings as enshrined in the Rome Statute. While the author has made inquiries with the Registry of the ICC regarding the existence of a Memorandum of Understanding (MOU) between the ICC and the United States, or indeed, whether such an MOU has been pursued by any organ of the Court (including the OTP) without receiving a definite answer, it can be surmised that under the current administration the United States is unlikely to grant the ICC access to Guantanamo Bay, let alone the 40 individuals who remain detained there.¹⁶³ Despite the U.S. hostility, the ICC, led by the Registry, should engage with U.S. officials, particularly in the Department of State, and seek the support and intervention of States Parties, to achieve a solution.

- Providing Victims Access to Counsel of their Choice – within the Legal Aid Regime

Many potential victims of torture and other cruel treatment in U.S.-run detention facilities have long-standing relationships with counsel or legal organizations: these individuals have engaged non-profit organizations like the Center for Constitutional Rights, Reprieve, REDRESS and the ACLU, as well as pro bono counsel from the private bar, to assist them in habeas corpus proceedings or civil proceedings in U.S. courts. Particularly for those men who remain detained at Guantánamo where

162. Tom McCarthy, *“Donald Trump: I’d bring back ‘a hell of a lot worse than waterboarding.’”* THE GUARDIAN, 7 February 2016.

163. In the Federalist Society speech, John Bolton stated in no uncertain terms: “We will not cooperate with the ICC. We will provide no assistance to the ICC.”

they risk facing prosecution, the ICC's practice of appointing either common legal representatives or legal representatives from its Office of the Public Council for Victims would be untenable. In accordance with the Statute and the Rules of Procedure and Evidence, the ICC should be prepared to allow victims to choose their legal representative, and in the case of indigent victims (which should be presumed in the case of the victims in this Situation), to do so within the legal aid system.

- Cooperation with the ICC

In order for an investigation into the Situation of Afghanistan and related crimes to be effective, it will require the full cooperation of a range of actors. First and foremost, States Parties to the ICC must be prepared to fulfill their obligations under Part 9 of the Rome Statute, including by providing records and documents, taking evidence, and effectuating the arrest and transfer of persons to the Court.¹⁶⁴ This requirement is particularly important with regards to those States which are themselves the subject of the investigation or are otherwise implicated in the potential crimes identified in the Request, including through participation in the arrest, transfer or detention of victims. International organizations must also stand ready to cooperate with the ICC in the investigation. Both the United Nations and NATO had a significant presence in Afghanistan, and would be in possession of relevant information for the investigation. Part 3 of the "Relationship Agreement between the International Criminal Court and the United Nations" outlines the parameters for cooperation between the ICC and UN, which should be fully adhered to in this case. If the ICC and NATO have not yet entered into a Memorandum of Understanding or other agreement, they should proceed to conclude such an agreement forthwith, guided by the object and purpose of the Court to end impunity.

Recognizing the threats made against ICC personnel and States Parties, the Assembly of States Parties ("ASP") must stand ready to both empower the Court to undertake a robust and challenging investigation (including with adequate financial support) that complies with the highest standards and seeks to ensure the safety of victims, witnesses and Court personnel, and to defend the institution and the fundamental principles of law that undergirds it.¹⁶⁵ When necessary, the ASP should be prepared to execute its powers under Rule 112 (2)(f) to consider questions relating to non-cooperation.

- Threats to civil society, human rights defenders and legal representatives

The Court must ensure that it takes all reasonable steps to protect the safety and security of members of civil society, human rights defenders and legal representatives, including from being subjected to legal measures such as travel bans or criminal prosecutions, resulting from their engagement with ICC proceedings.

164. Indeed, States Parties could provide resettlement to victims currently detained at Guantánamo, thereby making them available to participate in proceedings. See ICC. Art. 93 (1)(f) and (7).

165. See Statement by the President of the Assembly, O-Gon Kwon, reaffirming support for the ICC, ICC-ASP-20180911-PR1405, 11 September 2018, *available at*: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1405>.



Victims of political violence in Burundi: What participation before the ICC?

by Lambert Nigarura¹⁶⁶

The serious political crisis in Burundi since the announcement of Pierre Nkurunziza's third illegal and illegitimate mandate in April 2015 and the subsequent political violence have led to nearly 400,000 new refugees and victims of a multitude of crimes under international law, committed by elements of the police, the army, the national intelligence service, the Imbonerakure militia and the Burundi political authorities. This has occurred in a climate in which the manipulated Burundian justice system cannot fulfil its mission of delivering fair and impartial justice. This situation of inertia in the Burundian judicial system, corroborated by the massive and growing violations of human rights, prompted Pre-Trial Chamber III of the International Criminal Court (ICC) to authorise the opening of an investigation into the situation in Burundi.¹⁶⁷

In its decision authorising the opening of an investigation, Pre-Trial Chamber III found that there was a reasonable basis to believe that State officials and other groups implementing State policies, together with members of the Imbonerakure, had launched a widespread and systematic attack against the Burundian civilian population. This attack targeted those who opposed or were perceived to oppose the ruling party, after Pierre Nkurunziza announced in April 2015 that he would run for a third term. Thus, victims or their families have given a mandate to lawyers and human rights defenders' organisations to help them assert their rights before the ICC.

The decision to open an investigation followed the commission of serious crimes that fall within the scope of the ICC, as specified by the ICC Prosecutor¹⁶⁸ in a statement following the authorisation by the judges of Pre-Trial Chamber III to open the investigation.

166. Lambert Nigarura was born in Burundi in the province of Mwaro in the centre of the country on 8 August 1977. He has a degree in law and several diplomas in human rights. An activist of the Burundi civil society for more than 15 years, he is the national coordinator of the Burundi Coalition for the International Criminal Court (CBCPI = Coalition Burundaise pour la Cour Pénale Internationale) since September 2013. Lambert Nigarura is also a lawyer called to the Bujumbura Bar and member of the Collective of Lawyers "Justice for Burundi" that represents more than one thousand six hundred (1,600) victims of the political and security crisis in Burundi.

167. Situation in the Republic of Burundi, ICC-01/17-X, [Version publique expurgée de la Décision relative à la demande d'autorisation d'ouvrir une enquête dans le cadre de la situation au Burundi rendue en application de l'article 15 du Statut de Rome le 25 octobre 2017](#) (ICC-01/17-X-9-US-Exp), 9 novembre 2017.

168. Situation in the Republic of Burundi, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Burundi](#), 9 November 2017.

Indeed, according to the United Nations report on Burundi of October 2017,¹⁶⁹ between April 2015 and October 2017, violence caused at least 1,200 deaths, more than 6,000 people were placed in arbitrary detention, and hundreds more were subjected to acts of torture and enforced disappearances. In addition, there are cases of rape, persecution and other forms of violence. Between April 2015 and 6 May 2018, the Ligue ITEKA recorded 1,710 murders, 486 cases of enforced disappearances, 558 victims of torture and 8,561 arbitrary arrests, mainly related to the political crisis and the repression of the regime.¹⁷⁰ These crimes constitute crimes against humanity, perpetrated with impunity and aggravated by hate speech propagated by the highest authorities in the country.

The majority of victims are or are perceived to be opponents of the government. These figures remain largely contested by the Government of Burundi, without, however, showing a willingness to carry out any independent internal investigation. The 2017 UN Commission of Inquiry report on Burundi¹⁷¹ pointed to members of the National Intelligence Service (*Service National des Renseignements*, or SNR), elements of the police, the army and members of the *Ligue des jeunes Imbonerakure*. The 2018 UN report confirms the same trends while highlighting the increased role of the Imbonerakure militia and the persistence of serious violations with impunity.

The Burundian authorities generally do not take any legal action despite knowledge of the facts and the investigations that are opened remain, in most cases, without follow-up.¹⁷²

In response to this critical situation that had prevailed in Burundi since April 2015, Prosecutor Fatou Bensouda had announced twice that her office was closely monitoring the situation in Burundi and had warned the perpetrators of the violations (in May¹⁷³ and November 2015¹⁷⁴). On 26 April 2016, one year after the crisis commenced, the ICC Office of the Prosecutor officially announced the preliminary investigation into the situation in Burundi.¹⁷⁵

Responding in turn, the Burundian Parliament passed a law for Burundi's withdrawal from the ICC Statute, with the Government of Burundi formally notifying the United Nations Secretary-General of its withdrawal on 27 October 2016. This withdrawal took effect on 27 October 2017. Burundi hoped the withdrawal would take effect before the ICC opens its investigation in Burundi, and that it would bar ICC prosecutions and discharge Burundian authorities from the obligation to cooperate. The Burundian authorities refused any form of collaboration with the ICC or other UN mechanisms. The strategy was unsuccessful. In fact, the request for authorisation to open an investigation was sent by the Office of the Prosecutor to the Pre-Trial Chamber as early as September 2017, and the investigation was officially opened on 25 October 2017, two days before Burundi's effective withdrawal.¹⁷⁶ However, the proceedings remained confidential to protect potential victims and witnesses.

The ICC is therefore competent to conduct its investigation. It covers international crimes committed in Burundi or by Burundian nationals outside their country between 26 April 2015 and 26 October 2017.¹⁷⁷

169. United Nations Commission of Inquiry on Burundi, A/HRC/36/54, 11 août 2017.

170. See FIDH-Ligue ITEKA, « Burundi: a repressive constitutional reform to concentrate powers around the president alone », 16 May 2018; as well as FIDH-Ligue ITEKA report, « Burundi on the brink, looking back on two years of terror », 4 July 2017; or FIDH-Ligue ITEKA report, « Repression and genocidal dynamics in Burundi », 15 November 2016.

171. United Nations Commission of Inquiry on Burundi, op. cit., p. 5 et s.

172. United Nations Commission of Inquiry on Burundi, op. cit., p. 16 et 17.

173. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the recent pre-election violence in Burundi, 8 May 2015.

174. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening security situation in Burundi, 6 November 2015.

175. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, 25 April 2016.

176. Situation in the Republic of Burundi, ICC-01/17-X, Version publique expurgée de la Décision relative à la demande d'autorisation d'ouvrir une enquête dans le cadre de la situation au Burundi rendue en application de l'article 15 du Statut de Rome le 25 octobre 2017, 9 November 2017.

177. Ibidem

It is important to note that under the relevant provisions of the Rome Statute, Burundi remains legally bound to cooperate with the ICC¹⁷⁸ even though in practice the Burundian authorities have opted for isolation, blackmail and rejection of international mechanisms. Additionally, Article 50, paragraph 2 of the new Constitution of 7 June 2018 is a recognition of a clear lack of will, as it specifies that '*no Burundian may be extradited*'. This is also an encouragement to alleged perpetrators of crimes for whom impunity is guaranteed at the domestic level, as this new barrier prevents the possible extradition of perpetrators of serious crimes to extra-national jurisdictions.

The role of human rights defenders and victims in the opening of an investigation into Burundi

Burundian civil society organisations, lawyers, the media and international NGOs have played a key role in informing the ICC Office of the Prosecutor on developments in Burundi.

It is important to recall that since the beginning of Pierre Nkurunziza's peaceful anti-third term demonstrations, a bloody crackdown was carried out on peaceful demonstrators and a movement of arbitrary arrests has followed, even though the first killings were recorded since 26 April 2015.

Since then, several actors, most of them members of the Burundi Coalition for the International Criminal Court (*Coalition burundaise pour la Cour pénale internationale or CBCPI*), have set up alert and monitoring mechanisms and information has been shared with the Office of the Prosecutor almost systematically. This task was not at all easy because, on the one hand, independent organisations and media were struck off the list and/or banned and, on the other hand, lawyers and civil society activists were forced into exile. In December 2017, the Office of the Prosecutor reported that it had received at least 34 communications from various sources, pursuant to article 15 of the Rome Statute.¹⁷⁹

To address this situation, Burundian civil society organisations have used monitors and informants who collaborate clandestinely and who have continued to either collect and share information or verify its veracity on the ground in a very hostile context. Since the beginning of the crisis in April 2015 and still today, civil society organisations, in coordination with victims' lawyers, have continued to collaborate with relevant ICC bodies in order to provide all relevant information for the ongoing investigation.

The CBCPI took advantage of the celebration of the 20th anniversary of the ICC Statute to launch, in 2017, a 100-day campaign dedicated to international criminal justice for Burundi. During this campaign, a series of information and advocacy actions were carried out and the end of the campaign coincided with Burundi's effective withdrawal from the Rome Statute and the ICC opening an investigation into Burundi.

Although the decision of the judges authorising the opening of the investigation into Burundi reflects much of the information contained in the reports and communications sent to the ICC Office of the Prosecutor on international crimes committed and the lack of remedies for victims at the national level, some angles are notably lacking. It would have been interesting if the ICC had set up a process to collect the views and concerns of victims, particularly those in exile, on the value of the ICC opening an investigation and on its scope. This procedure for collecting 'victims' representations' under article 15(3) of the ICC Statute was set up prior to a decision to open or not an investigation for Kenya, Côte d'Ivoire, Georgia and Afghanistan. The security situation of

178. Article 127(2) of the ICC Statute provides that 'the withdrawal [of the Statute] does not relieve the State of its obligations under this Statute while it was a Party to it (...) nor does it affect cooperation with the Court in criminal investigations and prosecutions in respect of which the State had a duty to cooperate and which began before the date on which the withdrawal took effect.'

179. Office of the Prosecutor, Report on preliminary examination activities from the ICC Office of the Prosecutor, 4 December 2017

victims in Burundi would have made this procedure almost impossible, but the Court could have actively consulted victims living in exile and whose security situation was less fragile, in order to give more voice and space to victims at this stage of the proceedings.

It may be noted that since 2016, Burundian civil society organisations have also collaborated with the United Nations Commission of Inquiry on Burundi, whose first report was made public in September 2017; and whose mandate was extended for one year by the Human Rights Council in September 2018. From the first report, the conclusions were overwhelming as to the nature of the violations recorded, and one of the key recommendations was that the ICC should take up the case, given the existence of crimes against humanity committed against civilian populations with complete impunity.

Interaction with the ICC since the investigation was opened

As with any judicial body protectively seeking to maintain its independence and the confidentiality of its proceedings, communication of individuals and groups with the ICC was not accompanied by real feedback from the latter. This made it difficult, in the beginning, to be sure that the Court rightly valued the contributions of civil society and victims' lawyers.

It was only during the few civil society meetings with the ICC Office of the Prosecutor that the Office of the Prosecutor could reveal that it follows information regularly and with interest from various sources, including those provided by local and international human rights organisations. Since then, both the Office of the Prosecutor and the Victims and Witnesses Unit have been communicating, within a strict and professional framework, with victims' representatives. We appreciate the slow but positive progress of the Burundi investigation and hope that the next steps will be decisive.

It is also important to note that the ICC has significantly improved collaboration with lawyers and NGOs, to ensure that victims have access to relevant information related to the ongoing investigation in order to better protect their rights. Indeed, the section in charge of victim participation and reparation collaborates with the collective of victims' lawyers and some NGOs to raise victims' awareness of their role and the extent of their rights to participate or be represented at the various stages of the proceedings. The lawyers who represent more than one thousand six hundred (1,600) victims also coordinate their efforts to raise awareness among victims.

Interaction with the Trust Fund for Victims

The International Federation for Human Rights (FIDH) facilitated a meeting between the Burundian civil society delegation and the heads of the Trust Fund for Victims that was held on the margins of the ICC and NGO round tables in May 2018. Our associations stressed the importance and urgency of activating this fund to set up projects to assist Burundian victims, particularly those who have been able to find exile in neighbouring countries. A positive response could give hope to these victims whose trauma has gradually set in.

The major challenges of the work of NGOs and lawyers for Burundian victims

The challenges facing NGOs and lawyers for Burundian victims are numerous, especially when it comes to the fight against impunity and the struggle for an independent and effective justice system, but the main ones are as follows:

- Difficult access for NGOs and lawyers to victims to debrief them, inform them, collect their views and concerns. It should be noted that the Burundian context is

particular in that a climate of repression has been in place since 2015 and most lawyers representing victims as well as human rights defenders have fled the country. Victims who are in the country dare not claim either their rights or the status of victims, and coordination is difficult especially since they are scattered throughout the country;

- Lack of sufficient resources, which hinders the actions of lawyers and NGOs;
- Very delicate security situation for victims, human rights defenders, intermediaries, and lack of protection;
- Lack of information and awareness campaign by the ICC on what is required of victims at the ICC investigation stage;
- In the same vein, all attempts to resolve the Burundian crisis through a negotiated political solution have failed and the East African Community's (EAC) mediation attempt for more than two years has not yielded any results;
- From a regional perspective, the anti-CPI behaviour of some African states may lead to a renewed reluctance to collaborate with some states, although tensions seem to have eased after South Africa and the Gambia suspended their plans to withdraw from the ICC.

Conclusion

Since the announcement by the Office of the Prosecutor of the opening of the preliminary examination and the subsequent investigation into the situation in Burundi, the regime in Burundi has made no secret of its intention to silence anyone who advocates for justice for the victims of the atrocities of the crisis that has shaken the country since April 2015.

Some of the victims have found it very difficult to cross borders to find refuge in neighbouring countries with enormous physical, moral and psychological injuries. Some of them live with unbearable trauma, especially girls and women who have been raped before their parents' eyes, or parents who have watched helplessly as their children have been raped and murdered.

Despite the particular context in which Burundian victims find themselves, their role remain essential, and they require support and protection that can guarantee them effective and secure participation in the process of seeking truth, justice and reparation.

Beyond Victim Participation during Proceedings: Outreach and Information Activities during Preliminary Examination in Palestine

by Nada Kiswanson¹⁸⁰

Introduction

On 13 July 2018, Pre-Trial Chamber I of the International Criminal Court ('ICC' or 'Court') issued a 'Decision on Information and Outreach for the Victims of the Situation' in Palestine ('the decision')¹⁸¹. The decision is unique in that it compels, for the first time, the ICC Registry to engage with victims during the preliminary examination stage. At this stage, the ICC Prosecutor has not yet decided to open an investigation nor has she identified cases to be pursued and individuals to be prosecuted. As such, the decision challenges preconceived notions on the role that victims can or should play throughout the ICC process, and beyond judicial proceedings. The decision also deviates from previous practice on the timing of outreach and information activities. Prior to the decision, the practice has been to initiate outreach and information activities either at the stage of a request for authorization to open an investigation before a Pre-Trial Chamber, during the investigation phase or at the time of the arrest and surrender of a suspect to the ICC.



The ICC Prosecutor opened a preliminary examination on the situation in Palestine in January 2015 following the submission by the State of Palestine of an article 12(3) declaration to the ICC Prosecutor, accepting the jurisdiction of the ICC over alleged crimes committed in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014.¹⁸² At the same time, the State of Palestine deposited an accession instrument to the ICC Statute with the United Nations Secretary-General.¹⁸³ On 22 May 2018, the State of Palestine also referred the situation in Palestine to the ICC Prosecutor, pursuant to articles 13(a) and 14 of the ICC Statute and without prejudice to the 12(3) declaration.¹⁸⁴ On the basis of the referral, the ICC Presidency assigned the situation in Palestine to Pre-Trial Chamber I and thereby opened up the possibility for it to issue its decision on outreach and information activities.¹⁸⁵

180. Nada Kiswanson is a lawyer specializing in international human rights and criminal law. She has an LLB and LLM from Uppsala University, an (advanced) LLM from Leiden University, and a postgraduate certificate from Antwerp University. Nada Kiswanson represents Palestinian human rights organisations before the International Criminal Court.

181. Situation in the State of Palestine, ICC-01/18, [Decision on Information and outreach for the victims of the situation](#), 13 July 2018.

182. State of Palestine, [Declaration Accepting the Jurisdiction of the International Court](#), 31 December 2014.

183. State of Palestine: accession. [Reference: C.N.13.2015.TREATIES-XVIII.10 \(Depositary Notification\)](#), 6 January 2015.

184. State of Palestine, PAL-180515-Ref, [Referral by the State of Palestine Pursuant to Articles 13\(a\) and 14 of the Rome Statute](#), 15 May 2018. (The state referral document is dated 15 May 2018, but was received by the ICC Prosecutor on 22 May 2018).

185. Situation in the State of Palestine, ICC-01/18, [Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I](#), 24 May 2018.

The decision on ‘early outreach and information activities’, which is not limited to Palestinians, could be seen as an attempt by the judiciary to put victims at the center of the work of the ICC and give effect to victims’ rights, including the right to participate in judicial proceedings. Regrettably, the ICC didn’t widely disseminate the decision of the Pre-Trial Chamber. It also didn’t properly communicate the Pre-Trial Chamber’s own reasoning for issuing the decision. In Palestine and Israel, this resulted in victims that already do not know enough about their rights at the ICC, not learning of the existence of the decision. The lack of communication on the decision also allowed for criticism towards the Court in Israel, with Israelis painting the ICC as a biased institution. It has been reported that the State of Israel formally protested the decision.¹⁸⁶

Prior to this decision, the ICC has been criticized for its shortcomings in engaging in a meaningful, consistent, and timely manner with victims during all ICC stages and across situations. Advocates have pointed to limited ICC field presence, sporadic rather than continuous interactions with victims and affected communities, and delayed collection of approved application forms for victim participation. Furthermore, civil society organisations lament that they are expected to do the work of the ICC in both informing victims of their rights and ensuring that their views and concerns are transmitted to the Court, often within unreasonably short time frames.¹⁸⁷ These critical observations have been heard by the ICC Assembly of States Parties that since 2010 have repeatedly called on the ICC to carry out appropriate early outreach and information activities, including at the preliminary examination stage.¹⁸⁸

The Importance of Victims’ Involvement during a preliminary examination

In theory, the ICC Statute gives victims the opportunity to actively engage with the ICC and put their views and concerns forward directly to the Prosecutor and the judges. As such, the ICC Statute system *prima facie* accepts that victims have a unique viewpoint that must be heard and that victims themselves are able to convey it. Other international judicial institutions such as the ad hoc tribunals saw victims merely as sources of evidence that could support the case theory of either the defence or prosecution teams and assist in the judges’ determination on the guilt or innocence of the accused.¹⁸⁹

The shift from victims being seen as witnesses only to being seen as participatory individuals and rights-holders has been described as a move from retributive justice to restorative justice.¹⁹⁰ This move is in line with the human right to access to justice and the principle of an open court, where justice must also be *seen* to be done.¹⁹¹

Regardless, the ICC has involved victims in its work and invited them to submit their views and concerns to it at mainly the following stages; a) when the ICC Prosecutor requests authorization from a Pre-Trial Chamber to open an investigation into a situation, as was the case in Cote D’Ivoire, Afghanistan and Georgia,¹⁹² b) at the stage that a suspect has been arrested and surrendered to the ICC, as was the case in Uganda, Kenya, Mali, the Democratic Republic of the Congo,

186. Times of Israel, “Israel said to formally protest ICC’s unusual appeal to ‘Palestinian victims’”, 14 August 2018.

187. Aljazeera, *The ICC is reaching out to victims of war crimes in Palestine*, 20 Jul 2018.

188. *Resolution ICC-ASP/9/Res.3*, Strengthening the International Criminal Court and the Assembly of States Parties, 10 December 2010.

189. Wyngaert, *Victims Before the International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, Case Western Reserve Journal of International Law, Volume 44, Issue 1, 2011; War Crimes Research Office, *Victims participations before the International Criminal Court*, Legal Analysis and Education Project, November 2007; REDRESS, *The Participation of victims in International Criminal Court Proceedings: A Review of the Practice and consideration of Options for the Future*, October 2012.

190. War Crimes Research Office, *op cit*.

191. REDRESS, *op cit*.

192. Article 15(3) of the Rome Statute.

and the Central African Republic, c) during trial,¹⁹³ and d) in relation to the issuing of a decision of reparations to victims.¹⁹⁴ In the situation of the Comoros a Pre-Trial Chamber also issued a decision on victim participation during its review of a decision of the Prosecutor not to proceed into an investigation and invited victims to communicate their observations to the Court directly.¹⁹⁵

The ICC's delayed interaction with victims and affected communities until the beginning of judicial proceedings is problematic. The ICC Prosecutor spends years and at times more than a decade, on a preliminary examination. Outreach and information sharing during this lengthy stage is extremely limited and it is not carried out with the view to facilitate subsequent victim participation in proceedings nor to prepare civil society organisations to support the Court and victims during the investigation and trial stages. The lack of adequate engagement at the preliminary examination stage results in situations where civil society organisations struggle to collect and transmit approved application forms to the Court at later stages. It has also meant that victims do not know of their rights nor how to enjoy these rights, at the time that they must submit to the Court. The short time frame given for the collection of approved victim participation forms are unhelpful in this regard; victims and their legal representatives were given a mere 30 days to make representations to the Pre-Trial Chamber in the situation in Georgia.¹⁹⁶ During the 30-day period, 69 representation forms on behalf of 6,335 victims were collected.¹⁹⁷ Of course, an effort to early on engage with victims and set the ground work for future victim participation would also be beneficial for the Court.

Another problem with previous practice is that little to no significant effort is made at a preliminary examination stage to inform the concerned individuals, communities, and organisations of the mandate, role and importance of the Court. Unlike domestic courts, the ICC is a judicial institution that is situated far away from victims and affected communities and it applies laws and operates in a framework that are foreign if not incomprehensible to most people. In Palestine, this has led to misconceptions about the mandate of the Court which in turn either have given rise to unrealistic expectations or triggered animosity towards the Court. If the ICC was to properly communicate its mandate and work at an early stage then it could manage victims' expectations and counter the, at times deliberate, dissemination of misinformation. Furthermore, 'early outreach and information activities' could broaden and strengthen support for the Court, which could in turn positively impact States's cooperation with the ICC.

Last but not least, 'early outreach and information activities' expose ICC staff to the relevant local contexts and stakeholders. One would hope that ICC staff would make more informed and considerate decisions in relation to victims and affected communities if they gained a better understanding of their realities.

With the decision on 'early outreach and information activities', all organs of the court have a golden opportunity to ensure that the ICC's work and rights of victims are facilitated before the commencement of the judicial proceeding and strengthen support for the court.

193. Article 68(3) of the Rome Statute; See *inter alia* : *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06, *Decision on victims' participation*, 28 January 2008.

194. Article 75(3) of the Rome Statute; See *inter alia*: *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07, *Order instructing the parties and participants to file observations in respect of the reparations proceedings*, 1 April 2015.

195. *Situation on the registered vessels of the union of The comoros, the Hellenic Republic and the kingdom of Cambodia*, ICC-01/13, *Decision on the Victims' Participation*, 24 April 2015.

196. Public notice of the Office of the Prosecutor: *Victims of violence committed in the context of the August 2008 armed conflict in Georgia have 30 days to make representations to the ICC in The Hague on the opening of an investigation*, 13 October 2015.

197. *Situation in Georgia*, ICC-01/15, *Public, with Public Annex A and Confidential Annex B , Report on the Victims' Representations Received Pursuant to Article 15 (3) of the Rome Statute*, 4 December 2015.

The Scope and Rationale of ‘early outreach and information activities’

The decision on ‘early outreach and information activities’ in the situation in Palestine is a first at the ICC¹⁹⁸, however, the rationale and rights underpinning such activities are embedded in the twenty-year-old ICC Statute. The ICC Statute put victims at the heart of the Court and gave them the right to participate in proceedings, to receive reparations following conviction, and to receive information from and transmit information to the Court. As is pointed out by the Pre-Trial Chamber, victims’ rights are not limited to that of participation during judicial proceedings but “victims also have the right to provide information to, receive information from and communicate with the Court [...] including during the preliminary examination stage.”¹⁹⁹ It is on this basis that the Pre-Trial Chamber concludes that “in order to be able to properly exercise their rights, victims should be provided with sufficient and accurate information about the Court’s role and activities.”²⁰⁰

Both the above mentioned reasoning and conclusion by the Pre-Trial Chamber restrict the scope of ‘early the outreach and information activities.’ In fact, the decision puts forward a staged approach where outreach and information activities during the preliminary examination are meant to provide accurate information about the Court including its mandate and work. According to the Pre-Trial Chamber, increased activities, including assistance to victims to participate in judicial proceedings, will follow a decision by the ICC Prosecutor to open an investigation.²⁰¹

‘Early outreach and information activities’ that were ordered are to “(i) clearly indicate the general parameters of the Court’s jurisdiction in relation to the situation in Palestine; (ii) provide victims and affected communities, as well as intermediaries, with timely, accurate, concise, accessible and comprehensive information regarding the general mission of the Court as well as each of its organs’ role and activities; (iii) promote greater understanding of the different stages of the proceedings before the Court and the diverse roles that victims are statutorily called to play during these various stages; and (iv) respond to concerns and expectations. With regard to the role of each organ of the Court, victims should be reminded, in case they want to communicate information to the Court for the purposes of an eventual investigation or prosecution, that such information should be addressed directly to the Office of the Prosecutor.” The Pre-Trial Chamber also instructed Registry to create an informative page on the ICC website, directed to victims of the situation.

The Pre-Trial Chamber did not make any determination on who is to be considered a victim, beyond pointing to their linkage to the situation. Both Palestinians and Israelis could, therefore, benefit from the decision.

Implementation of Early Outreach and Information Activities

The decision on ‘early outreach and information activities’ by the Pre-Trial Chamber has the potential to transform and strengthen the Court’s engagement with victims. The decision could also empower victims, affected communities, and civil society organisations that interact with them. The realization of this potential is wholly dependent on the implementation of the decision.

As is stated above, the scope of ‘early outreach and information activities’ is limited. But even such limited ‘early outreach and information activities’ must be meaningful, timely, and continuous. To this end, it is vital that all organs of the Court recognise the value of ‘early outreach and information activities’ and that Registry takes full responsibility for the execution of the decision. The responsibility to provide victims with “sufficient and accurate information about the Court’s role and activities” falls squarely on the shoulders of the Registry to whom the decision is directed.

198. Situation in the State of Palestine, ICC-01/18, op. cit.,

199. Situation in the State of Palestine, ICC-01/18, para. 10, op cit.

200. Situation in the State of Palestine, ICC-01/18, para. 11, op cit.

201. Situation in the State of Palestine, ICC-01/18, op. cit., para. 12, op cit.

The decision explicitly mentions the Public Information and Outreach Section and the Victims Participation and Reparations Section and their “central role in the initial phase of approaching victims, non-organizations and intermediaries.”²⁰²

As has been mentioned above the Court has a tendency to rely on civil society organisations to carry out and facilitate outreach and information activities, as well as participation in judicial proceedings. It is important that Registry is mindful of the challenges that civil society organisations face in this regard; civil society organisations, in particular, domestic human rights organisations, are relatively small and often under-resourced. Moreover, some staff members of civil society organisations and their families are themselves victims of gross violations of international law and could more easily become the targets of violent retaliation for their involvement with the Court. Civil society organisations, in particular, domestic human rights organisations, do not usually operate within a rigid security and safety framework and it would be exceptionally difficult for the organization and its staff to uproot and relocate to a safer location.

The Court must also be mindful of the situation of victims and affected communities; for example, they may have specific security concerns or could be prohibited from traveling freely. Palestinians in the occupied territory do not enjoy their right to freedom of movement but are rather subjected to a rigid permit and identification system that (pre)determines their area of residency and movement within Palestine as well as their ability to travel in and out Palestine.

In light of the above, to carry out ‘early outreach and information activities’ the Registry must ensure that it has adequate human and financial resources to implement the decision. In 2018, Registry however marginally lowered their budget request for outreach and information in 2019. This despite the decision on Palestine and a pending decision by a Pre-Trial Chamber on the authorization to open an investigation in the situation in Afghanistan. The implementation of the decision on ‘early outreach and information activities’ must not hinge on the resources of civil society organisations. Civil society organisations can support the Court and facilitate its work but they shouldn’t be presumed to be the primary source of funding for Court activities. The Registry must explicitly include costs for outreach activities in its budget requests, rather than anticipate that possible costs will be absorbed under other categories of costs.

More importantly, ICC staff must interact directly victims and affected communities, preferably in locations that they can access. In relation to the situation in Palestine, this presupposes that Registry requests access to the occupied Palestinian territory and Israel and demands that it be allowed to carry out its mandate in Palestine independently and unhindered.

Conclusion

This chapter has put forward several reasons for why ‘early outreach and information activities’ ordered in the decision on Palestine are important. This chapter has also reflected on the role of civil society organizations in outreach and information activities and put forward recommendations on the implementation of the decision. The decision on ‘early outreach and information activities’ in Palestine is a first, but it must not be a last. The judiciary must ensure a consistent practice, across situations, and entrench what could potentially become the new practice on victim involvement at the Court.

202. Situation in the State of Palestine, ICC-01/18, para. 15, op cit.



Victims' Participation in the Ongwen Case: Strengths, Weaknesses and Lessons Learned

by Joseph A. Manoba and Francisco Cox²⁰³

The modalities for victims' participation in the Dominic Ongwen case were defined by pre-trial chamber which granted victims broad participatory rights. Whilst the pre-trial chamber was forth coming in defining broad participatory rights, it in the same decision denied victims access to the court's financial aid until the same was reversed. Victim participation in proceedings has had a tremendous and positive impact on their personality through telling narration of accounts of victimisation to the legal representatives often for the very first time. Healing and empowerment have been noticed and as well as satisfaction in the feedback on developments at the court.

Introduction

The Ugandan situation opened shortly after the statute came into force in July 2002 following a self-referral²⁰⁴ by the government of Uganda in December 2003. Senior commanders of the Lord's Resistance Army (LRA) were indicted by the court and arrest warrants kept under seal until sometime around 2005 when the accused Dominic Ongwen was named as one of the LRA commanders²⁰⁵ suspected to be most responsible for perpetrating serious crimes of concern in the greater northern Uganda. Dominic Ongwen like his co-indictees remained elusive, hiding in the bushes of South Sudan, Democratic Republic of Congo (DRC) and Central African Republic (CAR) from where he is said to have been apprehended by the Seleka rebels and handed over to the Uganda armed forces, which in turn surrendered him to ICC custody on 21 January 2015.

The Legal Representatives for Victims (LRVs) in this case were appointed by victims whilst applying to participate in proceedings. The background to this appointment is traceable in the work of the Uganda Victims Foundation (UVF).²⁰⁶ As founder and later Legal Advisor to UVF,

203. Joseph A. Manoba and Francisco Cox are Ugandan and Chilean nationals presently representing 2605 victims in the case of the Prosecutor versus Dominic Ongwen.

204. Situation in Uganda, [ICC-02/04](#).

205. Ibid.

206. The Uganda Victims Foundation (UVF) formerly Uganda Victims' Rights Working Group (UVRWG) that was set up by Joseph A. Manoba and supported by Stephen Lamony to raise a voice for victims of serious crimes in the greater north of Uganda and in turn supported by REDRESS Trust London in its activities.

Joseph A. Manoba interacted with some leaders of victims' groups including those from Lukodi and Abok, where a connection with victims was made in visits and activities carried out in IDP camps prior to the appointments. On his part, Francisco Cox worked with victims in South America and closely with Manoba hence the teaming up in the case. Both LRVs were invited to Lukodi by victims to speak to them.

The appointment as LRVs was formalised²⁰⁷ by the Single Judge of Pre-Trial Chamber II in a decision in which the modalities of participation are defined to include; a general right to consult the record of the case including decisions of the chamber, submissions of the parties, participants and the Registrar, transcripts and evidence disclosed by the parties and communicated to the Chamber, as well as the right to be notified of documents filed.²⁰⁸ These rights are extended to both public and confidential documents and restriction to any of them are allowed if there is sufficient reason warranting such restriction. The Single Judge also ordered immediate access to the victims' application forms to the LRVs.²⁰⁹ The LRVs are by this decision allowed the right to divulge confidential information to participating victims where it is necessary²¹⁰ as part of the process of sharing information on the developments at the court and to make victim participation effective.

Other rights granted include; the general right to attend public and non-public hearings;²¹¹ make written submissions and also respond to those filed by parties within five days of notification of a filing.²¹²

1. The Fallacy of Rule 90(1) of the ICC Rules of Procedure and Evidence

As alluded to in the introduction, despite having been appointed by victims in Northern Uganda in 2015, in a controversial decision, the Pre-Trial Chamber appointed a second team from the Office of Public Counsel for Victims (OPCV), citing budget concerns and a lack of transparency in the selection of the LRVs.²¹³ Essentially the decision meant that the LRVs were able to continue to represent their clients, however, without recourse to the ICC's legal aid system as the Court ruled that only counsel appointed by the Court was eligible for support. Thus, for over one year the LRVs represented their clients on a wholly pro-bono basis but were able to secure some funding initially from Trust Africa's²¹⁴ in order to undertake missions to meet and consult with their clients.

The suggestion that victims are not empowered to appoint counsel of their own choosing raises serious questions about how meaningful participation at the ICC really is. On the contrary, victims were punished for exercising their statutory choice and appointing two people who they had a previous engagement with and whom they trusted to represent their interests. This decision raises serious questions as to whether the Court will continue to allow for the appointment of external counsel or whether all victims will be represented by the OPCV in future cases.

207. Situation in Uganda, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-350, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, 27 November. 2015, para. 16-24.

208. Ibid, para. 26.

209. Ibid, para. 30.

210. Ibid, para. 31.

211. Ibid, para. 32.

212. Ibid, para. 33.

213. Ibid, para. 20.

214. Trust Africa is a Senegal based philanthropic organisation that has supported the works of some organisations especially those providing humanitarian interventions for victims of the LRA violence in the greater north of Uganda. The organisation initially provided support to the LRVs through African Youth Initiative (AYINET) to meet and consult with participating victims pending the determination of the LRVs motions for legal aid reconsideration within the ICC. It has thereafter provided more support through the Victims' Support Initiative to implement similar activities and those tailored at supporting the International Crimes Division (ICD) of Uganda.

By way of illustration, it was important to many victims that both LRVs had a strong background of working with victim communities. At the same time, the question is not one of where counsel must come from, but rather that victims have a choice in who they want to represent their interests, be it the OPCV or external counsel. Some victims may prefer to be represented by the OPCV, others may want counsel from their home countries or counsel who have specific experience working with, for example, victims of sexual and gender-based violence (SGBV).

Shortly before the LRVs were appointed by Pre-Trial Chamber II, the single Judge ordered outreach to be undertaken within the community of Lukodi where a majority of the 2605 victims represented by the LRVs are from for them to be informed of the developments at the court considering that Dominic Ongwen was now in custody of the Court; and report continuously to the chamber.²¹⁵ By implication, this decision applied to other locations that were later added to the charges Dominic Ongwen is facing. The Single Judge was mindful of the need for victims to complete the victim application forms as expeditiously as possible and thus proposed a shorter application form for victims to utilise.²¹⁶ Unfortunately, the short and simplified application form for victim participation was not publicly available on the court's website and this arguably hindered many would have been applicants from applying and participating in the proceedings.

2. Participation in Practice

From the onset, the LRVs resolved to make participation meaningful for every victim they represented. It was clear that in order for this participation to be meaningful the LRVs needed to not only inform their clients of the proceedings but take instructions from them. Instructions from participating victims are received through notifying the victims about the issue pending in court at the moment and then the LRVs seeking to know the views and concerns as applicable for the LRVs to apply. Examples include disclosure of identity, request for release from detention by Dominic Ongwen etc.

To achieve the goal of meaningful participation the LRVs recruited highly qualified and experienced team consisting of; legal assistants, case manager, and field assistants. The LRVs also recruited focal points in the field to ensure the confidentiality of information is maintained and effective mobilisation and implementation of field activities for the participating victims. The LRVs consulted peers and colleagues on potential candidates. Held consultations/engagements with the candidates and ultimately made a selection of the individuals. Experience working with victims and prior experience working with the court and or in a previous case was very instructive in the selection of the team members. Selection of focal points, on the other hand, was informed primarily by the existing victims' leadership structures which the LRVs did not want to dismantle but rather engaged for better victim' representation.

It will also be recalled that most IDP camps, especially those from which the participating victims resided, had by the time of the surrender of Dominic Ongwen to the Court been disbanded and all former residents had returned to their villages or relocated to town centres and therefore to meet with every client the LRVs have been well organised hence the elaborate focal points in each of the three locations where the participating victims come from

Next, the LRVs purposefully set in place a strategy to hold two types of meetings with victim participants. The first type of meeting is a general informational update meeting where clients are informed about developments in the proceedings including the number of witnesses that

215. Situation in Uganda, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-205, Decision Establishing Principles on the Victims' Application Process, 4 March 2015, para. 11.

216. Ibid, para. 19.

have testified at a given time; the type of witness²¹⁷; the nature of the testimony²¹⁸ the defence questioning; the LRVs questioning; as well as evaluation of representation. It is custom for the LRVs to ask if victims are satisfied with the representation offered as well as reminding them of each individual's right to seek a change of lawyer whenever there is dissatisfaction with the LRVs' team. This meeting is also characterised by questions and answer session. This set of meeting is held as closest and safest to the communities as can be and is held at least every after two months.

The second type of meeting is characterised as small group meetings with the objective of affording every individual an opportunity to participate by expressing their individual and personal experience of the conflict, the impact of the conflict on their personality and livelihoods; their expectations of the trial; their views on punishment; their views of the grounds of defence of Dominic Ongwen including questions his abduction, the role of "cen" or "spirits" or "apparitions"²¹⁹ in the conflict as deduced from the questioning of prosecution witnesses etc. In the initial phases of the trial, the LRVs held private one on one meetings with former child soldiers, victims of sexual and gender based crimes (SGBC), and children. Later the meetings were enlarged to group discussions of averagely 7 to 10 individuals because of the large numbers. This set of meetings is held every month for two months and is also characterised by questions and answers in the course of the discussions.

Both sets of the meeting are crucial for the LRVs to identify strategy and narrative they want to present on behalf of victims to the Court. It is thanks to these constant meetings that the team has been able to build a trusting relationship with victims. The LRVs view this as a good example of what attorney-client relation should look like even in a setting of mass representation. Despite the large numbers of clients the setting must always be that of attorney/client where the lawyers take instructions from the clients and guide them in representing their interest and not assuming what those interests are; what their response to certain issues will be; or having a standard representation as if all peoples' needs and interest are the same despite their own individual particularities.

3. Participation in the Court Room

Other than the meetings with victims in their communities, the LRVs have ensured that they represent the interest of victims in the court room in The Hague. Many participating victims have told the LRVs they want justice to be done. They want Dominic Ongwen to be punished for the attacks and victimisation they suffered.

Whilst the LRVs have not been allowed to question witnesses about the personal responsibility of the accused Dominic Ongwen owing to the Defence objections and supported by the trial chamber, from the interactions the LRVs have with their clients including former child soldiers and camp residents, it is well established that many hold him personally responsible for perpetrating attacks on the respective camps; forcing abductees to participate in attacks commit crimes whilst in the bush under his command. Victims therefore and definitively have views about the personal criminal responsibility of Dominic Ongwen and the idea thus far that LRV's cannot question witnesses about the accused criminal responsibility raises a Prosecutor *bis* situation is not justifiable because the trial and finding of guilt or not is of much interest and concern to the victims.

Whilst participation in proceedings has been possible, the restriction on questioning of witnesses

217. The type of witness in this context refers to either a former LRA insider or state actor or expert.

218. The nature of testimony here refers to whether the testimony related to the attack on one of the camps or the victimisation suffered or responsibility of the criminal actions etc.

219. Professor Tim Allen, the first Prosecution witness was called to testify about the Acholi people, their cultures, beliefs and conflict management amongst other things. He testified publicly about such things as spiritualism amongst the Acholi people hence the need for victims to know these testimonies and confirm the truthfulness of these accounts from a non Acholi.

on the personal criminal responsibility of Dominic Ongwen undermines the rights of victims in the participation process. This decision by the Trial Chamber²²⁰ goes against both ICC's precedent and international human rights law that has recognized the rights of victims to truth, therefore limiting the scope of questioning to a central aspect of truth determination is not only bad law but a new inflicted harm against victims.

In the quest for justice the LRVs presented the victims' case. The course of preparation for the victims' case necessitated consultations with a number of candidates who were identified from the small group meetings mentioned earlier as potential witnesses. These individuals engaged with the LRVs in further detailed discussions of a back and forth nature over a period of six months. This process raises anxiety and disappointment especially when the individual is not ultimately called as a witness as in this case where the Trial Chamber only allowed the LRVs to present a total of three victims and an expert.

4. Victim Participation and Healing

From the said meetings in the field and presence of LRVs in The Hague, victims, in this case, have been afforded opportunity to express their views and concerns on a variety of issues. Their victimisation has been made part of the record not merely in opening statements but through questioning of prosecution witnesses including attacks of their respective camps and the terror that characterised the attack and the aftermath of the attack²²¹. Evidence has been led on the destruction of lives, way of life and livelihoods and the impact of this destruction on the communities; terror of being abducted and forced to kill another abductee as initiation into the LRA; the ruthless treatment of those who attempted to escape; being forced to walk extremely long distances, carry heavy loads without rest; the lack of food, clothing, shelter; the distribution of girls to commanders as wives and sexual slavery; loss of household properties and other properties and destruction of shelter etc. have been narrated as truths of events that occurred in the three locations of Lukodi, Odek and Abok.

The consistent engagements with victims as discussed above, have had tremendous positive effects on victims and has allowed informed the LRVs on how best to execute their mandate. It has fostered the building of trust and protection of each other between the LRVs and the clients.²²²

At the victims' level, trust built over the length of pre-trial and trials proceedings has seen male victims of sexual and gender based crimes (SGBC) speak freely with the LRVs about their ordeal. One SGBC victim, an elderly man opened up to youthful and female members of the LRV team and narrated his encounter with an LRA rebel even when he was informed that he had the right to speak to a male member of the team and or the LRV personally, he maintained he was comfortable narrating his ordeal because as far as he was concerned he trusted the team to let the court know that he had been victimised this way by the LRA on the occasion of the attack on the camp. Sadly for him, despite the attempt by the LRVs to bring this experience of victimisation to notice of the chamber within the framework of the confirmed charges, the chamber declined to expose and make part of the record the sexual abuse of men by LRA fighters and this refusal by the chamber visibly had a chilling effect on the victims of this crime.

The LRVs have also observed that many victims have seemingly experienced healing through the active interaction and participation of the victims. The LRVs who have no training in counselling, have had to exercise their little knowledge of dealing with traumatic situations to afford victims opportunities to express themselves sometimes for the first time ever since victimisation. These

220. Situation in Uganda, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-205, op, cit.

221. Situation in Uganda, *The Prosecutor v. Dominic Ongwen*, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen, 6 December 2016*.

222. In one incident during a consultation meeting with clients, a stranger and non-participating victim decided to intrude the private meeting organized for victims however when he was identified, he survived the wrath of the participating victims and was warned against attending a meeting where he was not invited and further forced to delete pictures he had taken and also told in no certain terms that they would not tolerate any intimidation of their LRVs. It was an honouring experience of the LRVs to see victims standing up for their LRVs.

interactions have often times been characterised by several emotional breakdowns during narration. The LRVs believe that offering victims an ear to listen to victimisation accounts outside the court room has been fulfilling for many a victim and played an important role in dismantling the victims' sense or feeling of a conspiracy of silence²²³ by the world.

Added to this is the fact that the positive effect of providing testimony in a Court, in an official and formal setting, should be taken into consideration by the Chambers when deciding the amount of evidence they will allow LRVs to present. If Judges could see how just giving evidence contributes to the healing of trauma probably they would be more willing to "spend" a bit more time allowing victims to tell their stories.

In some victims, the healing process is slow owing to the overwhelming traumatic experiences. One such example is a victim who was abducted and whilst in the bush was made to kill his own father. The guilt of this incident has been heavy on the victim, however, speaking about the incident with the LRVs and other officers of the Court has been useful in offering healing albeit at a slower pace than other victims have experienced.

5. Other Matters of Victims' Concern

Despite the fact that the hearing is taking place at the seat of the Court in The Hague, so many kilometers away from the communities and the provision to follow proceedings by watching summaries prepared by the Public Information and Outreach Section (PIOS), the interest amongst victims to follow the proceedings has not depreciated. Victims express great interest in following the proceedings closely and seeing the accused Dominic Ongwen's demeanour, as well as witnesses presented.

The destruction of livelihoods, families, deaths, carrying heavy loads etc. has had its share of devastating effect on individuals. Widows and the elderly narrate how they live in squalor without family support but rely on well-wishers. It is evident that these individuals want to see justice done but also need material support such as housing and health care. Unfortunately, the government in Kampala has no programmes to address these needs and therefore these victims are left in a state of hopelessness because no reparations may be ordered unless there is a conviction of the accused persons. The assistance programmes of the ICC's Trust Fund for Victims being implemented in the country do not consider the material needs of victims, but focus solely on physical and psychological rehabilitation. The LRVs, therefore, are left in the unenviable position of explaining to victims the inability of the court to address the various needs whilst the accused has not been convicted let alone have sufficient funds to meet all the needs of victims. It is also still very early in the proceedings to say whether ordered reparations will include individual or material reparations.

Victims' participation in proceedings entails coming into contact with lots of confidential information disclosed mainly by the Office of the Prosecutor (OTP). Whilst this is critical for purposes of appreciating the prosecution case by the LRVs, in practice it can lead to challenging situations especially because in reviewing this information against information gathered independently by the LRVs, it is common practice to find useful and confidential information worth sharing with the OTP. Obviously sharing any such information is voluntary and in confidence and more often than not, the intention is to want the OTP to carry out its own investigations on such information and not simply rely on it as full proof. The challenge with such action of sharing with

223. Conspiracy of silence is a theory that suggests that victims sometimes feel that the whole world has abandoned them and not cared to know what really happened to them. This feeling is deconstructed when the victim gets an opportunity to narrate their experience to someone willing to listen to them. For more on the theory of conspiracy of silence see Yael Danieli, *Massive Trauma and the Healing Role of Reparative Justice*, in Carla Ferstman, Mariana Goetz and Alan Stephens (Eds), *Reparations for Victims of genocide, War Crimes, and Crimes against Humanity: Systems in Place and Systems in the Making* (Leiden. Boston, 2009).

the OTP is that any information shared is disclosable under Article 67 of the Statute and Rule 77 of the Rules of Procedure and Evidence which may be awkward for the LRVs because certain information requires further investigation before disclosure. The LRVs, therefore, observe that because of the independent nature of the OTP and its disclosure obligations, a decision to share information with the said OTP must be carefully considered and or avoided at all cost as a good practice unless sufficient and justifiable reasons demand such sharing.

Confidentiality and protection of witnesses in proceedings has in the LRV experience in this trial been effectively managed by the trial chamber. No major incident has been reported amongst participating victims and or witnesses about exposure and or threats registered. That notwithstanding, there have been occasional incidents where the LRVs sought the chamber's protection of witnesses in the form of redactions of particular details. The Chamber, however, declined such requests in the course of proceedings reasoning as it has done that in its view the particular information is not one that should be redacted on the one hand and no risk is foreseeable on the other. The LRVs believe that the inability of the chamber to appreciate the dynamics of the local setting informs the dismissal of a particular request for protection. Some witnesses are intermediaries of the court²²⁴ and as intermediaries, they have previously acted in some role in one or more processes relating to the court. To not be concerned for example about the description of the role the witness plays as an intermediary in the course of his/her testimony moreover when this role spells out the link to participating victims is to underestimate the risk associated with the said testimony and witness. There is a great risk of exposure when such testimony is kept public and no redactions allowed. The LRVs, therefore, think that trial chambers need to allow a benefit of the doubt in certain situations raised by the LRVs for the protection of participating victims.

Conclusion

In sum, victim participation, in this case, has provided numerous opportunities for victims in distinct ways. The LRV team has offered every individual platform to share their experiences; and in sharing experiences there has been trust and confidence built, healing, awareness of legal processes and developments in proceedings and hope for justice restored. A couple of challenges have been registered but these have not hindered the continued representation of victims in the Dominic Ongwen proceedings.

224. Intermediaries in this context would be persons who have had contact with the court in form of aiding the activities of one or more offices of the Registry and other organs of the court.



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The Perfect Storm: Obstruction, Intimidation and Inaction in the Kenya Situation

by Fergal Gaynor and Anushka Sehmi²²⁵

Introduction

In 2010, the Prosecutor of the International Criminal Court ("ICC") charged six prominent Kenyans for participation in crimes against humanity after Kenya's violent 2007 elections. Three suspects were chosen from each of the two sides involved in the post-election violence ("PEV"). The prosecutions of all six failed: two at the confirmation stage, two at the pre-trial stage, and two after the presentation of the prosecution's case-in-chief.²²⁶ The cases collapsed in the midst of state and individual obstruction of justice. After two of the accused – Uhuru Kenyatta and William Ruto – became president and deputy president of Kenya in 2013, they unleashed a high-level diplomatic campaign to vilify and discredit the ICC, in tandem with a practice of obstruction of access to evidence relevant to the charges. Simultaneously, efforts to bribe and intimidate key witnesses were underway.

225. Fergal Gaynor was appointed by the Trial Chamber in November 2012 as the common legal representative for victims in the *Kenyatta and Muthaura* case at the ICC, after a decade prosecuting political leadership cases in international tribunals. In 2013 and 2014, he and his field staff held 49 days of meetings with 839 victims of the crimes in the Nyanza, Western and Rift Valley regions of Kenya. In 2015, following the withdrawal of charges against Kenyatta, he and his team met approximately 700 of those victims in another series of meetings to discuss the termination of the case and associated issues. Anushka Sehmi worked for Victims Participation and Reparations Section ("VPRS") of the ICC in Kenya, was the case manager for the victims in Kenya II from, 2011-2015, and is currently assistant to counsel for the legal representatives of victims in *The Prosecutor v Dominic Ongwen*.

226. Uhuru Kenyatta, Francis Muthaura and Mohammed Hussein Ali were aligned to Mwai Kibaki's Party of National Unity. The ICC case against them was known as Kenya II. William Ruto, Henry Kosgei and Joshua Arap Sang were aligned to Raila Odinga's Orange Democratic Movement. The case against them was known as Kenya I. Charges against Ali and Kosgey were not confirmed by the Pre-Trial Chamber. Charges against Muthaura and Kenyatta were withdrawn after confirmation and prior to trial. Charges against Ruto and Sang were withdrawn at the conclusion of the Prosecutor's case-in-chief.

Eventually, the Prosecution ceased active investigation in Kenya, on the basis that it was not feasible to continue in the face of non-cooperation by the Government of Kenya ('Government'). Seised of a referral under article 87(7) of the Rome Statute ('Statute') regarding Kenya's non-cooperation, the Assembly of States Parties ('ASP') has taken no action. The Trust Fund for Victims ('TFV') has delivered no assistance to any victim in Kenya. Domestic promises of accountability and compensation remain unfulfilled.

This article focuses on these three challenges—obstruction, intimidation and inaction—from the perspective of the victims' legal team in the *Kenya II* case. Faced with this unprecedented confluence of negative factors, the team could pursue only one ethically acceptable option: to fearlessly represent the views and concerns of the victims. This meant litigating before the Pre-Trial, Trial and Appeals Chambers for full use of the Statute's remedies for obstruction of justice by states and individuals, and full compliance by the Prosecution with its article 54 obligation to take appropriate measures to ensure an effective investigation and prosecution.

1. Obstruction

The Kenya situation was the Court's first experience with a government determined to collapse an ongoing prosecution. It will not be the last. As the Court broadens its work and incurs the wrath of governments with increasingly sophisticated intelligence and technological resources, the problem of state obstruction of justice is not simply going to vanish. The Kenya situation offers lessons for prosecutors, victims' lawyers and States Parties alike, all of whom have a duty to counter the effects of deliberate state obstruction.

The Government employed a multi-pronged strategy. The Prosecution's requests for assistance were met with promises of full cooperation. But the Government's responses to those requests were tardy and often incomplete; its explanations for its inability to secure full access to critical witnesses and documents were vague, contradictory and evasive. Its efforts to comply with a court order to freeze assets of the accused were derisory. The Government unlawfully defied ICC orders to provide cell-phone, banking and other evidence, and to allow the interviews of witnesses in a position to provide key evidence about those responsible for the PEV, such as senior police officers. All this was, and is, in violation of the Statute, and of Kenya's own International Crimes Act.²²⁷

The Government simultaneously employed a multifaceted diplomatic strategy. Large teams of Government officials were dispatched to the African Union ('AU'), UN Security Council,²²⁸ and the ASP with the aim of halting the cases. Before the AU Assembly, Kenyatta heaped insults on the ICC.²²⁹ His government lobbied the AU Assembly to adopt a resolution to immunize from prosecution sitting heads of state and government, thereby creating an incentive for any leaders inclined to be murderous to hang on to power at all cost.

As a State Party, Kenya is free to propose or oppose changes to the Rules of Procedure and Evidence ('RPE'). It lobbied hard for rule changes intended to relieve high-level defendants of the obligation to appear in the courtroom person. But it was the Government's opposition to an

227. Situation in the Republic of Kenya, ICC-01/09-154, *Victims' request for review of Prosecution's decision to cease active investigation*, 3 August 2015, paras. 57 to 87.

228. In October 2013, Kenya, with the support and backing of the AU, requested the UN Security Council to defer the proceedings against President Kenyatta and his Deputy President, William Ruto, at the ICC for a period of one year. See United Nations, Security Council, S/2013/624, *Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council*, 22 October 2013; *Letter to the President of the Security Council expressing the opposition of the victims in the Kenyatta case at the International Criminal Court to any resolution by the Security Council to suspend the prosecution of that case*, 3 November 2013.

229. *The Daily Nation*, "President Uhuru hits out at the West over ICC", 12 October 2013.

amendment to Rule 68 of the RPE that was most revealing.²³⁰ The amendment was intended in part to facilitate the admission of the initial evidence of a witness who is later bribed, intimidated or who disappears. After the amendment was adopted, the Government pressed hard to ensure that it was not applied in the *Ruto & Sang* trial. After it was applied, the Government worked to have it overturned on appeal.²³¹

The Government has never fully explained why it was so eager to protect the results of what was plainly a well-resourced campaign to bribe and intimidate witnesses in the *Ruto & Sang* case.

Leaks of confidential filings were rampant. The Trial Chamber in the *Kenyatta* case noted ‘a pattern of information contained in confidential filings being leaked to the media’ and the ‘Kenyan Government’s cumulative inattention to the taking of appropriate measures to ensure the confidentiality of the proceedings.’²³²

2. Intimidation

This campaign by the Government to sink the cases against Kenyatta and Ruto took place simultaneously with interference with witnesses due to testify against Kenyatta and Ruto. In *Kenyatta*, two of the most critical witnesses were known as witnesses 11 and 12. When filing its pre-trial brief in the *Kenyatta* case in 2013, the Prosecution said:

‘Shortly after the Prosecution disclosed [to the Defence] the identities of Witnesses 11 and 12 in August 2012, the witnesses informed the Prosecution that purported Kenyatta intermediaries were attempting to locate them to offer a “deal” for them to agree not to testify. One of the intermediaries was Ferdinand Waititu, a sitting Member of Parliament and an associate of Mr. Kenyatta. In a series of controlled telephone conversations recorded by the Prosecution with the witness’s consent, Mr. Waititu told Witness 12 that he wanted to meet with him to discuss assisting Mr. Kenyatta to “solve this fight” and the “lump of money to be given”. Mr. Waititu indicated that he had spoken about the scheme to Mr. Kenyatta and was keeping him informed of its progress. He explained that Mr. Kenyatta wanted to avoid “direct” involvement because he was worried about getting caught tampering with evidence.’²³³

In the *Ruto & Sang* trial, which collapsed at the conclusion of the prosecution’s case-in-chief, witness intimidation loomed large. In August 2015, trial judges in *Ruto & Sang* noted ‘the element of systematicity of the interference of several witnesses in this case which gives rise to the impression of an attempt to methodically target witnesses of this case in order to hamper the proceedings.’²³⁴

Three Kenyans were publicly charged by the court for interfering with witnesses in the case. Kenya remains obliged to surrender them to the Court. As of October 2018, it has not done so.

230. In *Ruto and Sang*, the Government argued that the ASP had agreed that the amended rule 68(3) would not apply in the Kenya cases. *The Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1891, [The Government of the Republic of Kenya’s Request for Leave to file amicus curiae Observations on ‘Public redacted version of “Prosecution’s request for the admission of prior recorded testimony of \[REDACTED\] witnesses”](#), 27 May 2015, para. 4.

231. ‘The Government of the Republic of Kenya’s Request for Leave pursuant to Rule 103 (1) of the ICC Rules of Procedure and Evidence to join as Amicus Curiae and make Observations in the Appeal, by the Ruto and Sang Defence Teams, of the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’, 23 September 2015, ICC-01/09-01/11-1972. The AU also argued against the application of Rule 68(3) in the *Ruto and Sang* case. See The African Union’s *Amicus Curiae* Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties, 19 October 2015, ICC-01/09-01/11-1988.

232. *The Prosecutor v. Kenyatta*, ICC-01/09-02/11-967, [Order concerning the public disclosure of confidential information](#), 21 October 2014, paras. 11 and 12.

233. *The Prosecutor v. Kenyatta*, ICC-01/09-02/11, [Public Redacted Version of “Second updated Prosecution pre-trial brief”](#), 26 August 2013, ICC-01/09-02/11-796-Conf-AnxA, 19 January 2015, para. 95.

234. *The Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1938-Red, [Public redacted version of Decision on Prosecution Request for Admission of Prior Recorded Testimony](#), 19 August 2015, para. 60.

Confirming some of those charges, a pre-trial chamber noted in 2015 ‘the size and extent of organisation of the alleged criminal effort to corruptly influence witnesses’.²³⁵

In late 2014, Meshak Yebei, a man who almost certainly was in a position to reveal details of witness interference in *Ruto & Sang*, was abducted, murdered and his body dumped in a game reserve hundreds of kilometers away.²³⁶ Nobody has been arrested.

When terminating the *Ruto & Sang* case in 2016, presiding judge (and current ICC President) Eboe-Osuji, from Nigeria, noted ‘the incidence of witness interference at a disturbing scale’.²³⁷ Refusing to enter an acquittal, he said that ‘the extent of the evidence of interference is enough to make acquittal of the accused grossly unjust’.²³⁸ He referred to ‘a coordinated effort to bribe witnesses, in order to prevent them from appearing in court’²³⁹ and denounced ‘the interference and political meddling seen in this case’.²⁴⁰ He returned to the point often in his written opinion, noting ‘the unseen hands that had engaged in witness interference, the obvious aim of which is to frustrate the trial of the accused’.²⁴¹ He added: ‘The incidence of interference was bolstered and accentuated by an atmosphere of intimidation, fostered by the withering hostility directed against these proceedings by important voices that generate pressure within Kenya at the community or national levels or both. Prominent among those voices were voices from the executive and legislative branches of Government.’²⁴²

3. Inaction

The victims in the Kenya cases were faced with inaction by the Prosecution (after the collapse of the cases), the ASP (after it was seised with a formal complaint concerning Kenya’s ongoing noncompliance with the Statute) and the TFV (which has failed to deliver assistance to any victim in Kenya). Finding legal remedies for this inaction was not easy.

Following the collapse of the cases against all three suspects in *Kenya II*, the Prosecution ‘decided not to conduct any further investigations at present because it has concluded that, in the absence of genuine cooperation from the Government of Kenya, there is no immediate prospect of strengthening the evidence’.²⁴³ All investigation in *Kenya II* came to an end.

In a series of meetings held in Kenya in mid-2015, victims’ lawyers consulted over 700 victims of the charges in *Kenya II* on the question of whether they agreed with the Prosecutor’s decision to cease active investigation. By an overwhelming majority, the victims made their disagreement clear. The views of dozens of victims were later filed before the Chamber. Two of them said: ‘Our hope was with the ICC. We are now heartbroken following the termination of this case. I think Bensouda has failed.’²⁴⁴

235. *The Prosecutor v. Gicheru and Bett*, ICC-01/09-01/15-1-Red, Public redacted version Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute, 10 September 2015, para. 7.

236. *The Daily Nation*, “Meshack Yebei and the uneasy murder mystery for Hague court”, 9 March 2015.

237. *The Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-2027-red-corr, Public redacted version of: decision on defence applications for judgments of acquittal, 5 April 2016, Separate Reasons of Judge Eboe-Osuji, para. 141.

238. *Ibid.*, para. 141.

239. *Ibid.*, para. 152.

240. *Ibid.*, para. 154.

241. *Ibid.*, para. 156.

242. *Ibid.*, para. 142.

243. The Prosecution stated that it ‘considers that it has not made a decision “not to proceed” in the Kenya 2 case concerning violence in Nakuru and Naivasha. The [Office of the Prosecutor] has decided not to conduct any further investigations at present because it has concluded that, in the absence of genuine cooperation from the Government of Kenya, there is no immediate prospect of strengthening the evidence. The [Office of the Prosecutor] will continue to monitor the situation, listen carefully to people who come forward with evidence and to analyse any records which may become available. A further application for warrants of arrest or summonses might still be made if circumstances change and the necessary evidence emerges.’ See letter cited in Situation in the Republic of Kenya, ICC-01/09-159, Decision on the “Victims’ Request for review of the Prosecution’s decision to cease active investigation”, 5 November 2015, para. 24.

244. Quote from a/8670/11, p. 10. ICC-01/09-154-Anx1.

‘Bensouda and the judges have not done everything in their power to ensure the case goes on’²⁴⁵

For many victims, to cease to investigate before a day of trial had been held was bad enough. But to do so in the midst of public obstruction of justice by the Kenyatta’s government – and celebration by Kenyatta and his Attorney General after the withdrawal of charges – was salt on their wounds. Many expressed the view that the answer to obstruction by the Kenyan state was resilience and determination, not surrender and inaction. On their behalf, the victims’ legal representatives asked the judges to review the legality of the Prosecutor’s decision to cease active investigation. They also asked judges not to confirm that decision until satisfied that the Prosecution has complied with its obligation under article 54 of the Statute, and international human rights jurisprudence, to carry out prompt, thorough and effective investigations and prosecutions.

They argued that the Prosecutor’s inaction negatively impacted on three rights recognized by the Court’s jurisprudence: the rights (i) to a declaration of truth by a competent body (right to truth); (ii) to have those who victimized them identified and prosecuted (right to justice); and (iii) to reparation.²⁴⁶ In *Kenya II*, these rights went unrealised. Not one person responsible for the crimes of *Kenya II* was effectively investigated or prosecuted. Not a day of trial was heard. No formal declaration of truth following a trial was issued by the Court. As nobody was convicted, no reparation could be made.²⁴⁷

The litigation went straight to the heart of the ambit of prosecutorial discretion. Article 54(1) of the Statute obliges the Prosecutor to ‘extend the investigation to cover *all facts and evidence* relevant to an assessment of whether there is criminal responsibility under the Statute’ and to ‘take appropriate measures to ensure the *effective* investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses [...] and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.’²⁴⁸

The victims argued that prosecutorial discretion is not limitless, and that article 54(1) implicitly prohibits the Prosecution from ceasing to actively investigate until it has taken all action that it can under the Statute, even when operating in highly uncondusive environments. The conclusion is reinforced by the nature of the Statute itself. It concerns exclusively crimes against humanity, war crimes, genocide and aggression: crimes that happen in circumstances of great turmoil. It grants the Court jurisdiction *only* where the state in question is unable or unwilling to prosecute: *i.e.* an environment unlikely to be conducive to a smooth investigation. The Prosecutor’s duty to investigate therefore continues where there are deliberate efforts to undermine an investigation, including non-cooperation by a State Party, and the bribery and intimidation of witnesses. Both state and individual obstruction of justice are foreseen in the Statute: articles 87(7) and 70.

The victims also argued that the article 54(1) obligation requires an investigation and prosecution that are successful in achieving the objectives of the Court, including ending impunity for serious crimes. International human rights law requires that to be ‘effective’ an

245. Quote from a/9383/11, a male victim. See p.7, ICC-01/09-154-Anx1.

246. ICC-02/05-02/09-121, para. 3. See also ICC-01/04-01/07-474, paras 31-44.

247. Situation in the Republic of Kenya, ICC-01/09-154, Victims’ request for review of Prosecution’s decision to cease active investigation, para. 93.

248. Emphasis added. In addition, article 51(a) of the Prosecutor’s Code of Conduct states: ‘In accordance with article 54(1)(b), Members of the Office shall ensure that the standards of effective investigation and prosecution are upheld’; the Code requires its staff to act with ‘competence and diligence’ in this regard.

investigation and prosecution must also be prompt and thorough.²⁴⁹

The victims argued that the Prosecutor's investigation and prosecution in *Kenya II* had not been 'effective' within the meaning of article 54(1) for many reasons, an illustrative sample of which was set out in detail.²⁵⁰ In brief, these were: the failure to make effective use of article 87(7) to counter state non-cooperation; the failure to make effective use of article 70 to counter bribery and intimidation; the erroneously narrow geographic focus of charges relating to killing and rape by the police during the PEV; the failure to charge the national police commander with command responsibility; the self-evidently ineffective nature of the prosecutions of Muthaura and Kenyatta, where charges were withdrawn prior to trial, in circumstances of serious obstruction of justice. As Kenyatta's government was unwilling to ensure any domestic process, the Prosecution's cessation of investigation left the victims with no remedy for the serious violations they had experienced during the PEV.²⁵¹

The victims of *Kenya II* therefore requested the Chamber to find that the Prosecutor had failed to comply with her obligations under article 54, and to direct the Prosecutor to take measures to ensure the effectiveness of her investigation.²⁵² The victims argued that the only possible basis under the Statute for the Prosecution's decision to cease investigation was that set out in article 53: that it was in the interest of justice not to proceed with investigation or prosecution. The Pre-Trial Chamber has discretion to review any such decision.²⁵³

The Prosecution opposed the application for review. It dismissed as speculative the victims' detailed assertions concerning the inadequacy of its investigation and prosecution, and insisted that the victims had no standing to make the application. It also argued that, in any event, it had merely suspended, rather than ceased, its investigation.²⁵⁴ Pre-Trial Chamber II held that the victims did in fact have standing to bring the request,²⁵⁵ noting appellate jurisprudence that 'victims are not precluded from seeking participation in *any* judicial proceedings, including proceedings affecting *investigations*, provided their personal interests are affected by the issues arising for resolution.'²⁵⁶

But the Pre-Trial Chamber declined to judicially review the Prosecutor's decision to indefinitely suspend the investigation. The Chamber held that neither article 54 nor any other provision of

249. The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 ('Basic Principles') provide *inter alia* that States have an obligation to 'investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law' (Article 3(b)). Article 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65 provides, *inter alia*, that: 'There shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances'.

250. Situation in the Republic of Kenya, ICC-01/09-154, Victims' request for review of Prosecution's decision to cease active investigation, *op. cit.*, paras. 55 to 86.

251. The right of victims to an effective and enforceable remedy for violations of their human rights is proclaimed in numerous international instruments, including the Universal Declaration of Human Rights (art. 8), and several international treaties (e.g. art. 2 of the International Covenant on Civil and Political Rights; article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; art. 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; art. 39 of the Convention on the Rights of the Child; art. 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907; art. 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977; as well as arts. 68 and 75 of the Statute). It is further developed in the Basic Principles.

252. Situation in the Republic of Kenya, ICC-01/09-154, Victims' request for review of Prosecution's decision to cease active investigation, *op. cit.*, paras. 118 to 139, and para. 181 point b.

253. *Ibid.*, paras 140 to 163, and para. 182.

254. Situation in the Republic of Kenya, ICC-01/09-156, Prosecution's application to dismiss *in limine* the Victims' request for review of Prosecution's decision to cease active investigation, 25 August 2015, paras. 20-33, 35, 49.

255. Situation in the Republic of Kenya, ICC-01/09-159, Decision on the "Victims' Request for review of the Prosecution's decision to cease active investigation".

256. Appeals Chamber, ICC-01/04-556, "Judgment on Victims' participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial C", 19 December 2008, para. 56. Emphasis added.

the Statute provide for judicial oversight of the Prosecutor's compliance with article 54(1).²⁵⁷ Accordingly, the Chamber held that it was not competent to intervene in the Prosecutor's activities carried out within the ambit of article 54(1). The Chamber agreed that the Prosecutor's 'obligation to investigate under article 54(1) continues as long as evidence exists which is relevant to criminal liability – it has no mandated end'. It accepted the Prosecutor's characterization of its suspension of active investigation in the situation as 'temporary', due to the absence of genuine cooperation by the Government, and agreed that the investigation therefore was not closed or terminated.²⁵⁸

Kenya II raised the question of what remedy victims have where the ICC Prosecutor fails to *effectively* investigate and prosecute. The Statute is silent on the issue. In the case of a *lacuna* in the Statute, the Court is required to apply, under article 21(1)(c), general principles of law derived by the Court from 'national laws of legal systems of the world', as well as the law of the State that would normally exercise jurisdiction. The *Kenya II* victims argued that judicial review of a failure to investigate or prosecute is a general principle of law under article 21(1)(c), and consistent with internationally recognised human rights, as required by article 21(3).²⁵⁹ A review of nearly 70 national legal systems across the world revealed the existence of an article 21(1)(c) general principle of law that victims have a right to seek judicial intervention in respect of a prosecutorial failure to investigate or prosecute serious crimes.²⁶⁰

The Chamber declined to resort to the subsidiary sources of law referred to in article 21(1), on the ground that this was only possible when there was a lacuna in the Statute or the RPE. The Chamber held that no such lacuna existed, as article 53 regulates the Pre-Trial Chamber's competence to review the Prosecutor's exercise of her powers with respect to investigation and prosecution.²⁶¹

From the victims' perspective, the Prosecutor's ongoing inaction in Kenya is regrettable. But inaction continues in other spheres. There has been no accountability in Kenya itself for the crimes committed in 2007 and 2008: total impunity reigns.²⁶² Four years have passed since the withdrawal of charges against Kenyatta, and two since Kenya was referred to the ASP for its serial failure to deliver evidence relating to the *Kenyatta* charges. Kenya continues to be in violation of its obligation to ensure access to the evidence against Kenyatta which resulted in that referral.

The ASP has been publicly inactive on the referral to it of Kenya, which was a clear example of non-cooperation in respect of the Prosecutor's investigations. There have also been judicial findings of non-compliance against other States Parties, in particular in relation to the failure to arrest President Al Bashir of Sudan. But so far the only response from the Assembly is to express "concern" and then move on. The ASP has adopted no resolution condemning Kenya's ongoing non-compliance and has scarcely referred to the matter.²⁶³ Partly as a result, States Parties have looked the other way, normalizing relations with Kenya in many areas. As a remedy to enforce compliance by Kenya with its obligations under the Statute, referral to the ASP has been totally ineffective.

257. Situation in the Republic of Kenya, ICC-01/09-159, Decision on the "Victims' Request for review of the Prosecution's decision to cease active investigation", op cit. para. 13.

258. Situation in the Republic of Kenya, ICC-01/09-159, Decision on the "Victims' Request for review of the Prosecution's decision to cease active investigation", op cit., para. 14.

259. Situation in the Republic of Kenya, ICC-01/09-154, Victims' request for review of Prosecution's decision to cease active investigation, op. cit., para. 118.

260. Emma Lindsay, Jovana Crncevic, Bieata Andemariam and Daniel Lewkowicz carried out this review, and provided invaluable assistance to the preparation of the victims' request.

261. Situation in the Republic of Kenya, ICC-01/09-159, Decision on the "Victims' Request for review of the Prosecution's decision to cease active investigation", op cit., paras. 17 and 18.

262. To date, there has been an almost complete failure by the Kenyan police and judiciary to investigate and prosecute crimes committed during the PEV. See, for example, *Human Rights Watch, Turning Pebbles- Evading Accountability for Post-Election Violence in Kenya (2011)*.

263. On 24 November 2016, the ASP "Recall[ed] the non-cooperation procedures adopted by the Assembly in ICC-ASP/10/Res.5, recognizes with concern the negative impact that the non-execution of Court requests continues to have on the ability of the Court to execute its mandate, takes note of the decisions of the Court on non-cooperation findings in relation to Djibouti, Uganda and Kenya, and of the report of the Bureau on non-cooperation,...". Resolution ICC-ASP/15/Res.5, 24 November 2016.

The Kenya experience raised serious questions regarding transparency by the TFV. Does the TFV have a duty to communicate promptly its intention either to provide or not to provide assistance to victims of a situation? As of October 2018, the TFV had provided no assistance to any victim in Kenya. The victims' lawyers and others have pressed the TFV many times since 2011, publicly and privately, to provide a clear and unambiguous answer regarding its intentions for Kenya. It has failed to do so. The Board of the TFV has approved an allocation of funds to carry out project-related activities, including situational assessments in various situation countries, including Kenya.²⁶⁴ But there has not yet been any commitment from the TFV to provide any assistance to victims in Kenya, and any assistance – assuming it takes place at all – will take place more than a decade after the ICC first became involved in Kenya in 2009. For many victims, most obviously those who have died since 2009, it is already too late.

Conclusion

*'Our wounds have not healed'*²⁶⁵

The Kenya experience damaged the Court's reputation and its deterrent effect. The Court has moved on to other situations, adjusted its investigative procedures, and sought to apply lessons learned from the Kenya experience. This is welcome. But for the victims, the ICC process was catastrophic. Hopes were raised and dashed. Hundreds put themselves at considerable risk by attending multiple meetings with their lawyers in Kenya—including the authors of this article—and emerged with next to nothing. They have nowhere else to turn. Domestic efforts on accountability are at a standstill, and promises by Kenyatta of compensation remain unfulfilled.²⁶⁶

The *Kenya II* litigation raised important questions concerning the exercise of prosecutorial discretion. One concerns the criteria which the ICC Prosecutor uses when deciding not to investigate. Given the limited resources with which it operates, the OTP cannot be expected to investigate all situations which merit investigation. Where the Prosecution takes a decision not to actively proceed with an investigation or a prosecution, it is imperative that victims be assured that the Prosecution's reasons not to proceed are in conformity with the Statute and applicable law, just and based on general principles of universal application.

Reasons not to investigate or prosecute must be clearly articulated so that the merits of the decision can, where appropriate, be contested by the victims and scrutinized by the relevant Chamber. Reasons should not be only communicated to victims by well-intentioned but generic OTP press releases expressing regret, and assuring victims that they will never be forgotten. Instead, where the Prosecution decides not to continue an investigation, its staff should engage, face to face, with a representative sample of the victims themselves, and with the wider community in the affected area. Security permitting, this could take place through question-and-answer sessions on local radio and television. Where the Prosecution chooses inaction in the face of state obstruction and interference with witnesses, it is particularly important that its decision is publicly justified, and open to judicial scrutiny. In such cases, the final decision as to whether to investigate or prosecute must always remain with the Prosecutor, but fairness requires that the victims be fully heard.

The experience of Kenyan victims raises serious questions concerning the duty of the TFV to act transparently towards victims. If it is not going to be able to help them, it should say so publicly as soon as it knows this. Finally, the ASP's own procedures for dealing with non-cooperation by States Parties must be strengthened. But in the absence of action by the ASP, robust measures by willing blocs of States Parties, in the form of asset freezes and travel bans against the senior leadership of non-cooperating States Parties, must be considered.

264. TFV, *Report to the Assembly of States Parties on the Projects and the Activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2015 to 30 June 2016* (ICC-ASP/15/1416) (2016).

265. Quote from a/35292/14, a female victim. See ICC-01/09-154-Anx1, p. 13.

266. See [State of the Nation address](#), Nairobi, 26 March 2015.

The ICC Investigation into the Situation of Georgia: lack of victims' involvement and related challenges

by Nino Tsagareishvili²⁶⁷



In January 2016, the Prosecutor of the International Criminal Court (ICC) was authorised to proceed with an investigation into the situation of Georgia. The investigation looks into, inter alia, the alleged war crimes and crimes against humanity committed in the context of 2008 August War between Georgia and Russia.

The Georgia-Russia armed conflict saw attacks against the civilian population, which resulted in murders, forcible transfers of population, persecutions on ethnic grounds, the destruction of property, and pillaging. The conflict resulted in more than 800 deaths and thousands of displaced persons²⁶⁸.

The commencement of an investigation followed a preliminary examination where the Prosecutor gathered information regarding the alleged crimes and concluded that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed in Georgia. The Prosecutor therefore requested permission from the Pre-Trial Chamber for opening the investigation. Following this request, Pre-Trial Chamber at the ICC invited victims to express their views and submit “representations” to the Court on the issue of whether the request to open an investigation was in their interest²⁶⁹.

267. Nino Tsagareishvili is the Chair of the Georgian Coalition for ICC and the Project Coordinator at the Human Rights Center, a Georgian non-governmental organisation.

268. Office of the Prosecutor, [Request for Authorization of an Investigation Pursuant to Article 15, ICC Office of Prosecutor](#), October 13, 2015

269. Situation in Georgia, Pre-Trial Chamber I, [Decision on the Prosecutor's Request for Authorization of an Investigation](#), 27 January 2016.

Victims' Participation under Article 15(3): impact and lessons learned

After the Prosecutor filed her request to ICC Pre-Trial Chamber for the authorization to open an investigation, a notice was published on ICC's website on the same day offering victims to make representations to the Pre-Trial Chamber which were to be channeled through the Victims Participation and Reparations Section (VPRS) of the Registry. The Registry organized the process related to the submission of Article 15 (3) representation forms.

In order to facilitate the victims' participation process under Article 15, the VPRS conducted a mission visit to Georgia in October 2015 where it met victims and their representatives, as well as government officials. The representatives of VPRS explained the process and related procedures to all of the actors. The filling and submission of Article 15 representation forms was largely led by the local civil society organizations, lawyers and community leaders who effectively engaged their beneficiaries in a rather short period of time, considering their pre-existing relationship of trust.

The Pre-Trial Chamber of the ICC received 69 'representations' on behalf of 6,335 victims in relation to the Georgia situation²⁷⁰. Nine civil society organisations coordinated among themselves to elaborate the submissions, among which some already represented victims at regional level.²⁷¹ Community leaders involved in IDP camps also submitted victims' representations. This was the first opportunity where victims of the Georgia situation started to be substantially involved in the ICC process, sharing their personal views of why an investigation would be meaningful for them and what their expectations were. It is noteworthy that out of the 6,335 victim representations received, 99% responded in favor of authorising the Prosecutor to investigate the violence associated with the August 2008 conflict in the Situation in Georgia²⁷². The representation forms were one of the supporting materials which the ICC Pre-Trial Chamber relied on in granting the prosecutor's request.²⁷³

One of the major flaws of this process was a very short timeframe for submitting the representation forms. The victims and their representatives were given only 30 days to submit the forms. The Registry itself acknowledged this problem, stating that "considering the 30-day deadline for submissions, there was insufficient time for the Registry to conduct background assessments or commission mapping reports"²⁷⁴. It therefore encouraged submission of collective representation forms, in order to ensure that as many victims as possible would be able to make representations in the limited timeframe.

In addition to the inability to conduct the relevant background evaluation, a 30- day period is insufficient for reaching out and interacting with a large number of victims and their communities in the Georgia situation in order to explain to them the meaning of this process and their role. Doing that would have contributed positively to these groups by possibly raising their motivation, managing their expectations, and potentially led to an increased number of submitted forms. It was largely due to the active efforts of Georgian civil society and their pre-existing litigation work²⁷⁵ (notably towards the European Court of Human Rights) that facilitated the process and made it possible to submit a relatively good number of representation forms. However, the number of victims into the situation of Georgia is a lot higher, amounting to at least 27,000 Internally Displaced Persons (IDPs) who have been displaced as a result of the 2008 armed conflict. Therefore, allocating more time would have been absolutely necessary in order to better organise victims' involvement and comprehensively reflect their views in the representation forms. It should be noted that the number of representations received on behalf of South Ossetian victims was very low – only 386 South Ossetian and 166 mixed (Georgian/South Ossetian). Here as well pre-existing human rights networks were used as the main source for spreading the information to the potential victims. Considering that the Registry was unable to travel to South Ossetian

270. Situation in Georgia: Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, 4 December 2015.

271. Human Rights Center, Georgian Young Lawyers Association, Article 42 of Constitution, Union 21st Century, Human Rights Priority.

272. *ibid*

273. Situation in Georgia: Decision on the Prosecutor's Request for Authorization of an Investigation, 27 January 2016.

274. *Supra* note 270

275. *ibid*

region²⁷⁶, more time and resources were absolutely necessary for effectively engaging the victims living there in the Article 15 process.

Nevertheless, the victim representation process made a significant contribution to the authorisation of an investigation into the Georgia situation and to expanding its scope. Considerable number of the representations received related to crimes beyond the scope of the Prosecutor's proposed investigation for which the victims were demanding accountability²⁷⁷. The scope of the investigation was subsequently broadened by the Pre-Trial Chamber decision authorising the commencement of investigation and it extended to all crimes within the jurisdiction of the Court, limited only by the temporal and territorial parameters. Considering that the victims' representation forms were one of the supporting materials for Pre-Trial Chamber's decision, it can be concluded that they have contributed to the broadening the scope of the investigation.

Victims' Access to the Court at the investigation Stage

The investigation phase in the Georgia situation can be characterized as notably lacking victims' involvement. The outreach and awareness-raising activities informing victims and affected communities of their rights were critically lacking during the first two years of the investigation, which is problematic for multiple reasons. Victims, who could have been a valuable source of information and/or evidence, with a strong interest to provide it to the relevant organ of the ICC, lacked the information and realistic opportunities for doing so. Victims additionally lacked information about their rights in various ICC proceedings including as witnesses at the investigation stage, and their role during the investigation and subsequent judicial proceedings that could have affected their motivation for cooperation. With the possible exception of a small number of victims who were supposedly discretely contacted by investigators, victims were deprived of realistic opportunities for proactively reaching out to the OTP as the only way for such communication was through internet, an option not accessible for many victims in Georgia and even in cases where it is, information regarding the concrete ways and related modalities was lacking.

Soon after the investigation was announced in 2016, the interest among victims towards the ICC and this investigation was quite high. While working as a project coordinator at the Human Rights Center, local human rights NGO in Tbilisi which provided legal assistance for victims of the 2008 August War, I had personally witnessed the interest of victims who often called or visited the organisation to inquire about the investigation. Victims often asked how they could contact the Court, investigators, etc. Since then, this interest has largely faded away. The majority of victims now express apathy when asked about their expectations towards the Court and the ongoing investigation.

The prospects of serving justice in a case where ten years have passed with no tangible progress for punishing offenders at the national or international level seem reasonably far away. Victims of some of the gravest crimes committed during 2008 August War, particularly the elderly, often say that they might not live to see justice served.

Overall, the investigation period gives the impression that the ICC met the Georgia investigation unprepared, with a stark lack of resources for effectively implementing its functions. While respecting the confidential nature of the investigation process and the inability of the OTP to provide information on their investigative activities and progress, it must be admitted that serious gaps in terms of outreach to victims and affected communities as well as general public persist, almost three years after the investigation started. A general sense of hopelessness regarding this process can be observed.

276. ICC Registry, Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, December 4, 2015.

277. *Ibid*

Towards a Resourced Field Office in Tbilisi

Although the ICC opened a Country Office in Georgia in December 2017, equipped with various functions, including outreach and communication to victims and affected communities, the under staffing of the office raises questions to how much could this office achieve. To date, the office has employed only one full-time staff member - the head of the office -, and another, on a temporary contract. Neither can speak Georgian and cannot therefore communicate with victims and affected communities directly.

The office therefore critically lacks essential resources for reaching out to the large community of victims in Georgia, and for conducting comprehensive public information and outreach activities, as well as preparing the ground for victim participation once a process is triggered by the issuance of an arrest warrant, including conducting relevant mapping and analysis conducive to victims participation at later stages. As of now, the Office does not even have the relevant premises where it could receive the victims and answer their questions as well as accommodate its human and technical resources.

Existing situation raises concerns that the experience and problems that were observed during Article 15 process may be repeated again in relation to future victim participation processes, considering the lack of preparation, with little general understanding of what these processes mean and how victims can be part of it in a short timeframe. Even if victims cannot yet participate at the ICC, they should already be informed, consistently, of how does participation work and when are the possibilities to do so.

Victims' participation at the investigation stage

When victims' rights are discussed, the right to participate at proceedings is often at the center of the discussion, because this right is one of the ICC Statute's innovative features and it recognizes the centrality of victims to the criminal process. Right to participate is guaranteed by the Article 68 (3) of Rome Statute, according to which"

*"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"*²⁷⁸.

According to ICC Appeals Chamber, victims' participation at the ICC takes place only in the context of concrete judicial proceeding – "judicial cause pending before the Chamber"²⁷⁹. Thus, mandate of ICC Victims Participation and Reparations Section (VPRS) to support victim participation is triggered in relation to concrete judicial proceedings, such as a hearing on the confirmation of charges, Article 15(3) communication to the Chamber, trial hearing, etc. In the view of the Appeals Chamber, investigation is not a judicial proceeding, but an inquiry conducted by the Prosecutor into the commission of a crime. Therefore the victims are not accorded formal right to participate at this stage²⁸⁰.

However, the Appeals Chamber refers to instances when the victims may themselves initiate certain judicial proceedings during the stage of investigation, such as addressing the Court to take protective measures for their safety, physical and psychological well-being, dignity and privacy. However, these are the proceedings which are distinguished from the right to participate under article 68 (3) of the Statute in the view of Appeals Chamber²⁸¹.

There are several decisions of the Pre-Trial Chamber in various cases where it held that the victims should be afforded right to participate at the investigation stage including right to present their

278. Article 68 (3), Rome Statute.

279. ICC Appeals Chamber, decision on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December, 2008.

280. *ibid*

281. *ibid*

views and concerns and to file material pertaining to the ongoing investigation²⁸². The Appeals Chamber has repeatedly overruled such decisions, stating that there was ample opportunity for victims and anyone else with relevant information to pass it on to the Prosecutor without first being formally granted “a general right to participate”²⁸³.

Notwithstanding the above decisions, if the issue arises again, it is not excluded that the existing approach of Appeals Chamber to the issue of victims participation at the investigation stage changes, considering that the relevant Appeals Chamber decisions concern only those parties involved in the case in relation to which they were made²⁸⁴, thus the Appeals Chamber is not bound by those decisions if different facts and explanations are provided in a different case.

It is highly important that the victims are given chance to meaningful participation at the investigation stage beyond the instances of concrete judicial proceedings. Substantive involvement of victims at the investigation phase with concerted efforts of its different organs, including the Registry, VPRS, Outreach Section and OTP is essential for the objective and fair process for all parties involved. If victims are not given real opportunity to be involved in the process, if they are not allowed to submit material in a feasible way, as well as receive available information and if their concerns and questions are not sufficiently addressed in case of situation of Georgia, then the results of this investigation may be endangered as it risks losing public support who might not trust the outcome of the process where victims had no say and were not heard.

The ICC and OTP lack understanding that the victim involvement during the situation level can actually be helpful for full, comprehensive and objective investigation. In Georgia's case, during the preliminary examination stage, many victims who could have also been valuable witnesses might not have come forward with the representation forms considering that much was unknown about ICC in Georgia at that time and the possibilities that such a Court could effectively investigate the crimes committed in Georgia were also unknown. The actual investigation where the OTP was authorized to conduct its own investigative activities which it could not do during the preliminary examination stage, started after the completion of preliminary examination stage. Excluding other victims and witnesses from the main stage of investigation would thus contradict the principles of full, comprehensive and objective investigation.

Conclusion and Recommendations

As above analysis shows, the International Criminal Court started investigation into the situation of Georgia rather unprepared that hindered effective involvement of victims in the related processes. The unpreparedness and lack of relevant background analysis from the side of ICC was demonstrated from the initial instances of the victims' participation, specifically Article 15 victims' representations process where the Court largely relied on the pre-existing work of Georgian civil society in order to ensure the submission of representation forms. The situation did not improve during the investigation stage either. At this phase as well, the outreach activities and information regarding the ongoing process, including about the role of victims at the stage of the investigation, was critically lacking and negatively affected victims' motivation and may have hindered cooperation from their side. The ICC Field Office opened quite late, almost two years after the commencement of the investigation and with very restricted resources that could not substantially tackle existing challenges. The lack of victim-centered approach creates risks of losing public support which is vital for the effective realisation of subsequent ICC process, including victims' participation during the later stages of ICC proceedings.

Without proper information on victims' rights, including the right to participation, victims more than even feel disconnected from the Court and the investigation. The ICC should take into account the lessons learned and refine its strategy and policies in order to ensure the real opportunities for victims to be involved in ICC process, including:

282. *Democratic Republic of the Congo* “Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” 17 January 2006 (ICC-01/04-101-tEN-Corr).

283. *Supra* note 279

284. Bridie Mcasey, “Victim Participation at the International Criminal Court and its Impact on Procedural Fairness”, *Australian International Law Journal*, (2011).

- Conduct background assessment and map relevant information before the collection of representation forms under Article 15 of Rome Statute; provide sufficient time and resources for effectively spreading the information about this process, including through various communication channels, such as TV, internet, radio, newspapers; Comprehensively explain victims' role in this process through conducting various outreach missions and other awareness-raising activities; Provide sufficient time and resources for filling the representation forms by maximum number of victims.
- Ensure victims' involvement during the investigation stage, including, through providing information regarding their role and rights in this process as well as their rights during the subsequent ICC proceedings which can be conducive to raise their interest and motivation to cooperate.
- Enhance visibility of investigation; create feasible and realistic ways for the exchange of information with the victims during the stage of investigation, create ways for victims to provide their material/information, share feedback as well as receive information pertaining to their interest.
- Ensure establishing relevant local representation from the beginning of investigation, equipped with necessary human and technical resources for promoting effective victim involvement, as well as for conducting comprehensive outreach and public information activities and preparing ground for effective realization of victims' rights during subsequent ICC proceedings. The local representation should employ staff with specific expertise pertaining to different organs of ICC in order to provide relevant input for the implementation of different rights of victims; map relevant data and conduct assessment regarding the current state of victims, including information necessary for ensuring effective victim participation at subsequent ICC proceedings.



Retributive and restorative justice for victims: considerations on the *Lubanga* proceedings before the ICC

by Paolina Massidda²⁸⁵

Introduction

One of the main innovations of the Rome Statute has been to change the role of victims from witnesses – constituting the majority of the incriminatory or exculpatory evidence presented in the proceedings – to one of autonomous participants.²⁸⁶ They do not anymore support the thesis developed by one of the parties in the proceedings, namely the Prosecution or the Defence, as traditionally understood, but they present “*their views and concerns*” in an independent manner, benefiting from rights and obligations deriving from their status of participants in the proceedings.

Victims mention a multitude of reasons for claiming justice. The right to the truth is one of the components of the right to justice. In this regard, the main interest of victims in the establishment of the facts and the identification of the perpetrators is in itself the essence of the right to the truth generally recognised for the benefit of victims of serious violations of human rights. In the process of implementing this right through criminal proceedings, victims have a key interest in the outcome of the proceedings which ought to bring clarity in relation to what really happened, and fill the gaps which might persist between the procedural findings and the truth itself.

Victims wish to contribute to the search and the establishment of the truth. This process entails the speaking out, the sharing of events happened to them, the recognition of the harms suffered from, as well as of the crimes which generated said harms.

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286. D. Donat-Cattin, The Rights of Victims in ICC Proceedings, in *Collection of Essays on the Rome Statute of the International Criminal Court* (F. Lattanzi & W. Schabas eds.) 1999; D. Donat-Cattin, Article 68 - Protection of victims and witnesses and their participation in the proceedings, in *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, Second Edition (O. Triffterer), 2008.

The right to reparations is also one of the essential components of the right to justice. Indeed, the process of participation has a cathartic and healthy virtue at an individual level, as well as a restorative virtue at a family, social and community level. If the choice of victims to participate in the proceedings is first and foremost an individual step, which allows each of them, mostly through their counsel, to convey part of their experience and knowledge of the events, said choice also sometimes become a collective step getting together communities, neighbours and families.

It is also a question for victims to advance the facts so that reconciliation can be achieved through the punishment of the persons responsible for the crimes committed, that justice is done and hoping that their courage will set an example to prevent the commission of crimes *"of concerns to the international community"*.²⁸⁷

The first proceedings before the ICC (the Lubanga proceedings) shows that justice matters for victims and that they expect a careful, independent, fair, transparent, effective and watchful justice. A justice which is protective and restorative, able to establish the truth about the crimes that have been committed.

The Lubanga proceedings and its implications for victims

On 14 March 2012 Trial Chamber I delivered its judgment in the case of Mr. Thomas Lubanga Dyilo.²⁸⁸ Lubanga was found guilty of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities in the Ituri region in the Democratic Republic of the Congo (DRC) between 2002 and 2003. On 10 July 2012, Mr. Lubanga was sentenced to 14 years of imprisonment.²⁸⁹

The Trial Judgment marked the first time that a *militia* leader is held responsible for crimes committed within the DRC. The case is particularly significant for the development of jurisprudence concerning child soldiers. It builds upon relevant decisions of other tribunals and sets a very high standard for the prohibition of the use of child soldiers. It applies even if, for example, their families support their actions due to the circumstances of the conflict. A high threshold for accountability is also established in relation to children who played an 'indirect role' (who were forced to carry out daily activities which might not necessarily require the use of weapons or combat). Indeed, in examining the level of danger the child was exposed to, the judges "[f]ound that both the 'child's support and this level of consequential risk' meant that a child could be actively involved in hostilities even if he or she was absent from the immediate scene of the conflict".²⁹⁰

While the judgment marked a significant step against the punishment of crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities, it is also criticised for its overly narrow focus. In particular, sexual and gender-based violence (SGBV) crimes were not included in the charges brought against Mr. Lubanga despite the notorious fact said crimes were committed as part of the recruitment practice, as shown during the trial by numerous witnesses who testified that such crimes were in fact committed. This is at best inconsistent with a growing appreciation that crimes and human rights violations specific to

287. Preamble of the Rome Statute.

288. *Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012.

289. *Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, Trial Chamber I, 10 July 2012.

290. *Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, op. cit., paras. 1355 – 1356.

women are not just a casualty of conflicts, but a deliberate tool thereof.

The exclusion of SGBV crimes has caused disappointment among victims who considered that the presentation of the Prosecution case did not fully take into account what happened to them and the extent of their victimisation. In turn, this choice by the Prosecution not to charge any gender-based crimes has limited the possibility for victims to ask for reparations of the harms suffered in contrast with the increasing international recognition that justice demands the strengthened implementation of gender-sensitive reparations schemes.

On 7 August 2012, Trial Chamber I issued the decision establishing principles and procedures to be applied to reparations.²⁹¹ The judges indicated two goals of reparations, namely to oblige perpetrators to “*repair the harm*” caused, and “*to ensure that offenders account for their acts*”.²⁹² The Chamber considered it unnecessary to remain seized throughout the reparations proceedings and refrained from issuing a reparation order against Mr. Lubanga in light of his indigence. It found, instead, that reparations should be awarded “through” the Trust Fund for Victims and tasked the Fund with the dual mandate of “*determine the appropriate forms of reparations and to implement them*”²⁹³.

This approach caused disappointment among victims and triggered several appeals. In particular, victims questioned the fact that Mr. Lubanga was not considered liable for reparations, that the Chamber only adopted a collective approach to reparations and that judicial functions should not be delegated to the Trust Fund.

On 3 March 2015, the Appeals Chamber reversed the Trial Chamber’s decision issuing an Amended Order for Reparations.²⁹⁴ The Appeals Chamber’s most important conceptual clarification is the establishment of the principle of accountability of the convicted person towards victims which complements the punitive dimensions of the ICC.

The Appeals Chamber recognized a “*principle of liability to remedy harm*”, which flows “*from the individual criminal responsibility*” of the perpetrator.²⁹⁵ It specified that the accountability of the offender must be “expressed” through an order “against” the convicted person and that the indigence of the convicted person is not an obstacle to the imposition of liability for reparations. This finding is a clear victory for victims who sought express judicial acknowledgment of accountability, independently of the convicted person’s indigence.

The Appeals Chamber stressed the need for legal certainty and held that a judicial reparation order must contain at least five “*essential elements*”.²⁹⁶ The Appeals Chamber’s decision makes it clear that the establishment of accountability towards victims through reparation proceedings may be

291. *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012.

292. *Ibid*, para. 179.

293. *Ibid*, para. 266.

294. *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with Amended Order for reparations (Annex A), ICC-01/04-01/06-3129, Appeals Chamber, 3 March 2015 (the “Amended Order for reparations” and the “Appeals Judgment”).

295. *Ibid*, paras. 99 – 101.

296. A reparation order must 1) be directed against the convicted person; 2) establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97(1) and 98 of the Rules of Procedure and Evidence; 4) define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted. See the Amended Order for Reparations, Annex A to the Appeals Judgment, para. 1.

an asset *per se*. It sends a clear message that the Court should not rush over reparation decisions, but listen to victims and pay greater attention to their harm. It also increases the modalities of participatory justice and options of consultation of victims in designing the reparations scheme which fits their needs.

How the ICC would be able to handle this new type of litigation is unclear. Reparation proceedings may require expertise and skills that differ partly from criminal adjudication of the facts. Moreover, adjudication on reparations may entail longer judicial proceedings, triggering, therefore, the question of the actual benefit for victims. Indeed, lengthy reparation proceedings may have negative effects because of continuous traumatization or re-traumatization, increasing victims' fatigue and causing new grievances.

Moreover, there is a more fundamental question of whether and how the perpetrator-centered reparation regime at the ICC can redress damages in situation countries, without creating further harm and societal division. Some authors argue that ICC proceedings may create new dividing lines or hierarchies among victims, through their selectivity, abstraction, and processes of inclusion and exclusion.²⁹⁷ These tensions are even more apparent in proceedings where patterns of victimization reflected in crimes and charges may privilege harm of one group and side-line victimization of others.

The Lubanga case already poses this issue since it involved predominantly perpetration and victimization within one group, the Hema population. The Amended Order for Reparations refers at this possible tension acknowledging that selectivity "*could give rise to a risk of resentment on the part of other victims and re-stigmatization of former child soldiers within their communities*".²⁹⁸

However, in prioritizing accountability over other societal concerns, such as well-being, security, reconciliation or peace, the Amended Order has not solved the dilemma connected to the objectives of reparations. Indeed, relief of suffering, deterrence of future violations, societal reintegration or reconciliation are either not included in the Order or considered as secondary objectives that should be pursued to the extent possible.²⁹⁹

Yet reparations are about more than just responding to victims' basic needs. Reparations must respond to the real impact of violations in victims' lives and at the same time be received as sincere efforts on the part of the larger society to acknowledge what happened and to provide some real measure of justice to those harmed. Moreover, reparations in restoring the dignity of the victims can help to create the conditions necessary for reconciliation. The community dialogue provides an opportunity for victims and their families to discuss the underlying causes of the conflict and to address community understandings and perception that can prevent or fuel conflict. This process will help to rebuild trust within and between communities, and foster reconciliation.

In this regard, the Appeals Chamber confirmed the possibility of "collective reparations", directed to communities, within the limit of a sufficient link between the harm caused to the members of that community and the crimes committed by the convicted person. It recognized the benefits of such a "community-based approach" for prevention and reconciliation.

On 21 October 2016, Trial Chamber II - to which the matter was referred to for implementing the Amended Reparations Order – authorised the Office of Public Counsel for Victims (the "OPCV") to

297. S. Kendall, S. Nouwen, Representational practices at the International Criminal Court: the gap between juridified and abstract victimhood, in *Law and Contemporary Problems*, No. 3 and 4, 2013, 235 – 262.

298. The Amended Order for Reparations, Annex A to the Appeals Judgment, footnote 44 p. 18.

299. *Ibid*, paras. 71 and 72.

proceed with the process of locating and identifying potentially eligible victims, and to submit their dossiers to the Registry on a rolling basis until 31 March 2017.³⁰⁰ The purpose of the collection of new victims' dossiers was to provide the Chamber with a sample of the potentially eligible victims to inform its decision as to the amount of Mr Lubanga's liability for reparations.

Between November 2016 and March 2017, the OPCV undertook a series of mission in Ituri meeting with potential beneficiaries from 73 locations.³⁰¹ With the support of a Congolese Field Counsel based in DRC and several local focal points based in the different areas where potential beneficiaries resided, the OPCV put in place a methodology allowing to efficiently collect new dossiers in a short period of time. Individual interviews with potential beneficiaries took place in secure locations previously identified with the assistance of an interpreter. The findings of the Trial Chamber in its Judgement in relation to the locations of recruitment camps, the battles and names of commanders provided the basis for the assessment of the reliability of the accounts, as well as to determine the *prima facie* eligibility for reparations. As a result, the OPCV collected 394 dossiers of potential beneficiaries for reparations.

Consequently, on 15 December 2017, Trial Chambers II found that 425³⁰² of the victims in the sample qualify for reparations awarded in the case and issued a decision setting the amount of Mr. Lubanga's liability for reparations at USD 10,000,000.³⁰³ The Chamber recalled that the scope of a convicted person's liability is proportionate to the harm caused and, among other things, his or her participation in the commission of the crimes for which he or she has been found guilty, in the specific circumstances of the case.³⁰⁴

Importantly, the Chamber recognised that evidence established the existence of hundreds or even thousands of additional victims affected by Mr. Lubanga's crimes. It indicated that it will be for the Trust Fund to consider whether the persons who were not in a position to submit a dossier on time qualify for the collective award at the implementation stage of reparations.³⁰⁵

The implementation of reparations awards has still not started due to the very volatile security situation and the most recent Ebola outbreak in the region.

Conclusion

Prosecution of crimes and redress for victims lie at the heart of the mandate of the ICC.

Retributive justice, as the fundamental concept inherent to all criminal prosecutions, was accepted as a crucial objective for the ICC: to uphold due process rights and the rule of law. Essentially, it is an expression of outrage by the international community against the intolerable and heinous acts of individuals who have "*violated societal norms*" and who, as a result, are deemed deserving of punishment in the form of "*punitive measures [...] assigned through unilateral processes*".³⁰⁶

300. The "Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016", ICC-01/04-01/06-3252-tENG, Trial Chamber II, 21 October 2016.

301. For an explanation of the activities undertaken, see the OPCV's submission "Informations relatives aux enjeux ainsi qu'aux préoccupations et souhaits des bénéficiaires potentiels dans la procédure en réparations", ICC-01/04-01/06-3293-Red, 25 April 2017.

302. This number refers to the individuals identified by the OPCV, as well as by the other two teams of legal representatives.

303. The "Corrected version of the Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", ICC-01/04-01/06-3379-Red-Corr-tENG, Trial Chamber II, 21 December 2017, paras. 279 and 281.

304. Ibid, paras. 268-278.

305. Ibid, para. 280.

306. D.M. Gromet and J.M. Darley, "Retributive and Restorative Justice: Importance of Crime Severity and Shared Identity in People's Justice Responses", in *Australian Journal of Psychology* 2009-61, p. 50.

At the international level, retributive justice also plays a fundamental role in educating the public about what happened, and, in so doing, helps propagate important concepts for international harmony such as the equal worth of all persons and that *"no one is above universal human rights criteria and that blatant disregard for those rights will not be condoned."*³⁰⁷

However, a system that principally rests on the prosecution of perpetrators has its limitations. Some authors argue that international prosecutions alone cannot properly address crimes entailing gross human rights violations because "[T]he strict victim/perpetrator dichotomy does not account for the variety of ways in which ordinary individuals come to participate in violent actions".³⁰⁸

Moreover, the ICC is located far from the countries where the atrocities were committed. This distance contributes to the isolation of victims from the prosecutions. A further limitation to a system built on retributive justice alone is the fact that international criminal law focuses on mainly prosecuting high-ranking officials. While it is not an explicit legal requirement that only the most senior leaders are prosecuted, the reality is that systems in place, with limited resources, cannot afford prosecutions for all possible suspects. The selectivity of perpetrators (and crimes) is a serious limitation to the justice that international criminal law can deliver to victims and to its healing capacity. Restorative justice, therefore, is important in making the specific circumstances and needs of victims more integral to the international criminal justice process as it encourages the shift towards incorporating the victims' interests within the criminal proceedings.³⁰⁹

While neither of the justice outcomes sought suffices when pursued separately, combined they can come closer to actually delivering on the promise of justice. Based on experience and research to date, it may be argued that elements of both restorative and retributive justice need to be present for international criminal law to deliver justice. International criminal justice deals with the most inheous crimes, which undeniably trigger deep international moral outrage. Moreover, international crimes often occur in intra-state conflict situations where it is a matter of neighbour against neighbour and community against community. These are circumstances where there is a close relationship between victims and perpetrators, so reconciliation becomes also an important objective to achieve.

However, a state in transition is extremely fragile and volatile. More often than not, post-conflict societies must deal with dysfunctional institutions, limited resources and traumatised populations in an environment marked by huge failures in the judicial sector and a lack of public confidence in the government's ability to deliver on human rights, peace and security.

Justice becomes quite a relative concept in such a context. This means that, in societies suffering from mass atrocities on a scale incomprehensible to those who have not lived through them, it is crucial that the response is timely and takes a broad view of justice, incorporating both retributive and restorative elements.

307. K. Andrieu, "Transitional Justice: A New Discipline in Human Rights", *Online Encyclopedia of Mass Violence* 2010, p. 5.

308. Ibid, p. 7.

309. T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court*, Oxford, OUP, 2010, 4; and A. H. Guhr, "Victim Participation During the Pre-Trial Stage at the International Criminal Court", in *International Criminal Law Review* 109, 110 - 2008, 8.

Victims' participation in reparations proceedings in the Bemba case

by Marie-Edith Douzima³¹⁰, Evelyne Ombeni³¹¹ and Lydia El Halw³¹²

1. The central role of victims in reparations proceedings

In accordance with the texts and jurisprudence of the International Criminal Court ("ICC" or "Court"), victims are major actors in the reparations phase. The Court must take into account their needs and the reality on the ground. It is essential to conduct awareness campaigns and establish a dialogue between victims and the Court through their Counsel to achieve this. Their Counsel is, after all, the link between victims and the Court.³¹³

Consulting with victims is a major challenge. The Chamber cannot pass judgment on reparations, without having at least heard and considered victims' expectations on this issue.³¹⁴

2. Victims' consultations

In the Bemba case, consulting victims on the reparations process was seen as a way to acknowledge their suffering; and there were so many of them expecting reparations.

All the victims consulted in Bangui and further inland in the Central African Republic (CAR) were of the opinion that the ICC Trial Chamber's guilty verdict and sentencing of Jean-Pierre Bemba were not enough. They also criticised a sentence which in their eyes was not high enough in relation to a large number of victims, the gravity of the crimes and the extent of the harm they had suffered.³¹⁵ Reparations were seen as recognition of their suffering which they hoped would be in proportion to the harm, losses, and damage as determined by the Court.³¹⁶

In order to understand victims' expectations on reparations more precisely, the Legal Representative had decided to create different individual, collective and restricted groups. This

310. Married, mother of a daughter, Marie-Edith Douzima is a lawyer at the Central African Bar since 1992 and registered on the list of ICC counsel in 2007. Appointed Legal Representative of Victims in the Bemba case in 2010 she was the resource person in CAR in the context of the Registry's campaign for the inclusion of women lawyers on the ICC's list of counsel. Activist of Human Rights, she was President of the Association of Women Lawyers of Central Africa from 2001 to 2008, Coordinator of the Network of Central African NGOs of Human Rights, member of Lawyers Without Borders in France and CAR, member of the Network of Advocates of Central Africa Human Rights and Member of the Central African Coalition for the International Criminal Court which it created in 2006.

311. Evelyne Ombeni, lawyer at the Kinshasa Bar since 2013. Lawyer specialised in international crimes, including the recruitment of child soldiers and sexual violence. Since 2010, she worked at the ICC as a case manager in the team of Legal Representatives of Victims in the Lubanga case and the Benda & Jerbo case. Currently works as a Legal Assistant in the team of Legal Representation of Victims in cases The Prosecutor v. Jean-Pierre Bemba Gombo and The Prosecutor v. Thomas Lubanga Dyilo.

312. International legal expert specialised in war crimes, international crimes and sexual violence perpetrated during armed conflicts, Lydia El Halw works as a case manager on the team of the Legal Representative of Victims in the Bemba case at the ICC. PhD student at Panthéon-Assas University, her thesis focuses on sexual violence against men during armed conflict.

313. ICC Statute, Articles 68(3) and 75; Rules of procedure and evidence, Rules 89 to 93 and 97, Reparations order para 31.

314. ICC Statute, Article 75(3): "Before making an order [on reparations], the Court may request, and take into consideration, the observations [...] of the victims [...]".

315. In its decision on sentencing, the ICC Trial Chamber recognised that the damage to the victims and their community was of a serious and lasting nature. See para. 40, 21 June 2016.

316. Order for Reparations, para 45, 3 March 2015.

methodology helped to identify some trends in victims' concerns and to understand their states of mind better.

All the meetings showed that the impact of the crimes on victims' daily lives is indisputable: their health and way of life have been completely turned upside down, and the consequences are ongoing, although 15 years have passed since the events. The reparations proceedings had allowed many victims to regain hope in a very slow judicial process that had left them weary, and for some, lacking in all confidence.

The numerous statements submitted by the Legal Representative, the Office of the Public Counsel for Victims, the Trust Fund for Victims, experts and other organisations give plenty of proof that the victims were consulted repeatedly and that their needs were expressed and explained. Finally, they also contributed substantially to the experts' report on reparations submitted to the Chamber. The reparations' proceedings in the case reached the stage where the Chamber had already received all relevant submissions. All that remained was to render a judgment on the principles applicable to reparations and the extent of their victimisation.

3. The specific case of rape victims

In its first order nominating experts in June 2017, the Chamber had proposed to the parties and the experts to determine prioritisation criteria, taking sexual violence and children into account³¹⁷.

Sexual violence was used as a weapon of war in CAR during the 2002-2003 conflict.³¹⁸ An overwhelming majority of the thousands of rape victims in the case are extremely vulnerable. Many are still stigmatized, rejected by their families and by their community. They are still suffering from physical problems, such as vaginal and anal ailments, abdominal pains, skin disorders, pelvic pain, high blood pressure, gastric disorders, miscarriages, and sterility. Many have contracted HIV/AIDS or other sexually transmitted diseases. Very few received adequate treatment because of the notable lack of resources and the fear of being rejected by their communities³¹⁹. They have also been harmed psychologically, mentally and socially. Their suffering includes post-traumatic stress disorder, depression, humiliation, anxiety, guilt, and nightmares. Some had children as a result of rape and remain heavily stigmatised. It is important to also consider that rape is particularly a taboo subject in CAR. Rape victims are considered defiled and unworthy by their community. This taboo is particularly strong for male rape. Few dare to talk about it in this very patriarchal society.³²⁰

Consultations and dialogue tailored to victims' groups (by crime, gender and age) have allowed the long-ostracised rape victims to come forward and talk about their suffering and needs.

317. ICC-01/05-01/08-3500-Red: 'e) the criteria for determining which victims are given priority, notably sexual violence, child victims and other criteria'.

318. Dr. Tabo testified that soldiers from the Mouvement for the Liberation of Congo (MLC) used sexual violence as a weapon of war. As the Trial Chamber mentioned in its Judgment, the MLC troops were not well-paid and decided on their own 'recompense', mainly through rape. Moreover, MLC soldiers committed acts of rape to punish civilians whom they suspected of being rebels or rebel sympathizers. They targeted their victims including local leaders, without regard to age, sex, or social status. All rapes were associated to murders and pillaging or were committed during such crimes. They were committed in the presence of, or in the immediate vicinity of other soldiers and/or civilians, especially in the presence of children, parents, brothers and sisters, other family members and/or neighbors. They were also accompanied by physical and verbal aggression as well as threats towards the victims and their families ICC-01/05-01/08-3399, page 27.

319. The majority of infected sexual victims are in a very worrying condition. Many are in the final stages of their illness. They say they will die from lack of food and care.

320. Male victims of sexual violence suffer greatly in silence in CAR. Anal rape, especially when committed against men, has particularly negative connotations and causes an extreme sense of humiliation for the victims, causing many suicides.

Timidly at first, the male victims also began to appear, and to confide in their Legal Representative in complete confidentiality about their rape or HIV status, also hoping to receive reparations that would give them a better life.

4. Challenges in victims' participation in reparations proceedings in the light of the Bemba case

After its 16-year existence, the Court still faces significant challenges, as revealed tellingly by the latest twists in the Bemba case.

The complex Bemba case proceedings led Court officials to consider new problems, most notably the question of how to maintain the link between the Court and its participating victims more than 16 years after the events and 10 years after the start of the proceedings? What strategy should they adopt with respect to participating victims in the event that the accused is acquitted? How should they manage victims' expectations while offering hope of redress through international justice? Can reparations be considered when the accused is acquitted on appeal without, for all that, calling into question the crimes committed and victims' suffering?

5. The challenge of sustaining dialogue between the ICC and victims in lengthy proceedings as in the Bemba case

The Bemba case and its surprising outcome highlighted the difficulty of maintaining regular contact between Court officials and victims. The wide geographic dispersal of the victims, more than 16 years after the events and almost 10 years after the start of the proceedings at the ICC is hardly surprising. However, this data should be taken into consideration, especially in view of skepticism and distrust the Court sparked after acquitting Mr. Bemba on appeal³²¹. Many of the victims are now in hard-to-reach areas because of the country's precarious security situation, while others are in refugee camps, or living as exiles in other countries. Thus, it turns into a Herculean task to inform, explain to and engage with all the nearly 6000 victims about the acquittal verdict and the possible assistance of the Trust Fund for victims.

To counter rumors and other false news, it is more important than ever to maintain throughout the proceedings - and even after the case - a dialogue between victims and various Court officials, because any negligence in this matter can have a major negative impact on how communities perceive international justice and the ICC in particular.

In this vein and in the light of the Bemba case, it appears that such communication and outreach initiatives must be carried out also by the Legal Representative with the support of the Court. Victims should be kept sufficiently informed of the latest developments in the proceedings. Such communication also faces the major challenge of managing the expectations of victims while maintaining their hope for restorative international justice.

All hope in victims' communities is brought to the ICC in the absence of a sufficiently independent and impartial national justice system³²². Frustration is always part of any judicial process. Expectations and disappointments differ according to the circumstances of each case. The

321. See "Joint submissions of the victims' legal representatives on the consequences of the judgment of the Appeals Chamber of 8 June 2018 on the reparations process", 12 July 2018, para. 30-33.

322. *Supra*, para. 13

circumstances of the Bemba case in no way suggested such a turnaround or the judicial vacuum (which will be discussed below) in which the victims and the Court found themselves³²³. Thus, this unexpected outcome was difficult to understand for the victims, despite the sustained efforts of their Counsel to keep them informed³²⁴.

Although the victims had been informed by their Counsel of the long and fraught journey ahead³²⁵, we cannot ignore the impact that such an acquittal verdict may have on victims. They were involved in the proceedings for more than 10 years and were repeatedly approached about reparations. Their needs were analysed and appreciated by experts and evaluated by the Chamber³²⁶. The context of the Bemba case makes it particularly difficult for the victims to understand the situation and to accept it. It is rendered all the more difficult because Mr. Bemba and others were successfully convicted by another Chamber of the Court for tampering with the evidence and the witnesses in the main case, in order to obscure Mr. Bemba's guilt and evade conviction³²⁷.

Thus, it remains a challenge to this day for the various Court officials to set up effective communication strategies to inform victims that the accused's acquittal should not be perceived as a new injustice.

6. The Bemba case or the challenge to offer rehabilitation to victims in the absence of a guilty verdict

The Assembly of States Parties to the Rome Statute argued in 2009 that "to provide victims with the opportunity to formulate their views and concerns, to enable them to participate in the justice process and to ensure that their sufferings are taken into account, gives hope that they will trust the justice process and that they will consider it as relevant to their daily existence and not as distant, technical and of no interest. It is also hoped that their participation contributes to the process of Court justice."³²⁸

In the Bemba case, victims expressed to Counsel their sense of having been "betrayed", "stabbed in the back", and abandoned by the international justice system that promised them so much and in which they had placed so much hope.³²⁹ As stated above, the proceedings conducted by the Court create expectations among victims who feel that their requests will be taken into account, in one way, or another.³³⁰

323. Ibid, para. 36.

324. Ibid, para. 28. See also, FIDH Press Release, "[Bemba Case: Heavily criticized, the ICC must maintain victims' legal representation as the establishment of assistance programs for the victims is awaited](#)", 1 October 2018

325. *Supra* note 304, para. 20.

326. *Supra*, para. 57.

327. Office of the Prosecutor, Prosecution Detailed Notice of Additional Sentencing Submissions, 2 July 2018.

328. Assembly of States Parties, Report of the Court report on the strategy in relation to victims, 10 November 2009, para. 44.

329. Ibid, para. 30.

330. REDRESS, [Moving Reparation forward at the ICC: Recommendations](#), November 2016, p. 11: "Victims can file applications for reparation at any point in the proceedings and such applications are not contingent on a conviction of the accused." Past cases suggest that some victims will apply to participate in the proceedings as soon as an accused is transferred to the Court. As part of their application to participate, many also submit a request for reparation at the same time. The Court initially developed a standard form application form for victims seeking to participate in proceedings. Part of the form also included a section on requests for reparation. This not only encouraged victims to request reparation, it also created expectations that those requests would be considered in one way or another. "Experiences in all four cases that reached the repair stage to date suggest that a filled-in form is insufficient for a Chamber to progress requests for reparation - more detail is required".

Moreover, victims are not actors able to intervene in the selection of the situations and cases to be investigated and prosecuted, and even less so in the Prosecutor's strategic selection of the mode of responsibility³³¹. From that point onwards, victims relive a sense of great injustice through the errors of one party or another. These mistakes do not erase the crimes. On the contrary, they remain, along with their even greater consequences³³², which neither judges nor the parties concerned dispute. All of the above points to a question that the Court will have to answer sooner or later: how can the Court ignore these victims after more than 10 years of proceedings in which it acknowledged their existence and their suffering? And so, a new way appears, never encountered before that could yet represent the future of the law on the rights of victims to restorative justice and reparations: dissociation between the criminal responsibility of the accused and the reparations granted to victims.

This paradigm shift³³³ places the survivors of an international crime at the heart of judicial proceedings and would result in the adoption of an order for reparations that would no longer be against the accused but in favor of the victims. This idea, proposed and debated by Victims Legal Representatives in the Bemba case, was unfortunately not upheld by the Court.³³⁴

This missed historical landmark is all the more damaging because, unlike other cases, the victims of this case faced a Chamber that had already made a lot of progress on part of the reparation proceedings.³³⁵ During consultations with victims, they had highlighted their frustrations and reiterated their immediate needs for assistance to restore their lives, turned upside down by the crimes.³³⁶

The Court also has the duty to preserve the dignity of every victim who contacted it, in accordance with Article 68 of the Rome Statute, a responsibility which should not cease because of an

331. G. BITTI and G. GONZALES RIVAS, "The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court", in *Redressing Injustices through Mass Claims Processes, Innovative Responses to Unique Challenges*, The International Bureau of the Permanent Court of Arbitration, Oxford University Press, 2006, p. 313

332. *Supra* note 304, para. 35.

333. While this paradigm shift may at first seem original, it is nonetheless grounded, in preparatory work of the Rome Statute, the Praetorian edict, and the doctrine developed similar theories to enable victims to receive reparations regardless of the guilt of an individual: See "Joint Submissions by the Legal Representatives of Victims on the Consequences of the Appeals Chamber's Judgment of 8 June 2018", ICC-01 / 05-01 / 08-3647, 6 July 2018, para. 45; Such an approach had already been glimpsed during previous cases by Judge Eboe-Osuji in the Ruto and Sang case, who stated that in certain circumstances, the ending of legal proceedings should not prevent victims' rights to obtain reparations as soon as possible. See interpretation of the "Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) public and annexes 1 and 2" by Judge Eboe-Osuji, "Decision on Defence Applications for Judgments of Acquittal" (Trial Chamber (V)A), no. ICC-01/09-01/11-2027-Red-Corr, April 5, 2016, p. 136, paras. 199 to 202 (Reasons of Judge Eboe-Osuji), specifically p. 66, para. 9; See G. BITTI, *Jurisprudence of the International Criminal Court 2016*, Fundamental rights, n° 16, January 2018 - December 2018, pp. 19-20: «On the other hand, Article 75-1 of the Statute states that the 'Court establishes the principles that apply to forms of reparation, such as restitution, compensation or restoration, to grant to the victims or their dependents'. The Court may also determine the extent of damage, loss or injury to victims or their dependents. It may be pointed out that, contrary to paragraph 2, Article 75, paragraph 1, of the Statute makes no reference to the convicted or to the outcome of criminal proceedings. Thus, it is possible to imagine a civil proceeding before the Trial Chamber at the end of a criminal case, even after an acquittal: however, the Court would not be able to pronounce a civil conviction at the end of this civil case against a person not convicted by the criminal court. Nevertheless, it could establish the harm suffered by the victims and the principles applicable to reparations in their favor. Such a decision would probably not be without interest or value in victims' eyes: it would also doubtless offer the possibility for victims to turn to the Trust Fund for victims or to their national authorities to get tangible reparations on the basis of the judgment made by the Trial Chamber. It is hoped that the debate on this important issue will continue. The text of this article is available on the website of the [Journal of the Research Center for Human Rights and Humanitarian Law](#).

334. The judges recognized in their 'Final Decision on the reparations proceedings': "... however, the Court was created to fulfill a restorative as well punitive function, and the Chamber considers that it is within its power to make a final decision on the reparation proceedings, since it conducted all the trial and reparations proceedings in this case.", par.4, ICC-01/05-01/08-3653.

335. "Joint Submissions of the Legal Representatives of the victims on the consequences of the judgment of the Appeals Chamber of 8 June 2018 on the reparation proceedings", ICC-01/05-01/08-3647, July 6, 2018, para. 47.

336. *Ibid*, para. 2. See also FIDH report, "All I want is reparation". *Views of victims of sexual violence about reparation in the Bemba case before the International Criminal Court*, November 2017.

acquittal.³³⁷ Neither should it be questioned that the whole Court, and primarily the Chambers, have the duty to act in such a fashion as to avoid retraumatising victims by involving them in Court proceedings.³³⁸ The challenge then lies in the balance to be found between a humanist approach to international justice that is in contact with very vulnerable populations, and the realities of any contradictory judicial process.

7. The assistance mandate of the Trust Fund for Victims

On 13 June 2018, after the acquittal of Jean-Pierre Bemba, the Board of Directors of the Trust Fund for Victims decided to accelerate an assistance programme in CAR to bring physical and psychological redress to the victims and their families with material support.³³⁹ This decision was seen by all as a relief. The success of such assistance as recognised by Chamber III “will largely depend on the Trust Fund’s ability to obtain, inter alia, up-to-date data on the victims” and the cooperation of all stakeholders “subject to their agreement.”³⁴⁰

Cooperation with the Victims Legal Representative who is most familiar with the vast majority of victims is therefore essential. Only through such close cooperation will it be possible to identify and establish useful contact with the victims concerned, collect information on their assistance needs, as well as their consent to work with the Trust Fund. It is this unique relationship with the victims, but also the current state of the Trust Fund’s resources and its lack of permanent presence in CAR to date, which makes it imperative to involve the Victims Legal Representative and her team in defining and implementing victims’ assistance programs.

Conclusion

Today it seems essential to define assistance measures, or even reparation measures as requested by the Victims Legal Representative in the Bemba case, earlier in the proceedings. This would avoid any retraumatisation, and a waste of precious time for the victims of the most heinous crimes who need, for the most part, urgent care. These measures are even more important to counteract the effects of acquittals on victims, who are then left without recourse, justice or reparation. Such a paradigm shift would allow international criminal justice to respond to many of the problems encountered during proceedings and take better account of victims’ suffering. International justice could only grow in stature as a result.

337. Article 68 of the Rome Statute and related case law, notably the “Decision on the participation of victims” (Trial Chamber I), No. ICC-01/04-01/06-1119-tFRA, 18 January 2018, para. 137.

338. “Joint Submissions of the Legal Representatives of Victims on the Consequences of the Appeals Chamber’s Judgment of 8 June 2018 on the Reparations Proceedings”, ICC-01/05-01/08-3647, 6 July 2018, para. 63.

339. Trust Fund for Victims, Press Release: «[Following Mr Bemba’s acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance program in Central African Republic](#)», 13 June 2018.

340. Final decision on the reparations proceedings, ICC-01/05-01/08-3653, 3 August 2018.

Valuing victim participation: why we need better systems to evaluate victims' participation at the ICC

by Megan Hirst³⁴¹

Introduction

Earlier this year I was invited to speak at a Victims' Rights Working Group (VRWG) event titled "*Victim Participation at the International Criminal Court: It Still Makes Sense*". It's now nearly ten years since I started working on victim participation issues at the ICC, and despite countless frustrations and disappointments, I still agree: victim participation does make sense. The difficulty I have, and what I grappled with in preparing for the VRWG event, was how this could be demonstrated.

Those who work in and around the Court will be familiar with the sense of there being a community of "victims' people". We are scattered throughout the organs of the Court; external legal teams; and also among NGOs, journalists and others who follow the Court from without. We are far from homogenous; in fact, our internal divisions are well known. But what we have in common is a belief that victim participation has a *value*.

But in my view, one of our failings to date has been to define, measure and explain that value. We need to be able to do so, in part so that we can convince others of our cause. Rather than simply railing against the Judges, prosecutors, defence counsel and Registry officials who do not share our views, we need information which will change their minds. But we also need this information in order to inform our work and do it better: for example, when creating a strategy in a new proceeding, to work out what will be the best approach; and to identify before lobbying for reforms of Court systems and policies which reforms will actually add value.

The following piece sets out some of the views I shared at the VRWG event about how we might define and measure the value of victim participation in a way that allows us to do these things.

1. What constitutes value?

One difficulty arises because we don't have common ground on what constitutes value. Before we can measure value we need to know what it is (or might be): in other words, what do the benefits of victim participation look like if/when it is working well?

1.1 Value to the victims or value to the proceedings?

Within our community of "victims' people", we speak mostly in terms of value *to the victims*.

Value to the victims is sometimes seen in the form of outcomes: most obviously this might be a reparations award which reflects the victims' interests and wishes. And of course, a conviction is a key outcome for victims (though it will be variable how much victims can contribute to achieving that). For the most part, however, I think we should see the value that participation brings to victims as linked to process rather than to final trial outcomes. Trials will have outcomes which may be good or bad for victims even without their participation. What participation can add are recognition, information and voice. These together can, at least in theory, create agency and empowerment.

Those of us who are evangelists for victim participation like to relate anecdotes about these kinds of value: the acute attentiveness of victims in lawyer-client meetings, demonstrating the

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importance they place on receiving information and having the chance to ask questions; or the often profuse gratitude from a victim for the opportunity to simply tell her story in an application form. I have been told by clients of feeling proud and empowered when a submission was made on their behalf (even if it went on to fail). To many engaged in the court-facing end of ICC work, these benefits may appear inconsequential or seem clichéd in the retelling. But on the ground, it is clear that for some individuals who have had their ability to trust repeatedly undermined, or who have long felt voiceless, the chance to have representation by a trusted lawyer can have its own value.

However for many outside our circle of “victim people”, the key value which might arise from victim participation is framed in terms of value *to the proceedings*. This is a perspective which can often be seen in judicial comments on victim participation: in *Lubanga* for example, the Trial Chamber saw victims’ questioning of witnesses as linked to “a broader purpose, that of assisting the bench in its pursuit of the truth.”³⁴²

For a long time, I was wary of this view. It carries overtones of the “instrumentalist” approach of the *ad hoc* tribunals, which was criticised for seeing victims’ involvement as only valuable when it serves as a tool for the tribunal or the prosecution. This vision of victims can also contribute to the persistence of the belief that victim participation creates a “prosecutor *bis*” (something which is often claimed to create unfairness to the defence). In my view, if victims’ lawyers see their role as that of the second prosecutor there *is a problem*. But the problem is not that this is unfair to the defence. In fact, a bifurcated prosecution, without a single leadership on strategy, is likely to be harmful to the prosecution and potentially therefore helpful to the defence. Rather, the problem is that it is questionable what value such a form of victim participation adds. We have a prosecutor. The prosecutor’s role is clear. Moreover, victims’ lawyers have neither the resources nor the legal powers to play that role.

However resisting the instrumentalisation of victims, and the “Prosecutor *bis*” objection, do not need to mean rejecting the idea that victim participation can add value to the proceedings. Indeed the potential value which victims can bring to the proceedings stems from the very fact that they *are not* the Prosecutor, and will not always share her perspective. What victims are able to bring to the proceedings is a viewpoint which is neither that of the Prosecutor nor of the defence, and which would be missing if we only heard from those parties. In the *Kenyatta* case, a lack of state cooperation and suspected witness intimidation led the Prosecutor to decide that she would cut her losses and end the case. Of course, the defence was happy with this. It fell to the victims to demand that efforts be made to address non-cooperation and witness intimidation, for example by a referral to the Assembly of States Parties (ASP) and investigations of crimes potentially committed under article 70.

More often still, victims will bring factual perspectives before the Court which it would otherwise lack. Early in the *Ongwen* case, we noticed that the prosecution team asked minimal questions to victim-witnesses about the harm they had suffered. We asked our own questions on this and in time the prosecution team began addressing this topic in their own questions. We were also able to commission a detailed study on the impact of the crimes on victim communities. Had victims not been involved, this evidence may never have been systematically adduced through the trial. In the Myanmar/Bangladesh jurisdictional proceedings, I found that my clients raised key contextual issues, for example concerning their desire and inability to return to Myanmar, which the Prosecutor had not addressed (and was likely not in a position to address). I believe these views contributed to the Chamber’s overall understanding of the question before it and may have played a role in its finding that, if proved, “preventing the return of members of the Rohingya people falls within article 7(1)(k) of the Statute.”³⁴³

By adding perspectives which would otherwise be missing, victims can make the judicial process less narrow and more contextualised. There are, of course, those who will say that this is not what a criminal trial is about. And perhaps this is the crux of the matter: what *are* these trials about? In a recent interview with the ICCBA (former) Judge Van den Wyngaert said that: “The ICC is first and foremost a criminal court” and that therefore “[w]e should stop using slogans which

342. *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, ICC-01/04-01/06-2127, 16 September 2009, para.27.

343. ICC, ICC-RoC46(3)-01/18-37, *Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”*, 6 September 2018, para.77.

might be appropriate for a human rights court or a truth commission (for example “the right to justice” and the “right to truth”), but not for a criminal court.” In her view, the court should focus on its “basic function” of “decid[ing] about the guilt or innocence of persons who have been accused of atrocity crimes.”³⁴⁴

However, the Judge’s confidence in defining the purpose and mandate of an international court belies the existence of a decades-long complex debate on this subject. Indeed the contrary view is frequently put: that international trials have much wider and more ambitious objectives, extending beyond a fair decision on the guilt or innocence of one person, to encompass “more peculiar and idiosyncratic goals ... that does not seem to play the same prominent role in national systems of justice, at least not in proceedings in individual cases”. These are said to include the reprobation of offenders, providing reassurance that the international order is enforced, providing satisfaction to victims, addressing cultures of impunity, contributing to peace, security and the rule of law, providing an accurate historical record, and promoting reconciliation.³⁴⁵ This perspective can be found not only in academic writing but also in the judgements of international courts themselves.³⁴⁶ Of course, views differ on this question and an article of this length does not permit their full consideration. But I hope that most of us working in the system would agree that our trials are not *solely* directed at determining the guilt or innocence of individuals through a fair process. We surely expect a wider national, regional or international impact of some kind. Without that we must call into question the Prosecutor’s strategy of focusing on a small number of cases in each situation and the cost of establishing guilt or innocence in a tiny handful of cases.

And if it is the case that the purpose of international trials extends beyond fairly establishing the guilt or innocence of the accused, then when asking how victim participation adds value to the Court’s proceedings, we surely must ask not only whether victim participation leads to a fair and expeditious determination of one person’s guilt or innocence, but also it can add to the Court’s ability to achieve any of these wider goals.

Ideally, our conception of *possible value* arising from victims’ participation should be wide enough to encompass all of these possible forms of value, with evaluations done to identify where among them *actual value* exists, and which factors contribute to it.

1.2 Value for money

In a 2011 article which made her infamous among the “victims’ people” (then) Judge Van den Wyngaert wrote: “A question the Court will have to ask itself is whether the participation system set in place is “meaningful” enough to justify the amount of resources and time invested in it or whether it would be better to spend those resources and time directly on reparations?”³⁴⁷ Many of us have resisted engaging in this discussion. We have seen it as implying that victims’ rights can and should be monetised, or that victims should have to choose between reparations and participation.

In part this reaction is understandable: we have a sense that anything concerning victims is subject to more financial scrutiny than other aspects of the Court’s work; as if to say that victims are an optional extra, and therefore the first thing that should be cut. This is a hard pill to swallow in a Court which for 2015 allocated only around 4% of its budget to victim-specific staffing and legal aid.³⁴⁸ It is harder still in 2018, a year which saw it proposed to increase judicial salaries at an annual increased cost of half a million euros, and a decision to initiate the (paid) mandates of new

344. “Interview with Judge Christine Van Den Wyngaert”, ICCBA Newsletter, Issue 3, September 2018, p. 13.

345. B. Swart, “Damaška and the Faces of International Criminal Justice”, *Journal of International Criminal Justice*, 2008, vol.6, 87-114, p. 100.

346. See for example: ICTY, *Prosecutor v Momir Nikolić*, IT-02-60/1-S, Sentencing Judgement, 2 December 2003, paras 59-60.

347. C. Van den Wyngaert, “Victims before International Criminal Court: Some Views and Concerns of an ICC Trial Judge”, *Case Western Reserve Journal of International Law*, (2011), vol.44, issue 1, 475-496, p495.

348. Based on 2015 budget figures, FIDH calculated that the VPRS, OPCV and victims’ legal aid costs came to 4.15% of the Court’s budget: FIDH, [Five myths about victim participation in ICC proceedings](#), December 2014, p12). Current budgets do not enable an equivalent calculation to be made because the Registry no longer publicly reports on the budgets of individual units within its judicial services division.

judges who do not appear to be needed for active proceedings.³⁴⁹ There are many areas of the Court's work in which efficiencies could be gained. Nobody appears to question, for example, that it is a good use of resources for the entire of the *Ongwen* trial to be simultaneously interpreted into French, a language not yet used by a single participant in the proceedings. (In 2015 the language services section alone had more budget than the combined budgets of all victims' related sections.³⁵⁰)

But despite this, I believe we do need to ask when evaluating the value of victims' participation, whether that value is sufficient for the money we are spending. There are many reasons why. Partly this is just a question of realism: we have limited funds, and if we want to keep receiving them we need to convince funders that their money is achieving something and being used well. But more importantly perhaps, we owe it to the victims to ensure that the money we do have is used in the best way possible. This includes being able to identify the different correlations between value and expenditure in various areas of our work so that we can identify opportunities for reform and improvement. For example, if we are spending most of our money on an application process, while the most value is able to be achieved through legal representation, that might indicate the need to modify application processes so that budgets can be adjusted towards legal aid. Personally, I am convinced that it is possible to have meaningful victim participation without excessive expenditure, but in order to convince others of that, we need to engage with this question by measuring value for money and using the findings to answer the resource-related critiques of victim participation.

I also believe there are legitimate questions to be raised about whether the systems we have in place currently are the best way to use the limited funds currently available for victims' participation. Does it make sense, as occurs in the *Ongwen* trial, to spend money on two parallel victims' legal teams representing groups with indistinguishable interests? Would it not be both better *and* more efficient to have one large team with more field staff? Is it a good use of resources to require a highly individualised judicial process for determining victim applications even though the status of victim confers modes of participation which are almost exclusively collective in nature?

The difficulty we face in resolving questions of this kind is that we so far have not made systematic efforts to assess the value derived from the various aspects of victim participation. So while I might believe that we spend disproportionate amounts on having an individualised, judicially determined application process, it is true that I have no (non-anecdotal) evidence to support the view that this process is not immensely valuable in some way.

In 2010, when working in the Victims Participation and Reparations Section (VRPS), I was party to what might be politely termed a difference of opinion on this very subject. A large volume of victim application forms was submitted in the *Mbarushimana* case just before the confirmation hearing, too late for the VPRS to process them all. We proposed that the Chamber dispense with formally determining the applications and rely instead on rule 93, which grants a Chamber discretion to hear from victims who have not been through an application process. The Office of Public Counsel for Victims (OPCV) opposed. In discussions on the subject, I recall one member of the OPCV telling me that she believed the victims would prefer *not to participate at all*, rather than have this done through a process which denied them an individual judicial determination. Similar perspectives have indeed been put publicly by the OPCV in filings resisting the use of the "Kenya model", under which victim status is a matter of registration by the Registry rather than judicial determination. It seems all but certain that the Kenya model would involve enormous savings of time and budget. However the OPCV position is that there is inherent value for victims in having their application forms sent to the parties and read individually by a judge (or, presumably, a staff member working for a judge), rather than merely by a Registry official.³⁵¹

349. Proposed Programme Budget for 2019 of the International Criminal Court, ICC-ASP/17/10, 1 August 2018, para. 65 and p. 185. The annual cost of two additional judges (all new judges having been brought immediately on board despite two judges having their mandates extended due to ongoing proceedings) is just under a quarter of a million (see p. 185).

350. €6.14m or 4.53% of the Court's budget: Proposed Programme Budget for 2015 of the International Criminal Court, ICC-ASP/13/10, 18 September 2014, p. 104.

351. *Prosecutor v Laurent Gbagbo, Submissions in accordance with the "Order scheduling a status conference and setting a provisional agenda"*, issued on 8 October 2014, ICC-02/11-01/11-706, 27 October 2014, especially para.33; *Prosecutor v Bosco Ntaaganda, Joint submissions in accordance with the "Order Scheduling a Status Conference and Setting a Provisional Agenda"* issued on 21 July 2014, ICC-01/04-01/06-351, 14 August 2014, para.31.

I raise this point not (only) because I disagree with the OPCV's view. But because I believe it highlights a fundamental difficulty we currently face: even after more than a decade of victims' participation we don't have the data we need to inform these debates. As a result, it is possible even on such a fundamental question for the OPCV and the VPRS to continue to put diametrically opposed views, each resting on its own assumption about what makes victim participation "meaningful".

2. Systems for monitoring and evaluation

Clearly, victim participation is not the only aspect of the Court's work which is sorely in need of evaluation. In response to a more general need, the ASP in 2014 required the Court to develop the use of Key Performance Indicators (KPIs). In its subsequent reports on this, the Court has developed indicators around four key criteria, one of which is "that victims have adequate access to the Court".³⁵²

Unfortunately, the Court's PKIs in this area fall a long way short of the framework for monitoring and evaluation which is required. Only three of the indicators actually relate to participating victims (as opposed to reparations, outreach, or – rather bizarrely – witnesses assisted by duty counsel). These are: (1) the number of victims participating by the phase of proceeding in each ongoing case; (2) the number of victims in each case represented by external counsel versus OPCV; and (3) the number of field "trips" undertaken by legal representatives of victims in each ongoing case.

It must be immediately apparent that these three indicators surely cannot be sufficient to enable any real evaluation of victim participation. They are so limited and arbitrary that it appears they have been chosen by reference to what quantitative data was available, rather than what information is most relevant to assessing victim participation. The three indicators ignore entire areas of victim participation (such as participation outside the context of an active case). On the areas, they do address they fail to provide the comparators necessary to make the figures given meaningful. For example we may see that 728 victims participate in the *Gabgbo and Blé Goudé* case, but we are not given information about the approximate number of potential applicants in that case, or even about the number of actual applicants. Other indicators have no apparent relevance to value. For example, while contact between a legal team and clients is clearly important, the indicator most relevant to this tells us nothing about that actual contact. We are told how many "trips" have been made by legal team members to meet their clients. But we know nothing about which team members undertook those trips, whether they did so jointly, the duration of those trips, how many meetings were held, or the size of those meetings. A large number of trips may appear to suggest that client communication is good. But it may equally mean that only one mission was conducted, with multiple team members, and perhaps only for one day. It might be that it involved either a meeting with a single client or a meeting with 1000 clients together. We learn almost nothing from this data. (Additionally, the data appears to present an incomplete picture insofar as it seems to reflect only "trips" conducted with legal aid funds).

The lack of indicators is in some ways surprising because others must exist which would be easily quantifiable: victim applications received, time taken for applications to be processed and determined, the number of victims who nominate a lawyer, the number of victims who attend meetings with their lawyers (known to the court at least where transport reimbursements have been provided, as is usual practice), the number of witnesses requested and permitted to victims' legal representatives, just to name a few. If the Court is serious about spending its time and money on reporting against PKIs it must improve those which it has identified relevant to victim participation.

But in any event, there are numerous areas in which evaluating victims' participation is more difficult than compiling quantitative data of this kind. The meaningfulness of participation will depend on many factors which cannot be assessed without surveys of the participating victims themselves: What is the level of understanding of ICC procedures and victims' roles? What methods have worked best to achieve communication and increased understanding? Is trust established with victims' legal teams? What are the major factors in establishing such trust? Do

352. See most recently: [Third Court's report on the development of performance indicators for the International Criminal Court](#), 15 November 2017.

victims feel safe? Which steps in the process give the victims a sense of recognition, agency or empowerment? Which parts of the process are frustrating, alienating or distressing?

VPRS recognised the need for a qualitative assessment, and in 2015 it commissioned the Berkeley Human Rights Centre to undertake a survey involving interviews with victims who had participated in ICC proceedings. The resulting report³⁵³ provides some useful information on key issues relating to the value of victim participation.

For example, the findings appears to be at odds with the view put forward by OPCV regarding victim applications: "Victim participants reported that completing an ICC application gave them confidence that their experiences would be known at the court and aid in building a case against the accused. Few said that the judges needed to review them, however; most said they would be satisfied if any member of the ICC read their application." The report also appears to support the view that the main factor for victims in feeling that participation is meaningful is receiving information and having quality communication with their lawyers.

However, the Berkeley study also had its shortcomings. And it has not been repeated. I believe the Court should consider commissioning further independent evaluations but consider carefully how the Berkeley study could be improved on. In my view, some of the areas for improvement include:

- Any evaluation should be clearly directed and focused. A set of specific questions which the evaluation aims to answer, or criteria which it aims to assess, should be established in advance and made public. (This is different from particular survey questions which might be put to victims in order to answer those evaluation questions.)
- The questions/criteria assessed should cover a broad range of issues, including aspects of the work done by legal representatives of victims. Although objections relating to privilege and the independence of counsel will no doubt be raised by those who would oppose such scrutiny, it is impossible to conceive of effectively evaluating victim participation without evaluating the work done by victims' lawyers.
- The questions/criteria assessed should be detailed enough so that the data gathered in response can meaningfully add to what we already know and help guide future work in as practical way as possible. For example: rather than simply identifying that interaction with court staff and lawyers is perceived as valuable, this needs to be analysed further: Does the value differ depending on the role of the person meeting the victims (e.g. Registry staff or legal team? Counsel or field assistant)? Is that based on personal attributes (such as gender, personality, ethnicity, languages spoken), the office held, or the methods of interaction used? Similarly, if victims feel that indirect contact through intermediaries is less valuable, what are the features of the interaction which affect that?
- Although hearing from victim participants is clearly a central aspect of such an evaluation, thought needs to be given to other important sources of information. For example, surveying victims who are *not* participating in the proceedings may also provide valuable data and points of comparison.
- Ideally, a plan should be established for a multi-year evaluation program, with the same questions/criteria assessed over time so that change can be assessed.

The Berkeley study was not able to achieve all of this, but it was nonetheless important, and not only for the initial key findings it made. It also demonstrates that it is feasible for the Court to contract an independent agency to undertake this kind of evaluation, even despite the protective measure which prevents disclosure of victims' identities to the public. The use of a credible external organisation with social science expertise and a good understanding of victims' rights may have some advantages over using the Court's own Independent Oversight Mechanism. One is that academic institutions are often eager to be associated with the Court's work and therefore willing to use funding obtained from other sources for this purpose (in this way our victims' legal team in *Ongwen* was able to commission a client survey by experts at Tufts University). If partnerships of this kind can be established, it should enable the Court to undertake evaluations at minimal cost. And if these evaluations can assist in identifying reforms which would cut costs or increase value for money they may ultimately pay for themselves.

353. Human Rights Centre UC Berkeley School of Law, *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court*, 2015.

Conclusion

Fifteen years into the Court's work it is disappointing that we are not better equipped to analyse the value of victims' participation as we are implementing it. The Court needs to take steps to evaluate its work in this area, including in respect of value for money. This means improved KPIs on victims' participation, but also the commissioning of well-designed independent evaluations. We "victims' people" should not only be open to this scrutiny but actively fight for it. It is the best way to demonstrate, and also to ensure, that victims' participation *does* still make sense.

Conclusion

FIDH wishes to express its deep appreciation to the contributors of this journal in bringing attention to victim participation on the occasion of the twentieth anniversary of the adoption of the ICC Statute.

The ICC Statute is a turning point for victims allowing them, for the first time in the history of international criminal law, to participate in proceedings and to receive reparations and assistance. While contributions in this journal highlight a multitude of successes, they also identify numerous challenges and concerns over a reduced space that places victims on the periphery of ICC proceedings rather than at its centre. It is of utmost importance that these concerns are reflected upon and addressed in the spirit of preserving the central position of victims at the ICC.

The various contributions demonstrate the importance and value of victim participation at the International Criminal Court (ICC) at all stages of proceedings. Contributions highlight the various contexts in which victim participation contributed to establishing, and in some cases correcting, factual and legal analysis before the Court's Chambers. Participation has been key in responding to questions of jurisdiction, admissibility, qualification of crimes, the scope of investigations and in designing reparations awards. To victims, participation can be an empowering, healing process that restores their hope in justice and aids their feeling of agency in the legal processes. In some cases that took a turn against what victims hoped for, such as in situations of acquittal or when Prosecution decided not to proceed with investigations or prosecutions, victims actively pushed for challenging such decisions through their legal representatives and valued the opportunity to have a candid dialogue with them.

Contributions highlight numerous difficulties including the insufficiency of information provided to victims, particularly at the pre-trial stage, which in turn affects victims' ability to learn about and subsequently exercise their right to participation in a timely manner. In some cases, this challenge is a result of limited access to victims due to complex security situations in conflict, post-conflict or civil unrest settings. In other cases, cultural and gender norms have been factors in limiting victims' access to the Court and the opposite. Further, the Court's restrained resources places it in a difficult position to keep an efficient, while at the same time meaningful, system for the growing number of victims seeking to participate in its proceedings. Additionally, meaningful victim participation is exercised through effective legal representation. While different judicial approaches on modalities for participation and legal representation have been explored by ICC Chambers, victims' freedom to choose their legal representative must be preserved. Confidence, presence in the field and constant dialogue with victims is as key as presence in the courtroom in presenting victims' views and observations. .

To meet these and other challenges to victim participation, the Court, with the support of States Parties and key stakeholders including legal representatives of victims and civil society organisations, must devise strategies to thoughtfully address the issues. However it is important that any review of the system should not merely seek to find efficiencies; it should consider how to ensure that victims' explicit participatory rights set out in the Statute fully achieve their reparative potential.

FIDH has been committed to the promotion of victims' rights at the ICC since the inception of the Court including safeguarding and promoting a meaningful system for victim participation. FIDH urges the use of experiences outlined in the journal to shape the discussion on how to improve the system of victim participation at the ICC, reflecting on key lessons learned and recommendations made in the various contributions.



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For FIDH, transforming societies relies on the work of local actors.

The Worldwide movement for human rights acts at national, regional and international levels in support of its member and partner organisations to address human rights abuses and consolidate democratic processes. Its work is directed at States and those in power, such as armed opposition groups and multinational corporations.

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FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

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