fidh

Whose Court is it?

Judicial handbook on victims' rights at the International Criminal Court

April 2021 / N° 771a

Cover photo: A relative of an alleged extrajudicial killing wears a veil as he takes part in a protest versus the drug war killings outside the military and police headquarters on 17 July 2019 in Manila, Philippines. © Ezra Acayan / Getty Images via AFP

Ministry of Foreign Affairs of the Netherlands

This publication had been produced with the generous support from the Ministry of Foreign Affairs of the Netherlands. The contents of this publication are the sole responsibility of FIDH and can in no way be taken to reflect the views of the Ministry of Foreign Affairs of the Netherlands.

Whose Court is it?

Judicial handbook on victims' rights at the International Criminal Court

fidh

April 2021

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Whose Court is it? This question must be asked when assessing implementation of the ground-breaking provisions on victims' rights since the adoption of the Rome Statute, more than 20 years ago, and considering how to concretely move towards an effective victim-centred approach in proceedings at the International Criminal Court (ICC).

Judges have the highest authority within a court. They have the duty and privilege to ensure that justice is carried out, not just for the victims, but also with the victims: as envisioned in the Rome Statute and in line with international law, victims must be meaningfully and actively part of the justice process. Judicial practice must reflect recognition of victims as active rights holders, their aspirations and priorities. This Court, after all, belongs to them.

In addition to strengthening the Court's credibility and legitimacy, the recognition of victims' rights pays tribute to the centrality of victims' experiences and their potential to contribute to the justice process. It also underlines that respect for the rule of law plays a central role in rebuilding societies and that having members of the communities individually engaged with rule of law processes can significantly contribute to social reconstruction. Victim participation can also strengthen the work of the Court, as victims provide important factual and cultural context regarding the crimes committed and their impact. Victim participation can help the ICC establish the truth, facts and responsibilities and bring concrete reality, and humanity, to the courtroom.

The purpose of this judicial handbook, based on research and interviews with 18 practitioners and experts, is to take stock of judicial implementation of victims' rights at the ICC as of early 2021. The goal is to produce key practical recommendations for Chambers on the role they can, and must, play in ensuring meaningful exercise of victims' rights. Indeed, the election of six new judges in 2020 and their swearing-in in March 2021 should be viewed as an opportunity for all the ICC judges to renew their commitment to upholding the rights of victims throughout the Court proceedings and to harmonise their procedural rights.

The main findings are structured in seven chapters. Based on these findings, FIDH makes a series of specific recommendations to ICC Chambers, on each of the topics addressed in this report. The recommendations can be found at the end of each chapter.

Chapter 1: Decision-making on victims' rights

Judges play a central role in ensuring the meaningful and effective implementation of victims' rights. However, the ICC Chambers' practice so far on various aspects of victims' rights lacks consistency and reflects a sometimes narrow interpretation of victims' role under the Rome Statute framework.

This Chapter provides an overview of the prerequisites in terms of the decision-making process on victims' rights. It addresses the qualities required of judges (1), the importance of making high-quality, informed decisions and ways of strengthening judges' expertise on victims' rights and their understanding of dynamics in the situation countries (2), and the need to follow the guidance and best practices from the international human rights law framework on victims' rights (3). It also underlines the need for some legal certainty (4) and highlights the contribution of dissenting opinions by judges with advanced expertise on victims' rights (5).

In order to make high-quality informed decisions on victims' rights, as well as to be fully aware of the impact of their decisions on affected communities, judges must consult victims - as active rights holders - on all matters that affect their interests. Judges should also have or develop knowledge of victims' procedural rights and country dynamics and ensure that their decisions reflect the current state of the law, including best practices from international human rights law.

To render victims' access to the Court effective, it is paramount that Chambers harmonise their practices in

order to give legal certainty to victims and practitioners. They must only depart from established jurisprudence, in particular from the Appeals Chamber, when it is clearly justified. This requires updating the Chambers Practice Manual and making its language more prescriptive. In addition, Chambers should allow issues related to the interpretation of victims' rights to go on appeal as much as possible. Finally, it is fundamental that judges with more progressive approaches to victims' rights record through dissenting opinions their disagreements with certain restrictive interpretations.

Chapter 2: Fulfilment of victims' rights through legal representation

At the heart of victims' access to justice is adequate and effective legal representation, as it is the most crucial factor in victims' experience of the Court. Meaningful victim participation is conditioned by adequate legal representation. The practice of the Court in terms of legal representation so far has been very variable, with different systems being tested. While legal texts recognise victims' freedom to choose their lawyer, there is a growing tendency of some Chambers towards internalisation of legal representation for victims, appointing the Office of the Public Counsel for Victims (OPCV) as the common legal representative for victims, without due regard to their choices and needs, sometimes without even consulting them.

This Chapter highlights some of the lessons learned based on the Court's practice thus far, as well as key principles that must be borne in mind when judges take decisions related to legal representation for victims. While victims are free to choose their legal representative (1), the necessity for common legal representation for hundreds, sometimes thousands of victims, implies the adoption of a systematic and sequential approach to Rule 90(2), taking the dynamics in the country into account (3). The composition of the team of victims' legal representatives is of utmost importance, and victims should be able to engage lawyers who combine both knowledge of and proximity to victim communities, as well as expertise on the ICC (4). The role of OPCV requires clarification, as it seems to have become increasingly the go-to option for common legal representation, even though it was not initially intended to replace external counsel (5). These trends are also linked to the current legal aid policy for victims, that suffers from the inadequacy of a system initially meant for the Defence (6).

Chambers must respect victims' freedom to choose their lawyer. They should adopt a sequential approach to Rule 90, whereby victims are allowed to organise their own common legal representation before that control is relinquished to the Registry and the Chamber when victims are unable to agree. Clear standard procedures, based on this sequential approach, should be included in the Chambers Practice Manual. Knowledge of and proximity to the victim communities should be a priority over expertise on the ICC when appointing a common legal representative for victims, and Chambers should ensure that victims are properly consulted before any decision on their legal representation. It is also essential that an improved policy of legal aid for victims be put in place.

Chapter 3: Victims' right to information

Information is a pre-condition to exercising one's rights. Meaningful participation requires that victims know of and understand the process, and that there are clear and accessible systems in place. This means ensuring effective outreach programmes and engagement with victims. However, these are areas in which the Court has been criticised, including in relation to insufficient outreach and engagement with victims before the opening of a formal investigation.

This Chapter focuses on the importance that outreach has for victims to be able to effectively exercise their rights and for furthering the Rome Statute's objectives (1). It also highlights the challenges for the Registry (2), and describes the role Chambers can play in reaffirming the centrality of outreach and victims' engagement (3).

Chambers can contribute to improving the Court's track record in this area by recognising, in their decisions, the duty of the Court to effectively enable victims' right to information through proper communication and outreach. This includes triggering the Registry's outreach mandate as early as the preliminary examination stage. Such decisions must be made in close consultation with the Registry.

Chapter 4: Victims' rights in the preliminary and investigation stages

The Court's current practice has shown that the role of victims during the preliminary and investigation phases depends on how Pre-Trial Chambers interpret their own mandate to monitor the Prosecutor's actions. The modes of implementation of the rights of victims at these stages remain relatively vague.

This Chapter gives an overview of victims' rights in the preliminary and investigation stages. It begins by exploring the added value of victim participation in early stages (1), before looking at specific proceedings which explicitly invite victims to participate and submit their views without a cumbersome process for the Court (Article 15(3), Article 19(3) and Article 53(3)(a) of the Rome Statute), and enable them to participate in any judicial proceeding that affects their interests (Rule 93 of the Rules of Procedure and Evidence and Article 68(3)) (2). While the need for early outreach and engagement with victims is quite clear (3), setting up existing procedures to enable victim participation at early stages (4) can be challenging, and requires balancing on one side the need for consistency, and on the other side the need to adapt to the context (5).

As the Court develops its practice, victims should be given more room for participation at the early stages. They should be able to challenge the Prosecutor's choices before a Pre-Trial Chamber, in particular to appeal decisions not to investigate. Pre-Trial judges can guarantee a meaningful role for victims in shaping investigations and prosecutions, by clarifying the scope of and procedures for victims' involvement in proceedings as soon as a situation comes before the Pre-Trial Chamber.

Chapter 5: The process to authorise the participation of victims

This Chapter outlines the evolution and current process of victims' applications to participate in ICC proceedings, their assessment and authorisation. While the application process was marked by challenges and shortcomings in the earlier years of the Court, it has now gained efficiency, in relation to both the victims' application form (2) and the assessment process, known as the 'A, B, C system' (4). The Court could however benefit from more legal clarity as to when the victims' full application process under Rule 89 applies (1), how to interpret the definition of victim when granting victim status (3), and with regard to the redaction of victims' applications (5) and timing of victims' applications' (6). The Victims Participation and Reparations Section (VPRS) has an important role to play in this process (7) that Chambers need to acknowledge.

Chambers can contribute to more effective participation of victims by recognising that the written application process and judicial determination under Rule 89 should be reserved for general participation under Article 68(3). It should not apply to victims' involvement in specific proceedings under Articles 15(3), 19(3) and 53(3)(a), or when the Chamber uses its discretionary power to seek victims' views in a simplified procedure, including under Rule 93.

Concerning the application process itself, the current four-page application form and the simplified process for admitting victims to participate (known informally as the 'A, B, C system'), are welcome developments. The Chambers Practice Manual should be updated to reflect this practice, in order to harmonise practice across Chambers.

Regarding the recognition of victim status, the scope of the Prosecution's charges inevitably limits the number of people who may be eligible for victim status. Since Chambers have a discretionary power to be more flexible in their interpretation of the term "victim", they can, and should, adopt a broader approach beyond a strict causal link between the charges and victim status.

In terms of timing, VPRS should start collecting and processing victims' applications for a case as soon as an arrest warrant is issued. In addition, the procedure for admission before the Chamber should start immediately and continue on an ongoing basis.

Chapter 6: Modalities of participation

It must be recognised as a major achievement that there is now an established practice of victim participation at the ICC, a significant part of which is no longer questioned. However, little guidance is given by the founding texts as to how such participation should be organised, which has led judges to apply different modalities in different cases. Hence, ICC practice to date has lacked consistency, with Chambers deciding on the modalities of implementation of victims' rights on an *ad hoc* basis, sometimes leading to very limited possibilities to exercise rights.

This Chapter briefly explores the role of the presiding judge, the rights of victim 'participants', and the notion of 'personal interests of victims' (1), and gives an overview of the implementation of victims' participatory rights to date (2), in particular the right to appeal (3).

Victims' procedural rights should be harmonised and guaranteed throughout the proceedings, with Chambers ensuring a meaningful and effective exercise of victims' general right to participation.

It is important for Chambers to issue a framework decision at the beginning of an investigation clarifying the modalities of victim participation, clearly stating the procedure for victims' legal representatives to file submissions and receive notification of hearings, filings and decisions. In addition to submissions by their legal representatives, victims should be allowed to present their views and concerns in person.

Participating victims have the possibility to give evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility or relevance of evidence, as confirmed by Appeals Chamber's jurisprudence. Judges should allow time in the courtroom for victims' counsel to intervene and should not overly restrict the number of witnesses neither limit the scope of questioning of witnesses and experts in such a way as to contradict the Appeals Chamber's jurisprudence. Moreover, the Chambers Practice Manual should recognise the standard practice of allowing legal representatives to make a request to ask questions during the hearing (as opposed to submitting questions in advance). The role of the presiding judge is central in this regard.

Victims have a right to participate in appeals. The Appeals Chamber must ensure victims have proper access to justice and consider victims' applications to participate in a consistent manner. In terms of interlocutory appeals, it is now standard practice that victims who have participated in the proceedings have the right to file a response to the document in support of the appeal.

Victims should also be allowed to lodge an appeal against certain decisions. There are issues on which victims' interests are deeply affected, in relation to which they must be recognised as a 'party' (e.g., decisions on their victim status or on their legal representation, or decisions to deny an investigation). Chambers should identify a non-exhaustive list of issues on which victims will always be authorised to appeal and, most importantly, grant leave to appeal on these issues in order to promote clarification and harmonisation.

Chapter 7: Reparations

The ICC reparations system is unique and novel, and the practices and case law developed to date must be seen as achievements in and of themselves. So far, only four cases have reached the reparation phase, partly due to the very slow pace of implementation and the varying approaches applied by Chambers.

This Chapter highlights the basic principles and lessons learned in relation to reparations for victims. It starts by addressing the meaning of effective reparations (1), before focusing on the need for institutional principles on reparations (2), the role of Chambers (3), in particular regarding the identification of beneficiaries (4), the assessment of the harm (5) and in defining the types and modalities of reparations (7). The Chapter also explains the complementary roles of the Trust Fund for Victims (TFV or Trust Fund) and VPRS (8). While victims should be consulted and included at all stages of the reparations process, in a timely and effective way (9), judges should encourage the Trust Fund to use its general assistance mandate to provide urgent relief to victims at the early stage of a situation, in order to address their most immediate needs (10).

This handbook suggests the adoption of Court-wide principles on reparations, as mandated under Article 75(1), in order to ensure a level of certainty and consistency. The basis for these principles can be taken from the principles established in cases to date.

Chambers should outline as early as possible the steps to be taken before a reparations order, including in relation to identification of beneficiaries, appointment of experts, and submissions by different actors. Chambers should clarify the possible procedures for identifying beneficiaries and their practical implications, including whether victims should fill in application forms. The recommended approach is to combine the reception of individual applications with an additional separate process of identification. The focus should be on how victims can be empowered to be part of the process, for which it is essential to provide clarity as to the requirements and procedures.

In terms of assessment of the harm, practice shows that sampling, instead of individual assessments, is more appropriate to understand the type of victimisation and the needs of a group.

Regarding modalities of reparations, an important issue to consider is whether and to what extent reparations should respond to what victims want. While the Court has a tendency to favour collective reparations, often victims show a preference for individual reparations, and sometimes even reject the notion of collective reparations.

The Trust Fund for Victims and VPRS are complementary to each other and should work together. While coordination issues will not be resolved without appropriate action from the leadership of the Registry and the Trust Fund, Chambers can facilitate collaboration between them.

Chambers should provide sufficient guidance and clarity on the elements that need to be included in a draft implementation plan of a reparations order and monitor their implementation by requesting regular reports and imposing a clear timeline.

LIST OF ACRONYMS AND ABBREVIATIONS

AC	Appeals Chamber
Article	Article of the Rome Statute
ASP	Assembly of States Parties
CAR	Central African Republic
CSS	Counsel Support Section
DCC	Document Containing the Charges
DRC	Democratic Republic of Congo
FIDH	International Federation for Human Rights
ICC	International Criminal Court
IER	Independent Expert Review
LRV	Legal Representative of Victims
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PIOS	Public Information and Outreach Section
PTC	Pre-Trial Chamber
Rule	Rule of the ICC Rules of Procedure and Evidence
TC	Trial Chamber
TFV or Trust Fund	Trust Fund for Victims
The Court	International Criminal Court
VPRS	Victims Participation and Reparations Section

INTRODUCTION

Swearing in of six new judges of the International Criminal Court, March 2021.
© ICC-CPI

INTRODUCTION

1. Whose Court is it?

This question must be asked when assessing implementation of the ground-breaking provisions on victims' rights since the adoption of the Rome Statute, and considering how to concretely move towards an effective victim-centred approach in proceedings at the International Criminal Court (ICC).

The Court's jurisprudence recognises that victim participation should be *meaningful*, rather than *symbolic*. At public events, representatives of the Court, from the Office of the Prosecutor, the Registry, the Assembly of States Parties and Chambers, promote the Rome Statute's progressive inclusion of victims in the justice process. Yet all too often the steps required to make it a reality are not taken, with some actors at times even advocating or establishing limitations to such inclusion, depriving it of its essence.

When States Parties established the ICC, they declared themselves "*conscious that all peoples are united by common bonds*" and "*mindful*" of victims of atrocities.[1] On behalf of the people, they entrusted the Court, through its various organs, with carrying out justice. The purpose was to give a Court to those who did not have one: victims of the most serious crimes, whose national jurisdictions are unable or unwilling to fulfil their right to justice, truth and reparations. While the Office of the Prosecutor is mandated to conduct investigations and bring prosecutions on behalf of victims' communities, and the Registry has essential functions aimed at facilitating victims' access to justice, the ultimate power to give victims' rights their meaning and effectiveness rests with the Chambers. Indeed, judges have the highest authority within a court and this authority comes with responsibility. They have the duty and privilege to ensure that justice is carried out, not just *for* the victims, but also *with* the victims: as envisioned in the Rome Statute and in line with international law, victims must be meaningfully and actively part of the justice process. This Court, after all, belongs to them.

Beyond discussions around the practical modalities of implementing victims' rights, their proponents at the ICC face two major challenges: there seems to be a lack of recognition that victims are essential to the Court's mandate, while many decisions are taken based on misconceptions about the impact of victim participation.

2. Victims are essential to the Court's mandate

When asked how judicial implementation of victims' rights at the ICC could be improved, the various practitioners and experts interviewed for this report[2] unanimously drew attention to the need for judges to genuinely recognise that victims bring added value to the ICC, that victims can help judges to fulfil their mandate.

Enabling victims to be meaningfully involved in the justice process and to influence its course is not an act of generosity, or even a choice; it is first and foremost a legal obligation.[3] As Judge Blattmann wrote, "*victims' participation is not a concession of the Bench, but rather a right accorded to victims by the Statute*".[4] There is thus a need to shift the perception of victims, from that of passive recipients of justice to one of active right holders.

The Rome Statute grants victims a central role in the justice process and contains broad participatory rights for victims in criminal proceedings. This approach stemmed from the need to address the invisibility of victims in other international criminal trials in which the main way that victims could interact with the justice process was as witnesses. The right to victim participation was therefore considered innovative given its novelty in international criminal justice processes. It was expected that it would take the Court time to define modalities for effective participation, and to ensure that it is a meaningful process for victims, recognising victims as rights holders, empowering them, and contributing to their healing.

In addition to strengthening the Court's credibility and legitimacy, the recognition of victims' rights pays tribute to the centrality of victims' experiences and their potential to contribute to the justice process. It also underlines that respect for the rule of law plays a central role in rebuilding societies and that having members of the communities individually engaged with rule of law processes can significantly contribute to social reconstruction. Victim participation can also strengthen the work of the Court, by contributing to establishing the truth, facts and responsibilities and bringing concrete reality, and humanity, to the courtroom.

1 Preamble of the Rome Statute.
2 See infra, "4. Objectives and methodology".
3 See FIDH, "Enhancing Victims' Rights Before the ICC - A View from Situation Countries on Victims' Rights at the International Criminal Court", 2013, available here ("FIDH, Enhancing Victims' Rights, 2013"); FIDH, "New ICC Judges Must Ensure the Meaningful Participation of Victims in Criminal Proceedings", November 2020, available here ("FIDH, Judges Must Ensure Meaningful Participation, 2020"); FIDH/KHRC ,"The victims' mandate of the International Criminal Court: disappointments, concerns and options for the way forward, Observations and recommendations for the IER", June 2020, available here ("FIDH/KHRC, The Victims' Mandate of the ICC, 2020").
4 "Separate and Dissenting Opinion of Judge René Blattmann, Decision on Victims' Participation", The Prosecutor v. Thomas Lubanga Dyilo, 18 January 2007, ICC-01/04-01/06-1119, para. 13, page 549.

In 2013 a high-level panel organised by REDRESS and Amnesty International, reviewed the system of victim participation at the ICC and concluded that:

> *"[Victim] participation can strengthen the work of the ICC by establishing a strong connection between the Court and those most directly affected by the crimes it is investigating and prosecuting. Victims can provide important factual and cultural context regarding the crimes and their impact, which can also contribute to establishing the truth, as well as an historical record of events. Effective realisation of victims' rights may also help ensure lasting support for the ICC, act as a deterrent against future violence and inspire more victims and affected communities to demand justice, truth and reparation at the national level."*[5]

Victims have made very significant contributions to ICC proceedings, including by informing some of the Court's most important decisions, such as decisions on opening investigations and on the scope of the Court's jurisdiction. They have made continuous contributions through legal arguments on both substantive and procedural issues during pre-trial and trial proceedings and have played a central role in reparation proceedings.[6]

The Court's jurisprudence has emphasised that the participation of victims must be '*meaningful*' as opposed to '*purely symbolic*',[7] "*so that they can have a substantial impact in the proceedings*".[8] Judges must make use of their judicial power to guarantee that the practical modalities of victims' involvement at the Court ensure this, without being deterred by misconceptions.

3. Clarifying misconceptions

In FIDH's experience, only a limited number of experts – with direct experience in supporting victims in judicial proceedings – are acquainted with the objectives, advantages, and limitations of victim participation in the context of a criminal trial. The ICC suffers from the inadequacy of such expertise, leaving room for decisions to be taken based on misconceptions or even myths concerning victim participation.[9] These must be deconstructed.

First, victim participation does not constitute a burden in proceedings, nor does it cause delays or supplementary costs. As Judge Adrian Fulford, the presiding judge of the ICC's first trial, noted at the outcome of the Lubanga trial (DRC) in 2010:

> *"The experience of Trial Chamber I has been that the involvement of victims has not greatly added to the length of the case. Their submissions and questioning have been focused, succinct and seemingly relevant to the issues in the case. Whether it is said their role has undermined the fairness of the trial will be revealed in closing submissions, but purely from the point of view of time, they have not significantly extended the proceedings. These are early days, but I am cautiously optimistic that their participation can be accommodated effectively in the individual trials."*[10]

The impact of victim participation on the ICC budget is minimal. In 2015, funds dedicated to staff and activities of the Victims Participation and Reparations Section (VPRS) and the Office of Public Council for Victims (OPCV), as well as legal aid for victims – including funds for external legal representatives -, represented a mere 4% of the overall ICC budget.[11] Despite this, victim participation at the ICC has borne the brunt of the Court's financial difficulties, as cuts in budget lines and zero-growth policies have had an inordinate impact on victim participation.[12] For example, legal representatives for victims have consistently faced budget cuts relating to legal aid, affecting their team composition and ability to represent victims and meet with them in person.

Moreover, contrary to misconceptions about the role of victims in proceedings, maintaining that victims duplicate the role of the Prosecutor and that their participation does not usefully contribute, victim participation provides significant benefits both to proceedings and to victims themselves. Its added value beyond the role of the Prosecutor is recognised. As Judge Bruno Cotte observed when delivering the judgment in the Katanga case (DRC) in 2014:

> *"Here, [Trial] Chamber [II] wishes to commend the contribution made by the legal representatives and their teams throughout the proceedings. In the Chamber's view, they were able to find their rightful place during the trial and in their own way by at times taking a different stance to the Prosecution. They made a meaningful contribution to establishing the truth in relation to certain aspects of the case. The Chamber extends its gratitude for their contribution."*[13]

For this benefit to be optimal, the dynamics of victim participation in the situation country must be incorporated in any assessment of the participation system and victims' legal representation. The nature and impact of victim participation go beyond the courtroom, making it vital to adequately recognise the local aspect of victim participation and to dedicate the necessary resources to ensure adequate presence in the country.

---

5 REDRESS, "Victim Participation After 20 years of the Rome Statute: A Few Reflections", December 2018, available here ("REDRESS, Victim Participation After 20 years, 2018").
6 These issues will be discussed further throughout the report. It was also recognised by the "Independent Expert Review of the International Criminal Court and the Rome Statute System", Final Report, 30 September 2020, available here ("Independent Expert Report, 2020"), para. 838.
7 AC, ICC-01/04-01/06-1119, para. 85; AC, ICC-01/04-01/06-1432, para. 97; TC II, ICC-01/04-01/07-1328, para. 10(a); TC II, ICC-01/04-01/07-1788-tENG, para. 57; TC III, ICC-01/05-01/ 08-1005, para. 9(a).
8 PTC I, "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", The Prosecutor v. Germain Katanga, 13 May 2008, ICC-01/04-01/07-474, para. 157.
9 See FIDH, "5 Myths about victim participation in ICC proceedings", 2014, available here ("FIDH, 5 Myths, 2014"); FIDH, Judges Must Ensure Meaningful Participation, 2020, supra.
10 Judge Sir Adrian Fulford, "The Reflections of a Trial Judge", 2010, para. 20.
11 FIDH, 5 Myths, 2014, see supra, p. 12.
12 FIDH, "Cutting the Weakest Link: Budget Discussions and their Impact on Victims' Rights to Participate in the Proceedings", October 2012, p. 5, available here, ("FIDH, Cutting the Weakest Link, 2012").
13 Transcript ICC-01/04-01/07-T-343-ENG, page 4, line 25 to page 5, line 5.

In 2020, an Independent Expert Review (IER) conducted a thorough assessment of the implementation of victims' rights at the ICC. After considering submissions claiming that victims' involvement has a negative impact on trials and in response to arguments calling for a limitation of their rights, the IER concluded:

> *"In the absence of concrete examples of these impacts and in the face of anecdotal accounts to the contrary in respect of each, there is no basis for suggesting any curb on the right of victims to participate in proceedings of the Court."*[14]

4. Objectives and methodology

Objectives

The purpose of this research was a stock-taking exercise of judicial implementation of victims' rights at the ICC as of early 2021. FIDH aimed to identify the reasons for diverging practices between Chambers, as well as for often excessively narrow interpretations of some aspects of victims' rights, leading to limitations in victims' ability to fully exercise the rights afforded to them under the Statute.

In the context of the election of new judges at the end of 2020, the goal was to identify lessons learned from the experience so far, in order to produce key practical recommendations and guidance for Chambers on the role they can, and must, play in ensuring meaningful exercise of victims' rights within the Rome Statute system. It is hoped that the report will be disseminated among judges and staff of Chambers and trigger useful conversations to advance judicial practice on these issues.

By addressing the various aspects of victims' rights in a systematic way, it is also intended that the report will be a useful tool for victims' legal representatives and other practitioners to identify new strategies for advancing victims' rights at the ICC.

Methodology

This report was researched and written by Laetitia Bonnet,[15] an independent consultant, under the direction and supervision of Delphine Carlens, Head of FIDH International Justice Desk. A major part of the research included consultations with key stakeholders involved in implementing victims' rights at the ICC, through individual interviews conducted remotely. Eighteen individuals were interviewed for this report. They included staff or representatives from the Victims Participation and Reparations Section (VPRS), the Public Information and Outreach Section (PIOS), the Office of Public Counsel for Victims (OPCV), the Trust Fund for Victims (TFV) and the Chambers. In addition, FIDH interviewed a former judge, a member of a State Party's delegation, victims' legal representatives and members of their teams, as well as representatives of civil society organisations monitoring the ICC and/or assisting victims to engage with the Court, including local organisations. It should be noted that FIDH requested additional interviews with other current and former judges as well as other senior staff of Chambers, who respectfully declined the invitation. With the exception of one interviewee who explicitly stated that he agreed to be quoted, those interviewed preferred not to be identified in the report.

Findings and analysis in this report are also based on FIDH's extensive experience in monitoring and advocating for the implementation of victims' rights at the ICC, and in particular in linking the work of the ICC to the realities in situation countries. Many of this report's findings can be explored in further detail in previous FIDH publications, listed in the bibliography.

Finally, the analysis draws on a literature review of relevant publications in this field, in particular recent publications by civil society organisations and practitioners. The main sources used in this report are included in the bibliography.

14 Independent Expert Report, 2020, see supra.

15 Laetitia Bonnet worked with the ICC Victims Participation and Reparation Section (VPRS) from 2006 to 2012, as an Associate Legal Officer on the situation in Democratic Republic of Congo and the Lubanga and Katanga cases, and as a Field Officer in Central African Republic, on the Bemba case. Since 2013, Laetitia has worked with Asia Justice and Rights (AJAR) in Myanmar.

The International Criminal Court.
© Greger Ravik / Creative Commons 2.0

CHAPTER I:
DECISION-MAKING ON VICTIMS' RIGHTS

ICC judges in Ongwen case visit northern Uganda, June 2018. ©ICC-CPI

JUDGES play a central role in ensuring the meaningful and effective implementation of victims' rights. However, as this report shows, the Chambers' practice so far on various aspects of victims' rights lacks consistency and reflects a sometimes narrow interpretation of victims' role under the Rome Statute framework. Newly elected judges should draw on this experience and, together with their colleagues, renew their commitment to upholding the rights of victims throughout the Court proceedings and harmonise their procedural rights.

While this report addresses each of the aspects of victims' rights of which judges must have adequate knowledge and which they must promote, and their underlying modalities, there are also simple steps that can be taken to provide recognition to victims, as was shown recently in the delivery of the *Ongwen* judgment. Judge Schmitt, Presiding Judge of Trial Chamber IX, read out a summary of the judgment and noted that "*victims have a right not to be forgotten, and to be mentioned*" in the ICC courtroom.[16] Not only did he take the time to give detailed descriptions of some of the crimes committed, he also read out the names of the victims, as far as they were known to the Court. This served as a powerful acknowledgement of the deep suffering of both the mentioned victims and the thousand others at the hand of the Lord's Resistance Army (LRA).[17]

1. Qualities required of judges

One of the key qualities that judges at the ICC must possess is relevant legal expertise and experience in the handling of complex criminal litigation.[18] Litigation before the ICC often involves multiple actors, complex contextual issues, and various modes of liability. In addition, as FIDH and others have repeatedly stated, judges' expertise and experience should extend to victims' rights, either in domestic or international criminal proceedings, and they should demonstrate their willingness to respect and fulfil the rights afforded to victims under the Rome Statute system. This is particularly important due to the unique nature of victim participation at the ICC, which has similarities, and yet is very different to the participation of victims in domestic criminal proceedings – for example as a civil party ('*partie civile*'). Furthermore, in many common law jurisdictions there is simply no domestic equivalent of victim participation in criminal proceedings. Due to the nature of crimes of genocide, war crimes, and crimes against humanity, it is often the case that hundreds if not thousands of victims are eligible for participation in ICC proceedings. ICC judges must therefore be able to balance the right of victims to participate in proceedings with the rights of the defence, as well as the need to ensure the expeditiousness of the proceedings. However, to date, this balancing exercise has too often been carried out to the detriment of victims.

The role of the Presiding judge during trial is particularly essential in leading the debates and ensuring victims are given a proper place at every moment of proceedings. This requires the judge to be very familiar with the case-law in this area, and to defer decisions and request observations when the issues at hand are particularly complex. It is of utmost importance to ensure that Presiding judges have extensive experience in leading courtroom proceedings and have adequate knowledge of victims' procedural rights, including the Court's jurisprudence.[19]

The election of six new judges at the ICC is an opportunity to make progress in harmonising the procedural rights of victims. As noted above, the procedural rights of victims remain in a state of flux. Although there have been some moves towards harmonisation, especially in the process by which victims apply for participation in proceedings, there remains a lot to be done to ensure that victim participation at the ICC is meaningful. The new ICC judges will play a crucial role in this respect.

2. Making informed decisions

a) Developing knowledge and skills

Given the complexity and unique nature of victim participation at the ICC, as well as the extensive jurisprudence and practice on the matter, victims' rights are an area of law that requires all actors, including judges (and their legal staff), to constantly develop their knowledge and skills. This requires a thorough induction programme for new arrivals to the ICC bench; exchanges of experience with current and former ICC judges and staff and/or peers in other international courts, in particular the Inter-American Court of Human Rights; and continuous professional development initiatives and training sessions.[20]

b) Understanding the reality of victims' experiences in their own countries

Beyond technical knowledge, it is also crucial that judges and their staff obtain a better understanding of the reality of victims' experiences in the situation countries, which practitioners often refer to as 'dynamics in the field'. Judges need to be fully aware of the impact of their decisions on victims, and develop empathy and understanding for individuals who, despite having endured the worst atrocities, have significant resilience and strong opinions about their rights. This understanding can be developed by consulting victims

16 ICC, "Ongwen Case: Summary of the Verdict", 4 February 2021, available here.
17 Women's Initiatives for Gender Justice "Trailblazing ICC Judgment on SGBC – Ongwen verdict advances international accountability for forced marriage and forced pregnancy", February 2021, available here.
18 FIDH, Judges Must Ensure Meaningful Participation, 2020, see supra.
19 See also Independent Expert Report, 2020, supra, Recommendation 196.
20 Independent Expert Report, 2020, see supra, para. 414-426 and Recommendations 174 and 175.

and their legal representatives, but also by listening carefully to the actors who work directly with them, such as international and local civil society and, at the Court, staff from the Victims Participation and Reparations Section (VPRS), the Public Information and Outreach Section (PIOS) and the Trust Fund for Victims (TFV). Chambers need to rely on formal observations and recommendations from those organs, but also to provide space for listening at a human level to the staff, and in particular the in-country staff, who can offer some useful keys to the ICC in terms of making proceedings meaningful for victims.

In addition, judges should do everything in their power to visit the situation countries themselves. Country visits can be a very effective and powerful tool for judges to connect with the reality of the circumstances they are expected to judge. In Judge Cotte' s words:

> *"Field visits are essential. They enabled us to see the places and their topography, to meet the local community, victims and witnesses, and therefore to make the ICC closer and more visible than through video recordings of the proceedings. The field visits also made it possible for us to compare the statements of some witnesses with the reality in the field and to draw key conclusions regarding their credibility. It is without a doubt costly, but this procedural act is warranted every time it is possible."*[21]

c) Referencing

In addition to such efforts aimed at strengthening their knowledge in general, judges must also ensure that their decisions adequately reflect the current state of the law on specific issues related to victims' rights. Too often, decisions do not adequately take into consideration previous jurisprudence and practice. This can be addressed by ensuring that submissions, including *amicus curiae* submissions are requested, when deciding on a complex matter related to victims' rights, and carefully considering arguments put forward by victims' legal representatives, the Defence, the Prosecutor and the Registry. Decisions can also be improved by requiring systematic referencing in footnotes of sources on which Chambers' findings are based. While this might seem an obvious requirement, some important decisions on victims' rights have not consistently met this standard, which not only does not reflect well on the Court, but also undermines victims' rights in practical ways.

3. Human rights standards as a source of law

Article 21(3) of the Rome Statute requires the Court to interpret law consistently with internationally recognised human rights.

The ICC Appeals Chamber stated, in relation to Article 21(3) that, "*the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognised human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court*".[22] The Lubanga Trial Chamber for example recognised that international instruments on human rights, as well as certain significant human rights reports, have provided guidance to the Chamber in establishing its 'Reparations Principles'.[23] Trial Chamber VI in the recent reparations order in the Ntaganda case, delivered in March 2021, also gave a significant place to international human rights law in its decision.[24]

Beyond interpretation of the law, human rights should permeate all aspects of the Court's work. As Carla Ferstman writes, "*human rights should not only serve as the lens through which the ICC Statute and other applicable laws are applied and interpreted, it should also guide the ICC in its relationships with stakeholders (including victims) and help determine its goals and policies*".[25]

In a recent dissenting opinion, Judge Luz del Carmen Ibáñez Carranza reminded the Court that "*not only States, but also individuals and organisations, are bound to promote and respect human rights. The courts and especially ICC have a duty to provide the right and a guarantee of access to justice.*"[26]

Following guidance and adopting best practices based on the international human rights law framework is crucial in matters related to victims' rights, and the only way to render them truly meaningful, as opposed to symbolic. It means, for example accepting that victims, as right holders, must *always* be consulted on decisions that affect them. This is not consistently the case at the ICC, where decisions that significantly affect victim participation are often taken without consulting victims and/or those who represent them. This practice must change, in order to fulfil the right to access to justice and ensure the proper administration of justice and the Court's legitimacy.

21 FIDH interview with Judge Bruno Cotte on 3 March 2021.
22 AC, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", Prosecutor v. Thomas Lubanga Dyilo, 14 December 2006, ICC-01/04-01/06-772, para. 37.
23 TC I, "Decision Establishing the Principles and Procedures to Be Applied to Reparations',The Prosecutor v. Thomas Lubanga Dyilo, 7 August 2012, ICC-01/04-01/06-2904, para. 185.
24 TC V, "Reparations Order", The Prosecutor v. Bosco Ntaganda, 08 March 2021, ICC-01/04-02/06-2659 ("Ntaganda Reparations Order, 2021").
25 Carla Ferstman, "Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness", in *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice, (texts by practitioners)*, edited by R. Jasini and G. Townsend, November 2020, available here, ("C. Ferstman, Human Rights Based Approach, 2020").
26 Dissenting Opinion of Judge Ibáñez Carranza to AC, "Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Republic of Afghanistan", ("AC, Decision on Victim's Appeals in the Afghanistan situation, 2020"), ICC-02/17-138-Anx-Corr, see supra.

4. The need for legal certainty

Judges have a duty, in order to give effect to the general principle of access to justice, to ensure a degree of certainty and consistency between the decisions of the bench, and to enable victims to know the basis and framework for exercising their rights. Chambers must therefore harmonise their practices, to a certain extent, even if they have to make adaptations based on the specific circumstances of a case.

a) Harmonising jurisprudence and practice

The best way to ensure legal certainty and consistency is by according respect to the decisions of other Chambers, and by departing from established practice or jurisprudence only where that is justified on grounds precisely articulated in the decision/judgment.[27] In other words, minimum required legal certainty can be achieved by harmonising jurisprudence and practices. In particular, it is paramount that Chambers respect and follow the jurisprudence of the Appeals Chamber. It is not reasonable to set up a legal system in which all aspects can be thrown into question at any given moment. This goes against the right of access to justice and to the proper administration of justice. Chambers must respect the rulings of the Appeals Chamber and must provide adequate reasoning where they depart from them.[28]

On this issue, Judge Cotte remarked:

> *"Do Chambers have to follow an appeals judgment in another case? In my view: yes! I am aware that a single decision does not necessarily immediately become jurisprudence which must be complied with. But it obviously becomes a point of reference to which other Chambers must pay attention. It seems to me impossible not to take it into account. Common sense leads us to ask: 'Why did the Appeals Chamber rule this way? Is this decision applicable to the issue before me? If I want to depart from it, will my position bring added value or could it contribute to disorder, or even legal uncertainty?' Judges, from countries which are so different, must equip themselves with a common judicial culture that meaningfully takes into account the legal systems they represent and the founding texts of the Court."*[29]

Ensuring a degree of certainty and consistency also means developing and updating the content of the Chambers Practice Manual, under the leadership of the Presidency, in order to reflect the current jurisprudence and practice in relation to victims' rights. Suggestions of issues that should be updated are made throughout this report. In addition, its language should be rendered more prescriptive and its contents should be adhered to by Chambers in the absence of a specific valid reason not to do so.[30]

On the need for judges to develop shared practice and collegiality, Judge Cotte stated:

> *"The Court must find a balance, which means judges being fully aware that they are part of a working community and that there are not as many ICCs as there are Chambers! Some colleagues use the concept of 'independence' in a way that is, in my view, broad and inaccurate. Violating a judge's independence means holding his hand in order to try to influence his ruling in a specific way. Exploring the best ways of working, organising the work of Chambers so that it contributes to legal certainty, ensuring that decisions are taken within a reasonable time, feeling accountable for the fairness of the proceedings as well as their expeditiousness: none of this violates judges' independence. […] We should not confuse independence and individualism. The work of judges is not individual, it is collegial. Each brings an individual contribution to this collegiality. We all belong to the same and only Court. Everyone has the right to legal certainty: the Defence, the Prosecutor, the victims, and States. This requires a certain degree of predictability. The Chambers must establish common professional practices, under the leadership of the Presidency which also has a judicial role to play. They have started doing so and this is to be welcomed."*[31]

The Independent Expert Review added that the issues of confidentiality and independence should not be used as a way of deflecting accountability and preventing oversight.[32] Indeed, those interviewed for this report expressed the need for more public scrutiny and monitoring of judges' work in general, which necessitates increased transparency in relation to public records and that fewer materials be kept confidential.

b) Consolidating case-law through appeals

The Court's experience in relation to reparations is interesting, as one of the areas involving the most complex challenges to date for the ICC to resolve from a legal (and practical) perspective. It is also the only issue on which victims are allowed to appeal decisions. Litigation on this issue has shown that having a significant amount of jurisprudence from the Appeals Chamber on a specific issue is extremely helpful, in order to clarify both legal principles and practical modalities.[33] The availability of such jurisprudence reinforces the Court's capacity to implement its challenging mandate, by providing clarity and guidance for the future to all actors involved. In particular in relation to victims' rights, as a novel and innovative aspect of international criminal law, jurisprudence from the Appeals Chamber is of utmost

27 Independent Expert Report, 2020, see supra, recommendations 216 and 217.
28 *"Before departing from practice or jurisprudence approved by the Appeals Chamber, the Chamber should be required, by procedures stated in a Regulation of the Court, to identify the point precisely in a written notice to parties requesting written submissions thereon. Argument should be heard before deciding the point either as a preliminary issue or in the context of the appeal. In the event that the Chamber is faced with inconsistent decisions of the Appeals Chamber on a point, the same process should apply."* Independent Expert Report, 2020, see supra, recommendation 218.
29 FIDH interview with Judge Bruno Cotte on 3 March 2021.
30 Independent Expert Report, 2020, see supra, recommendation 194.
31 FIDH interview with Judge Bruno Cotte on 3 March 2021.
32 Independent Expert Report, 2020, see supra, para. 29.
33 See Chapter 7, Reparations.

importance to enable the ICC to advance and streamline its legal practice.

Chambers should therefore endeavour, as far as possible, to allow issues related to the interpretation of victims' rights to be appealed, in particular on issues of legal representation and modalities of participation. Practitioners lament that it is almost impossible to appeal issues, as judges are given a wide discretion to allow interlocutory appeals and most of the time decline to do so, sometimes without providing sound reasoning.[34] Judges should be more open to have their decisions appealed and welcome the scrutiny, in the name of legal certainty.

5. Individual contributions through dissenting opinions

Despite weaknesses in terms of experience and understanding of victims' rights within the ICC bench, there are judges at the Court with open, progressive and constructive views on the role of victims at the ICC. Indeed, some have extensive knowledge and experience of victims' rights in their own jurisdictions or in other international systems. Some are engaged to a greater or lesser extent in trying to advance those rights at the ICC. However, they can find themselves isolated, or without support from their colleagues.

It is crucial that those judges speak out and ensure that their voices are heard, not only in exchanges and deliberations with their peers, but also by the general public, and most importantly by the key constituency represented by victims.

When the majority of judges sitting on a case opt for a restrictive interpretation of victims' rights, it is fundamental that those with more progressive interpretations make their disagreements known and have them recorded in dissenting opinions. Powerfully written and legally-sound dissenting opinions like the recent ones issued by Judge Luz del Carmen Ibáñez Carranza, relating to victim participation and victims' right to appeal decisions, can be valuable in reassuring victims, and those who fight for them, that they are not forgotten in the distant courtroom.[35]

Indeed, Judge Ibáñez Carranza's opinion recalled Justice Ginsburg's inspiring words: "*Dissents speak to a future age. It's not simply to say 'my colleagues are wrong and I would do it this way', but the greatest dissents do become court opinions*".[36]

34 Based on interviews conducted for this report. See also Independent Expert Report, 2020, supra, para. 592.
35 Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the "Decision on the Registry's transmission of applications for victim participation in the proceedings", whereby the majority declined to consider the applications, The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, 25 March 2020, ICC-02/11-01/15-1319-Anx; Dissenting Opinion of Judge Ibáñez Carranza to the Decision on Victim's Appeals in the Afghanistan situation, 2020, see supra.
36 Ruth Bader Ginsburg Interview with Nina Totenberg of National Public Radio, Ruth Bader Ginsburg and Malvina Harlan, Radio Broadcast, 2 May 2002.

Recommendations

On the issue of decision-making on victims' rights, FIDH recommends that ICC Chambers:

1. Consult victims and their legal representatives on all matters that affect victims' interests;
2. Ensure that Presiding Judges have extensive experience in leading courtroom proceedings and have an adequate knowledge of victims' procedural rights, including the Court's jurisprudence on this issue;
3. Develop the knowledge and skills of judges and staff on victims' rights through a thorough induction for new arrivals, exchanges of experience with current and former ICC judges and staff and/or peers in other international courts, and continuous professional development initiatives and training sessions;
4. Undertake as many country visits as possible and organise opportunities to listen directly to ICC staff who work with victims, in particular local or staff based in the country, from VPRS, PIOS and TFV;
5. Request submissions from all participants in the proceedings and the Registry before making decisions on complex issues related to victims' rights, in order to ensure that decisions adequately reflect the current state of the law;
6. Ensure systematic referencing in decisions of sources on which Chambers' findings are based, in order to ensure that decisions adequately reflect the current state of the law;
7. Respect the decisions of other Chambers, and depart from established practice or jurisprudence only where it is justified on grounds which are set out with precision in the decision/judgment, in particular with regards to jurisprudence of the Appeals Chamber;
8. Develop and update the Chambers Practice Manual, under the leadership of the Presidency, in order to reflect current jurisprudence and practice on victims' rights and make its language more prescriptive;
9. Allow issues related to the interpretation of victims' rights to be appealed where possible, in particular on the issues of legal representation and modalities of participation; and
10. Encourage issuing dissenting opinions that can contribute to advancing victims' rights in the long term.

CHAPTER 2: **FULFILMENT OF VICTIMS' RIGHTS THROUGH LEGAL REPRESENTATION**

Legal Representative of Victims Joseph Akwenyu Manoba closing statements at Ongwen trial at the ICC, March 2020. ©ICC-CPI

LEGAL representation is the most crucial factor in victims' experience of the Court.[37] Only if it is effective can victims genuinely exercise their rights. This is especially true given the particularly complex nature of the system of victim participation before the ICC, which requires both an in depth understanding of the relevant legal issues and expertise in working with victims, in addition to a strong understanding of the local context.

'Meaningful', as opposed to 'purely symbolic' victim participation, as emphasised by the Court's jurisprudence, is conditioned by adequate and effective legal representation.[38]

As FIDH and others have long underlined, the starting point for examining effective representation must be a consideration of how victims can best exercise their rights to participate, and the development of a system on that basis that is most suited to rendering participation meaningful for victims.[39] This must essentially be done from the perspective of the victims, rather than the perspective of the courtroom.

Perceptions that "victims are too far" must be replaced with an understanding that the Court is "too far" from the communities where the crimes were committed. The premise must be that the Court needs to adapt to victims, rather than victims adapting to the Court.

The practice of the Court in terms of legal representation so far has been very variable, with different systems being tested. While legal representation is a complex issue that will not have a clear-cut answer suited to all situations, the present chapter aims to highlight some of the lessons learned based on the Court's practice thus far, as well as key principles that must be borne in mind.

While the legal texts recognise victims' freedom to choose their legal representative, there is a growing practice of some Chambers which has led to the appointment of the Office of Public Counsel for Victims (OPCV) as common legal representative of victims, without due regard to the choices, desires and needs of victims, and without even consulting them. This chapter addresses this issue specifically, as it was identified as a major concern by the vast majority of individuals interviewed for this report.

1. Victims' right to choose their legal representative

It is fundamental and imperative for Chambers to respect victims' freedom to choose their legal counsel, as outlined in Rule 90(1): *"A victim shall be free to choose a legal representative*." Not only is this a right enshrined in the ICC legal texts,[40] but it is also recognised under international law.[41]

There are significant concerns that some recent jurisprudence has denied this fundamental right without providing proper reasoning. While justified limitations to this right are discussed below, the starting point must always be the principle stated in Rule 90(1).

Victims must be consulted on any decision which will affect their rights, and legal representation is one of the most fundamental issues that affect them at a very personal and practical level.

As FIDH argued in recent proceedings, victims' choice of counsel matters as it enables victims to develop the confidence that the lawyer who stands for them before the Court will represent their views, in turn building confidence in the court process itself.[42] The freedom to choose counsel is a necessary pre-condition for confidence in the client-lawyer relationship. Without a lawyer who is trusted and perceived as their genuine representative, victims develop little sense of 'ownership' of ICC proceedings.[43]

It is worth highlighting that in recent developments in the case against Adb-Al-Rahman, the legal representative of the victim applicants,[44] the Office of the Prosecutor[45] and the Defence[46] are all in agreement that a failure to seek the views of victims on the question of their legal representation is contrary to the Court's legal framework.[47] Individuals consulted for the purposes of this report expressed deep concern about the lack of consultation of victims in recent decisions in this case.

---

37 See further on legal representation of victims: FIDH/KHRC, The Victims' Mandate of the ICC, 2020, see supra; FIDH, 5 Myths, 2014, see supra, p. 19-22.; see also FIDH, "Submission on the Registry's Proposal for the Amendment of the Court's Legal Aid Policy", December 2018, available here; FIDH, "Comments on the ICC Registrar's ReVision proposals in relation to victims", 2014, available here ("FIDH Comments on ReVision, 2014").

38 Assembly of States Parties (ASP), "Court's revised strategy in relation to victims," ICC-ASP/11/38, November 5, 2012, p. 5, available here; Independent Panel of Experts, "Report on Victim Participation at the ICC," July 2013, para. 12, available here; REDRESS, Victim Participation After 20 years, 2018, see supra; "Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions", Megan Hirst and Sandra Sahyouni, in "Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice", (texts by practitioners), edited by R. Jasini and G. Townsend, November 2020, available here ("M. Hirst and S. Sahyouni, Effective Legal Representation, 2020").

"[T]he main factor for victims in feeling that participation is meaningful is receiving information and having quality communication with their lawyers." Megan Hirst, "Valuing victim participation: why we need better systems to evaluate victims' participation at the ICC", in FIDH, "Victims at the center of justice, From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC", 2018, available here ("M. Hirst, Valuing Victim Participation, 2018"); referring to Human Rights Centre UC Berkeley School of Law, "The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court", 2015.

39 REDRESS, Victim Participation After 20 years, 2018, see supra; FIDH/KHRC, The Victims' Mandate of the ICC, 2020, see supra.

40 See Gilbert Bitti, "A Court for Victims?" in FIDH, "Victims at the center of justice, From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC", 2018, available here ("G. Bitti, A Court for Victims, 2018").

41 On the right to legal representation, see M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra.

42 "Request for leave to submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence", FIDH, The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman, 3 February 2021, ICC-02/05-01/20-283 ("FIDH Amicus Curiae Request, 2021"). See also M. Hirst, Valuing Victim Participation, 2018, supra; Human Rights Watch, "Who Will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond", August 2017, available here ("HRW, Who Will Stand For Us, 2017")

43 See FIDH, Enhancing Victims' Rights, 2013, supra, and FIDH Amicus Curiae Request, 2021, supra.

44 "Request for appointment, or in the alternative, reconsideration or leave to appeal", Legal Representative of the Applicants, The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman, 25 January 2021, ICC-02/05-01/20-268.

45 "Prosecution Response to 'Request for appointment, or in the alternative, reconsideration or leave to appeal'", Office of the Prosecutor, The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman, 28 January 2021, ICC-02/05-01/20-271.

46 "Demande d'autorisation d'appel de la Décision ICC-02/05-01/20-259", Conseil de la Défense de Mr. Abd-Al-Rahman, Le Procureur c. Mr Ali Muhammad Ali Abd-Al-Rahman, 22 January 2021, ICC-02/05-01/20-264.

47 See FIDH position in FIDH Amicus Curiae Request, 2021, supra.

It is of serious concern that decisions that significantly affect victim participation are often taken without consulting victims and/or those who represent them. Such decisions appear to be in breach of the procedural right to be heard before a decision affecting one party/participant's interests is taken.[48]

It is recognised that the right to choose a legal representative is not absolute, as part of the reality of victim participation at the ICC, "*for the purposes of ensuring the effectiveness of the proceedings*".[49] However, at the very least, if Chambers decide to not retain the lawyers appointed by victims, they must provide reasons for and justify their decisions.

2. The necessity for and limits of common legal representation

The need for victims to group together in order to be represented by joint counsel, known as common legal representation, is not disputed.

However, common legal representation does not mean completely disregarding victims' choices and desires. The implementation of common legal representation and its consequences on the practical exercise of their rights by victims need to be adequately examined, in order to ensure respect for legal principles.

Indeed, Rule 90 clearly describes a three-tier process for arranging victims' legal representation:

> *1. A victim shall be free to choose a legal representative.*
>
> *2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.*
>
> *3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.*

Under Rule 90, there are therefore two ways of organising common legal representation: first, the Chamber may request that the victims choose a common legal representative (with the assistance of the Registry); second, if the victims are unable to choose one within a certain time limit, the Chamber may request the Registrar to choose.

Regulation 80(1) of the Regulations of the Court permits the Chamber to appoint a legal representative for victims ("LRV") in the interests of justice, including counsel from OPCV. This is a legal basis that has sometimes been used in the recent practice of some Chambers to appoint OPCV as common LRV. However, it should be noted that Regulation 80 does not specifically relate to the organisation of common legal representation. On the contrary, Regulation 80 is subordinated to Rule 90 of the Rules of Procedure and Evidence in the hierarchy of texts applicable before the ICC and cannot be used to override the freedom to choose a legal representative.[50] In any case, Regulation 80 requires the Chamber to first consult with the Registrar and hear from the victims concerned, before appointing an LRV, which has not been demonstrated in recent decisions.

In the Court's practice related to the organisation of common legal representation for victims under Rule 90, the judges have asked victims to select a common LRV with the assistance of the Registry. The Registry's Victims Participation and Reparation Section (VPRS) has a general mandate to support victims in organising their legal representation. Through VPRS consultations with victims, the Court can make its best efforts to ensure that victims are informed, respected and enabled in their choice of legal representation.

VPRS has sought to establish a "*systematic approach*" to common legal representation, which has three components: "*early action on common legal representation*", "*meaningful consultation with victims*" and "*an open transparent and objective selection process*".[51] This enables VPRS to undertake a competitive recruitment process of victims' counsel, based on criteria about which victims are consulted, aimed at ensuring quality in legal representation.

This approach has the merit of being practically oriented on a very complex issue, empowering VPRS to be pro-active and take the lead based on its expertise, and enabling it to "screen out" unqualified potential LRVs. However, consultation of victims under this process on the choice of their LRV is necessarily limited and continues to reflect a top-down approach from the Court when it comes to victims' rights.[52] This approach comes down to using Rule 90(3) by default and assumes that it is sufficient to merely have regard to victims' general preferences about their legal representatives when making decisions on common legal representation.[53]

As an alternative, specialists have recommended to Chambers the use of a "*sequential approach*"[54] to Rule 90, as "*a structured process of decision making that allows victims to attempt to organize their own [common legal*

48 See analysis in FIDH, 5 Myths, 2014, supra, p. 19-22.
49 Rule 90(2).
50 G. Bitti, A Court for Victims, 2018, see supra.
51 See for example: Registrar, "Proposal for the common legal representation of victims", The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 2 August 2011, ICC-01/09-01/11-243; Registrar, "Proposal for the common legal representation of victims", The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 06 August 2011, ICC-01/09-02/11-214, para. 3.
52 See the analysis in: HRW, Who Will Stand For Us, 2017, supra.
53 HRW, Who Will Stand For Us, 2017, see supra.
54 REDRESS, "Representing Victims Before the ICC: Recommendations on the Legal Representation System," April 2015.

representation] before that control is relinquished to the Registry and the Chamber, should victims be unable to agree".[55] The development of clear standard procedures in the Chambers Practice Manual has also been recommended, including the criteria to be used by a Chamber to determine whether it is necessary to move from victims' free choice of counsel under Rule 90(1) to victims' choice of a common legal representative under Rule 90(2), and, as a last resort, to a court-appointed common legal representative under Rule 90(3).[56] Such a sequential implementation of Rule 90, with explicit criteria and justifications from Chambers when departing from victims' choices, coupled with robust coordination and consultations of victims by VPRS, would go a long way towards making victims' right to participation more effective.

3. The relationship with victims and the importance of country dynamics

Key to legal representation is the relationship between lawyers and their clients, which is at the core of the victims' experience with the ICC. The work of legal representatives' teams in the places where victims live, is the most important factor in enabling victims to have meaningful access to the Court, to receive adequate information, and to be able to express their views and concerns.

Trust is an essential element of this relationship.[57] Consulting, listening and building this relationship of trust with victims is what makes victim participation meaningful. This requires a strong presence in the situation country, without which it becomes purely symbolic representation.[58]

It is recognised that "*one of the most important elements of adequate and effective legal representation is maintaining proper communication between victims' lawyers and their clients*."[59] The work of counsel for victims requires constant communication with stakeholders in the country, an understanding of local realities, and the construction of a empathic relationship that takes into account the clients' views and concerns.

This aspect is significantly recognised in the criteria used by VPRS to organise common legal representation.[60] Resolutions of the Assembly of States Parties ("ASP") have also recognised the importance of dialogue with victims and have encouraged increased in-country presence to optimise the implementation of victims' rights.[61]

In order for Chambers to make informed decisions with regards to legal representation of victims, it is crucial for them to understand what the dynamics of legal representation entail in the situation country, and acknowledge that victim participation and its impacts go beyond the courtroom.[62]

It is also important for judges to grasp the complexities of conducting legal representation work in the situation countries, not only in terms of human resources (for example, the need for assistants or liaisons in the country), but also concerning financial resources (for instance, having to cover the travel of lead counsels to meet with their clients in person when there are no proceedings in The Hague).

4. Composition of teams of victims' legal representatives

The composition of LRV teams plays a crucial role in how effectively and meaningfully they will be able to carry out their duty. Various structures have been tried by the Court in different cases: external common LRVs, with or without the assistance of OPCV; counsel from OPCV, with or without team members or assistants in the situation country; and both external LRVs and counsel from OPCV representing different groups of victims.[63]

A good approach is one that combines both expertise on the ICC and knowledge of and proximity to victim communities ("mixed system"). It could adopt multiple forms, but there are some key elements to bear in mind, as outlined in previous FIDH publications:[64]

- Consultation and regular contact with victims should be the cornerstone of any engagement;
- The representation should be organised in such a way as to serve the interests of the victim clients in the case at hand (as opposed to the interests of individual lawyers, the interests of the system, the interests of a victims' office at the ICC or the interests of future/potential cases or victims in other cases);
- A mixed system should not prioritise internal knowledge about the Court over knowledge from the country;
- A mixed system should encourage participation of

55 HRW, Who Will Stand For Us, 2017, see supra.

56 HRW, Who Will Stand For Us, 2017, see supra.

57 See HRW, Who Will Stand For Us, 2017, supra; G. Bitti, A Court for Victims, 2018, see supra.

58 "*Victims' lawyers have a duty to build a relationship of trust with their clients and ensure that victims are able to understand the proceedings, present their views and concerns and partake in any relevant consultations that affect their interests. This necessarily requires that legal representatives have a field presence in the relevant situation country and are able to meet with their clients in person. Any other alternative results in 'remote representation' which is purely symbolic and pays lip-service to the rights guaranteed to victims under the Rome Statute of the ICC.*", in FIDH Amicus Curiae Request, 2021, see supra.

59 Bianchini, Studzinsky, Sehmi & Tibori-Szabó, "Communication Between Victims' Lawyers and Their Clients" in Tibori-Szabó & Hirst, "Victim Participation in International Criminal Justice: Practitioners' Guide", 2017, p.433. Notably, this principle is recognised in the Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, available here. See also M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra

60 See below, and, for example, Registrar, "Annex 3, General criteria for the selection of common legal representatives under rule 90(3) of the Rules of Procedure and Evidence", The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap, 1 August 2011, ICC- 01/09-01/11-243-Anx3.

61 See for example Resolution RC/Res.2, adopted at the Kampala Review Conference (2010), para. 2.

62 See section "B. Victim participation in the field: how does it work?" in FIDH, 5 Myths, 2014, supra, p. 19-22.

63 For an overview of case-law on this issue, see: FIDH Comments on ReVision, 2014, supra; HRW, Who Will Stand For Us, 2017, see supra

64 FIDH, 5 Myths, 2014, see supra.

external counsel, not restrict it. It should also allow and encourage their involvement in litigation strategy;

- Decisions as to the lead counsel's nationality should be taken following consultations with victims in the relevant cases; and
- In addition to the lead counsel, close attention should be paid to the team composition. A relevant local or in-country component, with staff placed in the country working on a full-time basis to liaise with victims, is crucial.

Consultations and research conducted by FIDH[65] and others[66] show that the type of structure that is most beneficial to victims, in particular where teams represent very large numbers of victims, is one in which priority is given to the following elements:

- Trust and quality of relationship between the lawyers and their clients;
- Capacity and resources of the legal representatives' team to interact on an ongoing basis with victims where they live ;
- Variety and quality of skills and knowledge of various members of the team, combining in-depth understanding of the local context (historical, cultural, linguistic, political) and high-quality experience with international tribunals and procedures; and
- Ongoing legal support from a member of the Office of Public Counsel for Victims (OPCV), to advise on ICC-specific legal issues.

This is supported by the Registry's findings in relation to the criteria to be used to organise common legal representation of victims and select LRVs, based on previous practice and the Court's jurisprudence.[67] Such criteria may include for example: relationship of trust with the victims, or capacity for such a relationship; demonstrated commitment to and experience of working with vulnerable persons; familiarity/connection with the situation country; particular expertise in international criminal law and/or relevant litigation experience; sufficient and immediate availability; information technology skills.[68]

While there is broad agreement that the lead counsel should be an external lawyer,[69] as opposed to OPCV (see below), there is no consensus on whether the lead counsel should be based in The Hague or in the situation country. Both have advantages and drawbacks. FIDH considers that this should be for the LRV to decide, based on the victims' interests in the particular context and following consultations with them.

In summary, the optimal composition of a team representing large numbers of victims before the ICC would include: an external counsel as the lead Common Legal Representative, a Legal Assistant, a Case Manager, an In-Country Counsel and/or several In-Country Assistants in charge of interacting with victims (depending on the number of victims they represent and the local context). The team should be assigned a Legal Officer from OPCV to provide legal advice and assistance on an ongoing basis.

5. The role of OPCV

Contrary to the understanding of some ICC judges over the past years who have appointed OPCV as common LRV, OPCV was not meant to become the go-to option for common legal representation of victims thereby replacing external counsel.[70] Rather, OPCV was established, like its counterpart for the Defence,[71] to provide support and assistance to victims and their legal representatives, and, in some specific instances where there is a vacuum of representation at very early stages, to represent the general interests of victims.[72]

The Principal Counsel of OPCV is of the view that *"a combination of expertise from both external counsels and counsels from the Office of Public Counsel for Victims constitutes the best way to ensure meaningful, efficient and effective representation of victims in the proceedings before the Court"*.[73] The combination of expertise in a "mixed model" is indeed crucial, as described above, but it is important that external counsel chosen by victims retain the leading role in teams representing victims (i.e., designated as common legal representative and in charge of defining the litigation strategy in close coordination with their clients), and that OPCV remains in a supportive role to the team to take full advantage of their expertise and knowledge of the Court. The Court should make full use of OPCV by having them, among others, provide legal support to teams, answer specific requests, help with strategy brainstorming, undertake research and provide advice.

A tendency towards internalisation of legal representation for victims would raise concerns. A system that excessively prioritises knowledge of the Court and its jurisprudence would be highly problematic

65 The following elements came back in many interviews conducted for the purpose of this report. See also FIDH/KHRC, The Victims' Mandate of the ICC, 2020, supra; FIDH, 5 Myths, 2014, see supra; FIDH, Enhancing Victims' Rights, 2013, see supra.
66 See for example HRW, Who Will Stand For Us, 2017, supra.
67 See for example TC II, "Order on the common legal representation of victims", The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 22 July 2009, ICC-01/04-01/07-1328, and TC III, "Decision on common legal representation of victims for the purpose of trial", The Prosecutor v. Jean-Pierre Bemba Gombo, 12 November 2010, ICC-01/05-01/08-1005. See also ICC-02/11-01/11-138, para. 45.
68 See for example Registrar, "Annex 3, General criteria for the selection of common legal representatives under rule 90(3) of the Rules of Procedure and Evidence", The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap, 1 August 2011, ICC- 01/09-01/11-243-Anx3. See also ICC-02/11-01/11-120-Anx2, ICC-01/09-02/11-214-Anx3, ICC-01/04-02/06-141-Red2.
69 Virtually all practitioners and experts interviewed for this report agreed on this, apart from representatives of OPCV.
70 See Regulations 80 and 81 of the Regulations of the Court.
71 The Office of Public Counsel for the Defence (OPCD).
72 *"[T]hese 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."* G. Bitti, A Court for Victims, 2018, see supra.
73 Paolina Massidda, "The Participation of Victims Before the ICC: A Revolution Not Without Challenges", in "Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice", (texts by practitioners), edited by R. Jasini and G. Townsend, November 2020, available here ("P. Massidda, The Participation of Victims, 2020"). This view was also put forward by Paolina Massidda during an interview conducted for the purpose of this report.

as it could seriously risk rendering victim participation merely symbolic.

In the past, serious concerns have been raised about OCPV's lack of ongoing engagement with the victims they represent in some specific situations.[74] It appears that their capacity (and willingness) to engage directly with victims has improved in recent years, through the deployment of extra resources in the situation countries, which is laudable. It should however be noted that when OPCV is appointed as common legal representative and hires local counsel to act as their assistant in the country, as has been the practice in some cases, this redeploys the costs that the Court would use under the legal aid system for the representation of victims at the local level, rather than subsuming it under the OPCV budget.[75] Moreover, as noted above, a mixed system should encourage participation of external counsel, not restrict it. It should also allow and encourage their involvement in litigation strategy, which has not been the case under the system used by OPCV in recent years, according to which counsel hired for working in the situation country is subordinated to counsel from OPCV.

Another concern regarding the internalisation of legal representation of victims as opposed to using external counsel is related to the risk of limiting independence and willingness to challenge the ICC on issues concerning victims' rights.[76] Concentrating victim representation at the ICC in one office would undoubtedly be detrimental to the evolution of victims' rights. Indeed, a mixed system should give external counsel sufficient autonomy and, while promoting respect of the texts of the Court, should not pre-empt creative initiatives that could help advance interpretation of the rights of victims under the Statute to enable victims to play the central role intended for them.

This concern was echoed by Judge Cotte:

> *"In my view, the Office of Public Counsel for Victims is, as its name indicates [*in French*, 'Bureau du Conseil Public pour les Victimes'], an office dedicated to giving advice [*in French *'conseil']. It is an office established to provide support and assistance. The Office can also in some instances intervene during a hearing, when a legal representative has not yet been appointed. We must not deprive ourselves of their knowledge and the unique expertise they have gained. But there is a risk in over-professionalising victims' legal representation. I think it is necessary to have lawyers in the courtroom who have an external view, who are not an organ of the Court and who will not feel, even unwittingly, too involved in its operation, its habits and its constraints. It seems important to me that external lawyers can potentially bring new approaches and perhaps enable the Court to renew and challenge itself."*[77]

Instead of representing victims in a multitude of proceedings, OPCV would be better used to provide assistance to LRVs. Serious concerns have been raised about the insufficiency of the assistance currently provided by OPCV to external counsel. While OPCV does respond to a limited amount of very specific requests for assistance from counsel, all the LRVs (and members of their team) interviewed for this report said they were reluctant to seek assistance from OPCV, and that they do not receive the help they were hoping for when they do.

In fact, many practitioners, including LRVs, express the concern that OPCV's interests are no longer to assist external counsel to achieve maximum effectiveness in their work, since they are seen as the competition.[78]

The reasons invoked for appointing OPCV as common legal representative are often linked to issues of efficiency and the costs of legal aid for external counsel.[79] However, the argument of the cost-effectiveness of OPCV has yet to be shown, as noted by FIDH[80] and other organisations monitoring the issue of legal representation[81] and previous court reporting on the issue.[82]

Individuals interviewed for this report expressed concern about the growing practice of appointing OCPV as the common legal representative, underlining its impact on the legitimacy of the Court by reinforcing the perception of a Western court imposing justice on victims from the global South.

6. Legal aid for victims

As observed by the Registry, legal aid is crucial to ensuring meaningful legal representation of victims:

> *"[E]xperience before the Court has demonstrated that in order to ensure the effective exercise of the rights afforded to victims under the Court's legal framework, the Court must ensure that legal aid resources are made available to indigent victims."*[83]

74 See HRW, Who Will Stand For Us, 2017, supra, regarding the experiences in Uganda. This issue was raised by many individuals interviewed for this report.
75 See also the discussions on budgetary issues, infra.
76 CICC Legal Representation Team, *"Comments and Recommendations to the Eleventh Session of the Assembly of States Parties, November 14-22, 2012," p. 4-5. This concern was repeatedly expressed by individuals consulted for this report. See also FIDH Comments on ReVision, 2014, see supra: "While it is possible for structures to be designed in such a way that they are independent within the Registry, we submit that a lawyer that is an employee of the Court could nevertheless be limited in its ability to act fully independently. We believe that restrictions to independence do not necessarily and always arise as a consequence of specific structural limitations, although they may (for example, if the lawyers' unit must have its budget approved by the Registrar). Limitations to independence may also arise as a consequence of belonging to an institutional culture and perception limitations. We submit that victims' views about the ICC and the proceedings, including harsh criticism, could not be understood fully and be acted upon in a fully independent manner by persons who are employees of the Court. Furthermore, we recall that it is of utmost importance that the interest of victims should be the primary concern that guides all of the lawyer's motions and interventions. We are concerned that lawyers who are staff members of the Court may at times have in mind other interests, such as policies of the Court or of their own office or (actual or possible) interests of clients in other (present or future) cases."*
77 FIDH interview with Judge Bruno Cotte on 3 March 2021.
78 See for example Richard J. Rogers, "Assessment of the ICC's Legal Aid System", Global Diligence, 2017, para. 277 and 279, available here ("R. J. Rogers, Assessment of the ICC's Legal Aid System, 2017"). See also: *"[It]s interests are no longer to assist external counsel achieve maximum effectiveness in their work, and an atmosphere of 'competition and tensions' between external counsel and the office which was designed to support them has instead taken root."* M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra.
79 See for example PTC II, "Decision establishing the principles applicable to victims' participation and representation during the Confirmation Hearing", The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), 18 January 2021, ICC-02/05-01/20-259, para. 35.
80 See section "D. Is victim participation really that costly?" in FIDH, 5 Myths, 2014, supra; FIDH, "Cutting the Weakest Link" 2012, see supra.
81 Catherine Denis, ASF, "Victims' Choice vs. Legal Aid?", May 2016, para. 29-32, available here; HRW, Who Will Stand For Us, 2017, see supra.
82 ASP, "Supplementary report of the Registry on four aspects of the Court's legal aid system," ICC-ASP/11/43, November 1, 2012, para. 4.
83 Registry, "Registry's single policy document on the Court's legal aid system", ICC-ASP/12/3, 4 June 2013, para. 20, available here.

However, the permissive language in Rule 90(5) fails to adequately address the specific character of legal aid for victims.[84] The Court has not recognised legal aid as a right of participating victims who are indigent. Instead, it is granted at the Registry's discretion,[85] which leads to significant limitations on the effective exercise of victims' rights.

Currently, the Court's legal aid policy limits the provision of legal aid to Court appointed common legal representatives (as opposed to those chosen by victims). In other words, an LRV chosen and appointed by (a) victim(s), but not the Court, will not be compensated financially by the Court, even if the victims are indigent. This is something that should be addressed by Chambers in order to give full effect to the rights of victims afforded under the Rome Statute system.

Of particular concern is the impact of this policy at early stages of the proceedings, in the situation phase, when the Court has not yet appointed a common LRV.[86] The refusal of legal aid at this stage fails to recognise the extent of legal representation work during this period, to the detriment of meaningful fulfilment of victims' rights.[87] A Senior Legal Officer in the Office of the Prosecutor seems to concur with this view, stating: "*It may be worth considering appointing legal representation for potential victims on a limited retainer at an earlier stage to provide necessary advice and direction to them from the outset*".[88] The Independent Expert Review also supported this position.[89]

As FIDH[90] and others[91] have highlighted on previous occasions, problems raised by the Court's legal aid policy became clear at the pre-trial stage in the case of The Prosecutor v. Ongwen. In that case the Single Judge accepted a structure whereby victims were represented by two legal representation teams, one was a court appointed common legal representation team and the other team was externally appointed by the victims. But the Single Judge also decided that victims who had appointed their own legal representative would not qualify for financial assistance, even if they lacked the means to pay for it.[92] That team was ultimately allowed to access the Court's legal aid scheme after repeated and significant pressure from the legal team and civil society on the Registrar. However, policy on legal aid currently proposed risks a return to such problematic decisions.

More generally, legal aid for victims suffers from the inadequacy of a system designed for the Defence, which the Registry has failed to creatively and adequately transpose to the particularities of victims' representation. For example, contrary to Defence Counsel who can visit (a) client(s) in detention in the Hague, an LRV needs to travel to the country where victims live and have team members based there who can travel around the country to meet victims on a regular basis.

The lack of adequate financial resources for legal aid and reductions over recent years are serious obstacles to the fulfilment of victims' rights. Some teams of LRVs have to share ridiculously small budgets. Chambers should be mindful of this. As mentioned elsewhere in this report, and as FIDH and other civil society organisations have long highlighted, financial difficulties should not override the objectives of the Rome Statute.[93] It is for the Court and the States Parties to provide adequate capacity and necessary resources. The role of Chambers is to reaffirm victims' rights enshrined in the legal texts and to call on the Registry to take the practical steps necessary to ensure teams effectively represent victims.

In any case, Chambers should refer explicitly to justifications based on budgetary considerations in decisions concerning legal representation, in order to ensure transparency and accountability of the Court in this regard.

7. Other challenges

Court support to LRVs should not be construed narrowly and limited only to financial support. Consultations with LRVs highlighted their difficulties gaining access to the Court premises because they are not court-appointed, and lengthy bureaucratic and complicated approval processes for essential activities such as meetings between LRVs and their victim clients, obtaining email addresses and being notified correctly. LRVs consulted described their interaction with the Counsel Support Section (CSS), as the most difficult, frustrating, and unnecessarily time-consuming aspect of their work representing victims. Others have similarly voiced lawyers' concerns that the "*CSS failed to appreciate fully the role of victims' teams, especially the fieldwork necessary to keep victims properly informed*" and that "*victims' lawyers found their dealings with the CSS to be frustrating and timewasting.*"[94] Problems seem to be compounded for lawyers representing victims at the situation phase. It is important for Chambers to address this issue when directing the Registry to facilitate victims' legal representation.

Timing of decisions is often a challenge as Chambers usually issue decisions on victim participation and on common legal representation at a very late stage

84 Rule 90(5) provides that "[A] victim or a group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance" (emphasis added).
85 See R. J. Rogers, Assessment of the ICC's Legal Aid System, 2017, supra, para. 271.
86 See examples in M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra.
87 See infra, Chapter 4, Victims' rights in the preliminary and investigation stages.
88 See Nicole Samson, "Dual Status Victim-Witnesses at the ICC: Procedures and Challenges" in "Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice", (texts by practitioners), edited by R. Jasini and G. Townsend, November 2020, available here ("N. Samson, Dual Status Victim-Witnesses, 2020").
89 Independent Expert Report, 2020, see supra, recommendation 341.
90 FIDH/KHRC, The Victims' Mandate of the ICC, 2020, see supra.
91 HRW, Who Will Stand For Us, 2017, see supra; M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, see supra.
92 PTC II, "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights", Situation in Uganda, 27 November 2015, ICC-02/04-01/15-350, para. 18.
93 On legal representation specifically, see: Catherine Denis, ASF, "Victims' Choice vs. Legal Aid?", May 2016, para. 29-32, available here; HRW, Who Will Stand For Us, 2017, see supra.
94 See R. J. Rogers, Assessment of the ICC's Legal Aid System, 2017, supra, para. 281.

proceedings, which makes it hard for the appointed common legal representative to prepare appropriately.[95] Common legal representation of victims should be organised at a sufficiently early stage in pre-trial and trial proceedings in order to ensure the efficient and meaningful participation of victims during those proceedings, which is a practice that the Registry aims to implement.[96]

Recommendations

On the issue of legal representation of victims, FIDH recommends that ICC Chambers:

1. Respect victims' freedom to choose their lawyer, as outlined in Rule 90(1), as the starting principle for deciding on issues of legal representation, and consult them before issuing decisions that affect their choice of counsel;

2. When organising common legal representation, follow Rule 90 (rather than Regulation 80), and always take into consideration the views of the Registry (VPRS), the dynamics in the country, and the needs of legal representation at the local level;

3. Use a sequential approach to Rule 90, whereby victims are allowed to attempt to organise their own common legal representation—with the assistance of VPRS—before the Chamber requests VPRS to choose a common legal representative;

4. Develop clear standard procedures regarding common legal representation in the Chambers Practice Manual, in close consultation with the Registry and based on the sequential approach—including the criteria to be used by a Chamber to move from Rule 90(1) to 90(2), and, as a last resort, to Rule 90(3);

5. When organising common legal representation of a large group of victims, direct the Registry to ensure that the composition of legal representatives' teams allow for effective representation of victims, recognising the need for an external counsel as the lead Common Legal Representative, supported by legal/technical staff as well as an adequate team in the country in charge of interacting with victims. The team should be assigned a Legal Officer from OPCV to provide legal advice and assistance on an ongoing basis;

6. Refrain from appointing OPCV as common legal representative when other options are available, and consult with the Registry and victims in this regard;

7. Recognise legal aid as a right of all participating victims who are indigent—whether or not represented by Court appointed common legal representatives—including at early stages of the proceedings; and

8. Direct the Registry to provide adequate overall support to victims' legal representatives, beyond financial support, in order to ensure effective victims' access to the Court through their lawyers.

95 See for example P. Massidda, The Participation of Victims, 2020, supra.

96 See the arguments developed in FIDH Amicus Curiae Request, 2021, see supra. See also Registrar, "Report recommending a decision concerning the common legal representation of victims participating in the case", The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, ICC-02/05-03/09-134. See also "Report on the organization of common legal representation", ICC-02/05-03/09-187 in the same case.

CHAPTER 3:
VICTIMS' RIGHT TO INFORMATION

Town Hall meeting with the affected communities, Bossangoa, Central African Republic, May 2011. ©ICC-CPI

BEYOND the rights to participation and reparations, and in order to give effect to those, victims have a right to be properly informed about matters that affect their interests under the Rome Statute framework[97] and under international law.[98]

Victims' right to receive information from and communicate with the ICC has been established by the Court's jurisprudence.[99] The Court's strategic plans[100] and regular resolutions of the Assembly of States Parties[101] have long recognised the importance and necessity of outreach, which is also highlighted by independent experts,[102] as well as civil society and practitioners.[103]

As stated by Pre-Trial Chamber III in the situation of Palestine:

> *"For the Court to be able to properly fulfil its mandate, it is imperative that its role and activities are properly understood and accessible, particularly to the victims of situations and cases before the Court".*[104]

The right to information includes the right to notification of victims and their legal representatives.[105] This issue is addressed in Chapter 6 below.[106]

1. The importance of outreach and publicity of proceedings

a) The importance of outreach for the effectiveness of victims' rights

Fulfilment of victims' right to information is a pre-condition to exercising their other rights. As Pre-Trial Chamber III stated, "*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*".[107]

In order for victims to participate in ICC proceedings, and to do so meaningfully, they must know of and understand the process, and clear and accessible systems must be in place. This means ensuring effective outreach programmes and engagement with victims. In particular, experience has shown that "*an effort to early on engage with victims and set the ground work for future victim participation*"[108] is crucial for victims to be ready to apply to the Court when proceedings start at a later stage.

Proper outreach by the Court is a means to put victims back at the centre of justice, when much of the discussions that reach the general public tend to concern perpetrators. It also contributes to the empowerment of victims as agents of justice, which is a stated objective of the Court.

b) The importance of outreach for advancing the Rome Statute's objectives

Beyond giving effect to victims' rights, outreach and public information play a key role in furthering other objectives of the Rome Statute system.

For example, Pre-Trial Chamber III stated that:

> *"Outreach and public information activities in situation countries are quintessential to foster support, public understanding and confidence in the work of the Court. At the same time, they enable the Court to better understand the concerns and expectations of victims, so that it can respond more effectively and clarify, where necessary, any misconceptions"*[109]

FIDH has repeatedly stressed that early outreach by the ICC is essential to match expectations with the realities of the mandate of the Rome Statute, in order to mitigate disappointments, frustrations, and even animosity towards the Court.[110] It is crucial to tackle misinformation and misconceptions among the general population and among victims' communities, which affect the perception and legitimacy of the Court. In global and national contexts where the ICC's detractors are using misinformation tactics to trigger resentment against the ICC, the Court must have robust responses.

By broadening and reinforcing support for justice in general and for the ICC in particular among the population, effective outreach and information activities can have positive effects in terms of States' cooperation and domestic accountability efforts. Outreach is also essential for the deterrent effect of the ICC to have any meaning. The Court as a whole, including the Chambers, the Registry and the Office of the Prosecutor, should aim

97 Relevant provisions include Articles 21 and 68(3) of the Rome Statute, Rules 16(1)(a)-(c) and (2)(a), 85, 86 and 89 to 93 of the Rules of Procedure and Evidence, Regulation 86 of the Regulations of the Court, and Regulations 6, 8, 103(1), 104, 105 and 112(1) of the Regulations of the Registry.

98 United Nations General Assembly, "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", A/RES/40/34 of 29 November 1985, and United Nations General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", A/RES/60/147 of 21 March 2006.

99 See for example: PTC III, Palestine, Decision on Information and Outreach, 2018, ICC-01/18-2, supra; PTC III, Myanmar, Order on Information and Outreach, 2020, ICC-01/19-28, supra.

100 See for example ICC-ASP, "Strategic Plan for Outreach of the International Criminal Court", 29 September 2006, ICC-ASP/5/12.

101 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; ICC-ASP/13/Res.4, 17 December 2014, Resolution on Victims and Affected Communities, Reparations and the Trust Fund for Victims; Resolutions on Strengthening the ICC and ASP, ICC-ASP/9/Res.3 (2010); ICC-ASP/10/Res.5 (2011); ICC-ASP/11/Res.8 (2012); ICC-ASP/12/Res.8 (2013); ICC-ASP/13/Res.5 (2014); ICC-ASP/14/Res.4 (2015); ICC-ASP/16/Res.6 (2017); ICC-ASP/17/Res.5 (2018); ICC-ASP/18/Res.6 (2019).

102 Independent Expert Report, 2020, see supra.

103 See for example: FIDH/KHRC, The Victims' Mandate of the ICC, 2020, supra; "Beyond Victim Participation during Proceedings: Outreach and Information Activities during Preliminary Examination in Palestine", by Nada Kiswanson, in FIDH, "Victims at the center of justice, From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC", 2018, available here ("N. Kiswanson, Outreach in Palestine, 2018"); FIDH, Enhancing Victims' Rights, 2013, see supra; REDRESS, Victim Participation After 20 years, 2018, see supra.

104 PTC III, Palestine, Decision on Information and Outreach, 2018, ICC-01/18-2, see supra, para. 7.

105 Rule 92 of the Rules of Procedure and Evidence.

106 See infra, Chapter 6, Modalities of participation.

107 PTC III, Palestine, Decision on Information and Outreach, 2018, ICC-01/18-2, see supra, para. 11; PTC III, Myanmar, Order on Information and Outreach, 2020, ICC-01/19-28, see supra, para. 7.

108 N. Kiswanson, Outreach in Palestine, 2018, see supra.

109 PTC III, Palestine, Decision on Information and Outreach, 2018, ICC-01/18-2, see supra, para. 7.

110 See for example FIDH, Enhancing Victims' Rights, 2013, supra.

to contribute to these general objectives in the broader fight against impunity.

2. Challenges for the Registry[111]

The ICC is widely criticised for its shortcomings in terms of outreach and engagement with victims.[112] The lack of effective, meaningful, consistent and timely outreach has long been noted by the Assembly of States Parties (ASP)[113] as well as by the latest Independent Expert Review (IER).[114]

One of the major issues is that outreach does not start until a formal investigation has been opened: the "*need for the Court to carry out outreach activities from the outset of the Court's involvement in a country, including during [preliminary examinations]*" was explicitly highlighted by the IER, in line with requests from the ASP.[115]

One of the reasons for such limitations is the Registry's interpretation of Regulation 5bis of the Regulations of the Registry, as restricting its mandate by only allowing it to initiate activities once there is a 'situation'.[116] While the IER recommends amending the Regulations themselves, this interpretation needs to be approached with caution. In a context in which there is wide acknowledgement of the practical need for outreach at the earliest stages, including within the Registry itself, and judicial recognition of victims' right to obtain information in order to exercise their rights (see above), the Registry's interpretation of Regulation 5bis is not necessarily correct.

In any case, Chambers have the power to order the Registrar, pursuant to Rule 92(8) of the Rules of Procedure and Evidence, to take the necessary steps to ensure adequate publicity of the proceedings at all times. A judicial decision therefore can trigger the Registry's outreach mandate, including during the preliminary examination stage. This has been done in relation to the situations in Palestine and Bangladesh/Myanmar.[117]

Rather than stemming from the legal mandate, limitations are due to practical realities that restrict the ability and capacity of the Registry to conduct effective and meaningful outreach and engagement with victims. These include, in particular, a lack of adequate financial resources and staffing, with very limited presence in the situation countries, making it difficult to carry out this ambitious mandate. However, as FIDH and other civil society organisations have long stressed, financial difficulties should not override the objectives of the Rome Statute. It is for the Court and the States Parties to provide adequate capacity and necessary resources.[118]

Rather than being constrained by such limitations, Chambers can and should play a role in reaffirming the centrality of outreach and of victims' rights through their decisions, in particular in a context in which the Registry is failing to carry out such a challenging but crucial mandate.

3. The role of Chambers

As stated above, Chambers have the power to order the Registrar, pursuant to Rule 92(8) of the Rules of Procedure and Evidence, to take the necessary steps to ensure adequate publicity of the proceedings at all times. In addition, the Court has the duty to effectively enable victims to exercise their right to be heard and considered, which requires adequate information and outreach.[119]

Chambers should continue to make use of their power to reaffirm the importance of outreach and engagement with victims, by including such orders in their decisions. They should do so in particular at early stages of proceedings, in the preliminary examination phase and during the investigation, but also at the beginning of the pre-trial and trial phases. Particular consideration should also be given to communication and outreach in relation to the reparations phase, including in terms of the respective responsibilities of the Registry (PIOS and VPRS), the Trust Fund for Victims (TFV) and legal representatives of victims.

The reasoning and affirmations contained in the decisions of Pre-Trial Chamber III in the situations of Palestine and Myanmar/Bangladesh,[120] in particular on the duty to effectively enable victims to exercise their right through proper communication and outreach, should serve as guidance in all decisions of Chambers in relation to victims, at all stages.

In addition, acknowledging the need for outreach from an early stage, as soon as a situation is assigned to a Pre-Trial Chamber, should become the standard approach in all ongoing and future preliminary examinations. Consistent practice in this regard, across all situations, is key, following the example of Pre-Trial Chamber III, including with regards to its observations on the interaction of such outreach with the Prosecutor's obligations at this stage.[121]

However, it is crucial that such decisions are made in close consultation and coordination with the Registry, in particular PIOS and VPRS. In order for decisions to have meaningful impact, Chambers must be aware of

111 The Office of the Prosecutor has its own responsibilities with regards to outreach. Given the scope of the present report, this section focuses on the work of the Registry's Public Information and Outreach Section (PIOS), as the arm of Chambers in terms of outreach, which works in coordination with the Victims Participation and Reparations Section (VPRS).
112 Almost all individuals interviewed for the purpose of this report mentioned outreach as one of the main challenges for an effective and meaningful implementation of victims' rights at the ICC. Concerns were particularly strong among respondents from (or involved in) situation countries, including for example Georgia, Palestine, Afghanistan, Myanmar/Bangladesh. See also the reports mentioned supra.
113 See supra.
114 Independent Expert Report, 2020, see supra, para. 392 and 393. See also p. 857 for the link to the victims' application process.
115 Independent Expert Report, 2020, see supra, para. 3942.
116 Regulation 5*bis* of the Regulations of the Registry states: "Outreach programmes shall be aimed at making the Court's judicial proceedings accessible to those communities affected by the situations and cases before the Court."
117 PTC III, Palestine, Decision on Information and Outreach, 2018, ICC-01/18-2, see supra; PTC III, Myanmar, Order on Information and Outreach, 2020, ICC-01/19-28, see supra.
118 See for example FIDH, Enhancing Victims' Rights, 2013, supra.
119 PTC III, Palestine, Decision on Information and Outreach, 2018, ICC-01/18-2, see supra, para. 8.
120 PTC III, Palestine, Decision on Information and Outreach, 2018, ICC-01/18-2, see supra; PTC III, Myanmar, Order on Information and Outreach, 2020, ICC-01/19-28, see supra.
121 PTC III, Myanmar, Order on Information and Outreach, 2020, ICC-01/19-28, see supra, para. 8 and 10.

practical factors related to the reality of the Registry's work in the situation countries and the division of tasks between relevant sections. Improved understanding of the dynamics in the situation countries would put Chambers in a better position to fulfil their duty to ensure that the Court is accessible to victims.

It is the Chamber's role to monitor the work of the Registry and hold it accountable. Such decisions by Chambers can help to improve coordination between various organs and sections, including country offices, and to ensure that relevant actors obtain the resources and support they need to conduct their mandate properly. Chambers should also ensure monitoring of the implementation of such decisions. In the situation in Palestine for example, the Registry failed to adequately implement the order but was not held accountable.

Other actions from Chambers that could help to improve the quality of the Court's outreach include ensuring more consistency and legal certainty in judicial practices (in order to clarify the type of information that should be passed on to victims) and giving advance notice to PIOS of important decisions (in order to enable them to prepare key messages in coordination with the relevant sections).

Finally, it is of paramount importance that Chambers ensure their decisions are available in a timely manner in a language understood in the country where victims live. The Court's failure to provide decisions in relevant languages can negatively affect victims' capacity to exercise their rights. Chambers should request that decisions be systematically and promptly translated into relevant languages.

Recommendations

With regards to outreach and public information, FIDH recommends that ICC Chambers:

1. Reaffirm the importance of outreach, public information and engagement with victims in all decisions related to them;
2. Order the Registry, as soon as a situation is assigned to a Pre-Trial Chamber, to establish outreach and public information programmes tailored to the specific situation, taking into account domestic civil society views and perspectives, in coordination with the Prosecutor, and focusing on how victims can engage with the ICC—including during a preliminary examination;
3. Consult and coordinate with the Registry, in particular PIOS and VPRS, before making detailed decisions related to outreach and engagement with victims;
4. Establish systems of reporting and monitoring of the Registry's implementation of orders related to outreach;
5. Give particular consideration to communication and outreach in relation to the reparations phase, taking into account the respective responsibilities of the Registry (PIOS and VPRS), the Trust Fund for Victims and legal representatives of victims;
6. Give advance notice to PIOS of important decisions and make decisions available in writing at the time of their pronouncement; and
7. Request that decisions be systematically and promptly translated into relevant languages.

CHAPTER 4:
VICTIMS' RIGHTS IN THE PRELIMINARY AND INVESTIGATION STAGES

© Massoud Hossaini

WHILE the Court's practice in terms of victim participation during pre-trial and trial stages is now established, the modes of implementation of the rights of victims during the preliminary and investigation phases remain relatively vague and the Court's practice in this regard reflects a narrow view of the role of victims.

This is in part due to a strong opposition, historically, from the Office of the Prosecutor to attempts by victims to proactively engage in the judicial process at these stages, partly because of a fear of being excessively challenged. It is hoped that the new Prosecutor and his office will be more open to giving victims their rightful place in the Rome Statute system.

In any case, it is up to Chambers to regulate the role that victims have during those stages. The Court's practice has shown that the role of victims at the early stages depends to a large extent on how Pre-Trial Chambers interpret their own mandate to monitor the Prosecutor's (in)actions. Chambers should not shy away from being more proactive in this regard, in accordance with the intention behind the creation of Pre-Trial Chambers.[122]

It is crucial for victims to have an effective access to the judge during the early stages, in order to ask questions, share their views and concerns, and nourish the focus and scope of future investigations, as it is at this point that the process is shaped. The existing legal framework provides for victims to feed into the process, rather than merely passively observe it. This is crucial, as victims can bring important perspectives that are different to those of the Prosecutor.

1. Added value of victim participation in early stages

The experience so far demonstrates that victims can contribute significantly at these stages to the Court's search for the truth, in particular by ensuring that the scope of the investigation reflects, as far as possible, the reality of the crimes committed and the actors involved.

In the proceedings related to Georgia, for example, it is clear that victims' representations submitted, under Article 15, after the Prosecutor requested the Pre-Trial Chamber's authorisation to open an investigation led the Pre-Trial Chamber, while authorising the opening of an investigation into international crimes committed in Georgia in 2008, to expand the scope of this investigation. Additional alleged crimes were included, that were not mentioned in the Prosecutor's request for authorisation, in particular arbitrary detention of civilians and torture of prisoners of war.[123] In this way, victims played an important part in guaranteeing that the scope of the investigation reflects as much as possible the reality and variety of the crimes, and thereby includes the full range of groups of victims of the crimes committed during what is referred to as the "August war" of 2008.

In the ground-breaking proceedings related to the Court's jurisdiction in the Myanmar/Bangladesh situation, according to a legal representative, "*victims played a pivotal role in pushing the envelope on the legal issues brought to the Court's attention*".[124] In this situation, the significant added value of victims' representations was explicitly highlighted by Pre-Trial Chamber III.

> *"The Chamber recalls that, in its decision authorising the investigation, it had considered that, while it had reached its decision on the basis of the material provided by the Prosecutor, the abundant information contained in the victims' representations before it would have also allowed it to reach the same conclusion. It also considered that the victims' representations provided valuable information relevant to the scope of the investigation, gravity and the interests of justice."*[125]

Furthermore, in the appeals proceedings related to Afghanistan, victims' legal arguments played an important role in the Chamber's decision to authorise the Prosecutor to open an investigation into international crimes allegedly committed in Afghanistan.[126]

2. Legal basis for victim participation in early stages

Under the Rome Statute framework, there are several specific proceedings in the early stages in which victims are explicitly invited to participate, but victims are also allowed to participate in any judicial proceedings that affect their interests.

a) Article 15(3): representations when the Prosecutor requests authorisation to open an investigation

Pursuant to Article 15(3) of the Rome Statute, when the Prosecutor decides to initiate investigations *proprio motu* and submits to the Pre-Trial Chamber a request for authorisation of an investigation, victims may make

122 "*Our organizations 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.*" FIDH and others, "Victims question the ICC about the lack of prosecution of Jean-Pierre Bemba for crimes committed in the DRC", November 2010, available here. See also discussions on prosecutorial discretion in Fergal Gaynor and Anushka Sehmi, "The Perfect Storm: Obstruction, Intimidation and Inaction in the Kenya Situation" in FIDH, "Victims at the center of justice, From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC", 2018, available here ("F. Gaynor and A. Sehmi, The Perfect Storm, 2018").

123 Nino Tsagareishvili, "The ICC Investigation into the Situation of Georgia: lack of victims' involvement and related challenges" in FIDH, "Victims at the center of justice, From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC", 2018, available here ("N. Tsagareishvili, The ICC Investigation into the Situation of Georgia, 2018"); 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.*

124 "*Not only did the PTC, in granting the Request, rel[y] on the arguments advanced by the LRVs on the legal questions raised therein, 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. 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.*" Wayne Jordash QC and Uzay Yasar Aysev, "Victim participation in the pre-situation phase: insights from the Pre-Trial Chamber's Rohingya decision", in FIDH, "Victims at the center of justice, From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC", 2018, available here ("W. Jordash QC and U. Y. Aysev, Victim Participation in the Rohingya situation, 2018").

125 PTC III, Myanmar, Order on Information and Outreach, 2020, ICC-01/19-28, see supra, para. 5.

126 See "The Right to Appeal" in Chapter 6, Modalities of participation.

what are referred to as "Article 15 representations", in accordance with Rule 50. Through such representations victims can present their views on whether and why an investigation by the ICC would serve their interest and what the scope of such investigation should be. This process has been implemented in the situations in Kenya,[127] Côte d'Ivoire,[128] Georgia[129] and Afghanistan.[130]

b) Article 19(3): observations in proceedings concerning jurisdiction or admissibility

Under Article 19(3), victims may submit observations in proceedings concerning the jurisdiction of the Court or the admissibility of a case. This procedure was implemented in the situation in Palestine in 2020, in which victims submitted observations on the territorial jurisdiction of the ICC.[131]

Interestingly, in 2018, in the Bangladesh/Myanmar situation, Pre-Trial Chamber I recognised victims' standing to submit observations on the Court's jurisdiction, not pursuant to Article 19(3), as contended by the victims, but under Article 68(3) on the participation of victims in proceedings, while also making reference to Rule 93 on the Chamber's power to seek the views of victims or their legal representatives.[132] While this is an interesting and progressive use of Article 68(3), which opens the door to useful debates about the scope of the provision and its interaction with other more specific provisions, it was also a missed opportunity to clarify the scope of participation under Article 19(3).[133]

c) Article 53(3)(a): participation in a review of the Prosecutor's decision not to investigate or prosecute

In accordance with Article 53(3)(a) and Rule 92, victims can participate in a review of the Prosecutor's decision not to investigate or prosecute. In the Comoros situation (the Gaza Flotilla incident), Pre-Trial Chamber I authorised victims to submit observations.[134] The Chamber noted that "*victims' participation in the context of the article 53(3) review proceedings is a mandatory requirement stemming from rule 92(2) of the Rules, which applies irrespective of the grounds on which the Prosecutor bases the decision under article 53(1) of the Statute*"[135] and that this applies to "*all victims who have communicated with the Court in relation to the situation in question*".[136]

In the Kenya situation, when victims submitted a request for review of the Prosecution's decision to cease active investigation, Pre-Trial Chamber II held that victims had standing to bring the request.[137] It considered that:

> *"[O]ne of the valid forms of victims' participation in the proceedings of a situation is to prompt the Chamber to consider exercising its proprio motu powers with respect to a specific issue affecting the victims' personal interests".*[138]

While it is a shame that the Chamber interpreted "*the extent of [its] judicial oversight over the Prosecutor's activities regarding her investigation*" in a narrow way and denied the request, this development was significant in recognising victims' right to be proactive in these types of proceedings.

d) Rule 93: seeking the views of victims

Rule 93 of the Rules of Procedure and Evidence provides a non-exhaustive list of issues on which a Chamber may seek the views of victims. As noted above, Pre-Trial Chamber I in the Bangladesh/Myanmar situation made use of this provision (alongside Article 68(3)) to confirm that victims had standing and to accept their submissions.[139] By holding that "*rule 93 of the Rules gives [the Chamber] discretion to accept observations presented by victims on any issue and at any stage of the proceedings, whenever the Chamber finds it appropriate*",[140] Pre-Trial Chamber I confirmed the potentially wide application of this provision to participation of victims in early stages of the proceedings.

Chambers should not shy away from using this provision in a broad range of circumstances, as an effective and efficient way for victims to submit their views without a cumbersome process for the Court.

e) Article 68(3): general right to participate in any judicial proceedings

The umbrella principle of Article 68(3), which is at the core of victim participation at the ICC, gives victims a general right to present their views and concerns, at appropriate stages and when their personal interests

127 PTC II, "Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute", Situation in the Republic of Kenya, 10 December 2009, ICC-01/09-4.
128 PTC III, "Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute", Situation in Côte d'Ivoire, 6 July 2011, ICC-02/11-6.
129 Registrar, "Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute", 4 December 2015, Situation in Georgia, ICC-01/15-11. For more information on the process in Georgia, see N. Tsagareishvili, The ICC Investigation into the Situation of Georgia, 2018, supra.
130 PTC III, "Order to the Victims Participation and Reparation Section Concerning Victims' Representations", Situation in Afghanistan, 9 November 2017, ICC-02/17-6. For more information on the process in Afghanistan, see Kyra Wigard, Guissou Jahangiri and Zia Moballegh, "Victims' Representations in Afghanistan: Unprecedented Challenges and Lessons Learned" in FIDH, "Victims at the center of justice, From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC", 2018, available here ("K. Wigard, G. Jahangiri and Z. Moballegh, Victims' Representations in Afghanistan, 2018").
131 PTC I, "Order setting the procedure and the schedule for the submission of observations", Situation in the State of Palestine, 28 January 2020, ICC-01/18-14.
132 PTC I, "Request under Regulation 46(3) of the Rules of the Court, Decision on the '"Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'", Bangladesh/Myanmar situation, 6 September 2018, ICC-RoC46(3)-01/18-37 ("PTC I, Decision on jurisdiction in the Myanmar/Bangladesh situation, 2018").
133 These reflections are based on discussions with a legal representative of victims for the purpose of this report.
134 PTC I, "Decision on Victims' Participation, Situation in the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia", 24 April 2015, ICC-01/13-18.
135 Ibid para. 8.
136 Ibid para. 8.
137 F. Gaynor and A. Sehmi, The Perfect Storm, 2018, see supra.
138 PTC II, "Decision on the '"Victims' Request for review of the Prosecution's decision to cease active investigation'", Situation in the Republic of Kenya, 5 November 2015, ICC-01/09-159.
139 PTC I, Decision on jurisdiction in the Myanmar/Bangladesh situation, 2018, see supra.
140 Ibid para. 21.

are affected. The Appeals Chamber confirmed 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*".[141] As noted above, Pre-Trial Chamber I in the Bangladesh/Myanmar situation made use of Article 68(3) (and Rule 93) to confirm that victims had standing and to accept their submissions in proceedings concerning jurisdiction, at a very early stage, before/during a preliminary examination.[142]

In the Kenya situation, Pre-Trial Chamber II considered that "*one of the valid forms of victims' participation in the proceedings of a situation is to prompt the Chamber to consider exercising its proprio motu powers with respect to a specific issue affecting the victims' personal interests*".[143] The Chamber also explicitly recognised the general possibility of being "*seized of a request emanating from victims of the situation who have filed an application for participation in the proceedings*".[144]

These examples show that Chambers have the legal tools to give victims a meaningful place at the early stages of a situation.

Interestingly, the Appeals Chamber also reaffirmed recently that pre-trial chambers may have a role to play when it comes to reparations:

> *"A chamber of the Court, whether pre-trial, trial, or appeal, must permit victims whose personal interests are affected to present their views and concerns at any stage of the proceedings determined to be appropriate by the Court. This duty may, in some cases, compel a pre-trial chamber to hear submissions related to reparations. Depending on the circumstances, there may also be a role for a chamber to make interim orders and decisions in relation to reparations proceedings. In particular, a pre-trial chamber is vested with the authority to seek States' cooperation to effect forfeiture for the benefit of victims and then to hear the observations of any persons interested in the protective measures and to make orders where appropriate. Moreover, a pre-trial chamber may make orders for the protection and privacy of victims and the preservation of evidence. All of these functions can and should be engaged, where necessary, to secure victims' opportunity to benefit from reparations, should a conviction be handed down at a later stage."*[145]

f) Moving away from a narrow interpretation of victims' rights

It is hoped, as the Court develops its practice and clarifies the above legal principles, that more space will be given to victims at the preliminary examination and investigation stages.[146] Indeed, victims should be able to challenge the Prosecutor's choices before a Pre-Trial Chamber.[147]

The narrow manner in which victims' rights are sometimes currently interpreted at the early stages of proceedings is problematic: for example, victims should be able to appeal decisions where either the Court or the Prosecutor fail to undertake or authorise investigations, thereby hampering victims' rights to truth, justice, and reparations.[148]

Furthermore, victims must be able to call into question the excessive length of certain preliminary examinations, such as those in Guinea, Colombia, Afghanistan, and Palestine. The need for the Prosecutor to avoid "prolongation" of preliminary examinations was recently emphasised by Pre-Trial Chamber I in the Myanmar/Bangladesh situation[149] as well as by the Independent Expert Review, which recommended that they should not last more than two years.[150]

ICC judges play an essential role at the preliminary examination phase in the implementation of victims' rights. This role should aim to vindicate the rights of victims rather than limit their participation on issues that affect their fundamental rights.

3. The need for early outreach and engagement with victims

As discussed in the previous chapter[151], outreach and information to victims are crucial to victims' effective exercise of their rights, particularly the right to participate.

Civil society organisations and legal representatives assisting victims in situation countries raise concerns and frustrations about the shortcomings of the ICC in terms of outreach and engagement with victims at these stages, which places the burden of providing information entirely on local civil society and has direct consequences for the ability of victims to exercise their rights before the Court.[152]

141 AC, "Judgment 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", Situation in the Democratic Republic of the Congo, 19 December 2008, ICC-01/04-556.
142 PTC I, Decision on jurisdiction in the Myanmar/Bangladesh situation, 2018, see supra.
143 PTC II, "Decision on the Victims' Request for review of the Prosecution's decision to cease active investigation", Situation in the Republic of Kenya, 5 November 2015, ICC-01/09-159.
144 PTC II "Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya", 3 November 2010, ICC-01/09-24, para. 15.
145 AC, "Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 18 August 2020 entitled 'Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute'", The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), 18 December 2020, ICC-02/05-01/20-237, para. 14.
146 See reflections in N. Tsagareishvili, The ICC Investigation into the Situation of Georgia, 2018, supra.
147 G. Bitti, A Court for Victims, 2018, see supra; FIDH, "Judges seeking to join ICC's bench must have proven expertise on victims' rights", November 2020, available here; See also discussions about prosecutorial discretion in F. Gaynor and A. Sehmi, The Perfect Storm, 2018, supra.
148 See discussions on recent decisions of the Appeals Chamber in the Afghanistan situation in FIDH, "Judges seeking to join ICC's bench must have proven expertise on victims' rights", 2020, supra.
149 PTC I, Decision on jurisdiction in the Myanmar/Bangladesh situation, 2018, see supra, para. 84.
150 Independent Expert Report, 2020, see supra, para. 706-719 and Recommendation 257. See also FIDH/KHRC, The Victims' Mandate of the ICC, 2020, supra.
151 See Chapter 3, Victims' right to information.
152 This concern was expressed by many individuals interviewed for this report, including representatives of local civil society groups in Palestine, Georgia, and Afghanistan. See also N. Tsagareishvili, The ICC Investigation into the Situation of Georgia, 2018, supra; N. Kiswanson, Outreach in Palestine, 2018, see supra; K. Wigard, G. Jahangiri and Z. Moballegh, Victims' Representations in Afghanistan, 2018, see supra; Lambert Nigarura, "Victims of political violence in Burundi: What participation before the ICC?" in FIDH, "Victims at the center of justice, From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC", 2018, available here ("L. Nigarura, Victims of P;olitical Violence in Burundi, 2018").

There are significant challenges to the Registry's capacity to conduct this work in the early stages, including the Registry's limited interpretation of its own mandate in this area. However, there is wide acknowledgement of the practical need for outreach at the earliest stages, including within the Registry itself, and judicial recognition of victims' right to obtain information in order to exercise their rights.[153]

In any case, Chambers have the power to order the Registrar, pursuant to Rule 92(8) of the Rules of Procedure and Evidence, to take the necessary steps to ensure adequate publicity of the proceedings at all times. A judicial decision therefore can trigger the outreach mandate of the Registry, including during the preliminary examination stage. This was done in relation to the situations in Palestine and Bangladesh/Myanmar.[154]

4. Setting up procedures for enabling victim participation

a) Under Article 15(3), Article 19(3) and Article 53(3)(a) of the Rome Statute

In relation to processes under Article 15(3) ("victims' representations" on the opening of an investigation), Article 19(3) (victims observations on jurisdiction or admissibility) and Article 53(3)(a) (victims' participation in the review of the decision of the Prosecutor not to investigate or prosecute), given the very precise and limited scope of victims' involvement, there should be no need for victims to be granted the status of victims by a Chamber before they can participate (following the application process set out in Rule 89). This is in contrast to the requirements for participation under Article 68(3). However, the practice of different Chambers has not been entirely coherent on this specific issue, and it is important to harmonise approaches in order to provide some legal certainty to victims and their legal representatives.[155] In any case, Chambers should outline explicitly and clearly the procedures and timelines that victims and the Registry should follow.

For example, in relation to representations under Article 15(3), in the Afghanistan situation, Pre-Trial Chamber II ordered VPRS 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."*[156] To help facilitate this process, VPRS prepared a template representation form which was available on the ICC website during the process, in a number of languages.[157]

However, in relation to Burundi no such procedure was put in place by the Court on security grounds, although local civil society considers that victims living in exile could easily have been consulted.[158] It is important that the Court be creative in putting such systems in place.

It is also important to recognise that victims' Article 15 representations may be made directly to the Chamber through their legal representatives. Some individuals interviewed for this report underlined that, while the role of VPRS is crucial in facilitating victims' representations, it should not preclude other avenues for victims to intervene through their legal representatives. Some legal representatives are of the view that involvement of lawyers in this process is needed, as it is not only a question of conveying victims' views, but also advising them and advocating on their behalf.

In the situation in Palestine, in the proceedings under Article 19(3), Pre-Trial Chamber I invited victims generally to submit observations, and issued an order setting out the procedure and schedule for submission, without the need to be admitted through a formal application process.[159]

It should be noted that when Pre-Trial Chamber I in the Bangladesh/Myanmar situation made use of Article 68(3) (and Rule 93) to accept victims' observations in Article 19(3) proceedings concerning jurisdiction, it did not require victims to be admitted through a formal application process.[160]

Finally, regarding processes under Article 53(3), in the Comoros situation, Pre-Trial Chamber I authorised victims to submit observations based on a *prima facie* assessment by VPRS of their applications for participation.[161]

b) Procedures related to the general right to participate in proceedings

In general, for victims to be able to participate in proceedings on the basis of Article 68(3) of the Rome Statute, they have to submit application forms and await a decision of the Chamber authorising them to participate after confirming their victim status. This process, which also applies to proceedings related to a situation (as opposed to a case), is discussed in more detail in Chapter 5 below.[162]

However, it should be noted that Chambers have the discretion to allow victims to participate without having

153 See Chapter 3, Victims' right to information.
154 PTC III, Palestine, Decision on Information and Outreach, 2018, ICC-01/18-2, see supra; PTC III, Myanmar, Order on Information and Outreach, 2020, ICC-01/19-28, see supra.
155 See M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra.
156 PTC III, "Order to the Victims Participation and Reparation Section Concerning Victims' Representations", 9 November 2017, ICC-02/17-6. For further analysis of how this Chamber has dealt with victims standing to participate, see M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra.
157 See K. Wigard, G. Jahangiri and Z. Moballegh, Victims' Representations in Afghanistan, 2018, supra.
158 L. Nigarura, Victims of Political Violence in Burundi, 2018, see supra.
159 PTC I, "Order setting the procedure and the schedule for the submission of observations, Situation in the State of Palestine", 28 January 2020, ICC-01/18-14.
160 PTC I, Decision on jurisdiction in the Myanmar/Bangladesh situation, 2018, see supra.
161 PTC I, "Decision on Victims' Participation, Situation in the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia", 24 April 2015, ICC-01/13-18, para. 12.
162 See Chapter 5, The process to authorise the participation of victims.

submitted application forms, or without their applications having been decided upon by a Chamber. Interestingly, as explained above, when Pre-Trial Chamber I in the Bangladesh/Myanmar situation made use of Article 68(3) and Rule 93 to confirm that victims had standing, victims' legal representatives had filed submissions and the Chamber simply accepted them, without admitting them through a formal application process.[163]

In addition, the Appeals Chamber in the Afghanistan situation allowed victims to participate in an appeal brought by the Office of the Prosecutor even though they had not submitted application forms to participate and no formal determination had been made on their victim status.[164]

In relation to the standard process involving victims' application forms, the challenge at the early stages, before a case is announced, is that victims are generally not encouraged by the Court to prepare and submit application forms. The reasons for this include VPRS's lack of capacity and resources to engage meaningfully with victims' communities in the range of situations. It appears that the level of priority given to carrying out the VPRS mandate to assist victims in their application process in the situation phases has been reduced on the basis of lack of resources. Beyond this practical reason, which must be addressed, there is an inherent difficulty in conducting this process when there is ambiguity as to its purpose.

The message to convey is extremely tricky: victims can fill in application forms and submit them to the Court and VPRS has the mandate to assist victims in doing so, yet it is unclear whether and when a Chamber would take a decision on them.[165] In addition, it must be questioned whether it is worth investing the efforts and resources required, from victims, local civil society and the Court, to enable this process, given that it is unclear how victims can participate at this stage and what the benefits to them are. Consideration must be given to not raising victims' expectations: victims recognised as such by an ICC Pre-Trial Chamber and participating in a situation, before a suspect has been identified, may not qualify to participate in a future case, against a specific suspect. The complexity of these issues makes it hard to convey adequate messages to local civil society groups and give them a definite answer as to whether or not they should assist victims to fill in forms at this point.[166]

While all these issues are understandable and are at the heart of the Court's meaningful engagement with victims, the key is information. Victims must be empowered to make informed decisions. This does not mean that VPRS should encourage victims to fill in forms at the situation phase. It means that the Court must put victims in a position to understand the limitations themselves. The Court has a duty in this regard, even, and especially, before a case is announced.

This requires Pre-Trial Chambers, as soon as they are seized of a situation, to clarify the scope of and procedures for victim's involvement in the situation (from preliminary examination to investigation, to the confirmation of charges). There needs to be a clear framework, with specific steps, from the beginning. This will enable the Registry to identify adequate messaging to convey to victims' communities, and in turn help to ensure that victims' rights are fulfilled.

In addition, Pre-Trial Chambers should recognise victims' right to information as fundamental and explicitly instruct the Registry to start outreach and engagement with victims as soon as a Chamber is seized of a situation. In this regard, the practice of Pre-Trial Chamber III in the Palestine situation is an interesting example:

> *"The Registry shall establish, as soon as practicable, a system of public information and outreach activities among the affected communities and particularly the victims of the situation in Palestine. In the view of the Chamber, the Registry should establish a continuous system of interaction between the Court and victims, residing within or outside of Palestine, for as long as the situation in Palestine is assigned to a Pre-Trial Chamber."*[167]

Finally, Chambers should be mindful of the fact that the issue of outreach and engagement with victims during the situation phase is not only relevant to potential participation in proceedings related to the situation and investigation. Early work in this area is crucial to prepare for participation in future cases. If the Court waits until there is an arrest before informing victims of their right to participate and the modalities to apply to do so, and establishing a presence in the country, it will be too late and timeframes for allowing victims to apply will be too short, thus denying a meaningful exercise of victims' rights.

163 PTC I, Decision on jurisdiction in the Myanmar/Bangladesh situation, 2018, see supra.

164 For discussions on victim participation in the appeal brought by the Prosecutor, and the denial of their right to make an appeal against the Pre-Trial Chamber decision, see "The Right to Appeal", in Chapter 6, Modalities of participation. For the judgment in which the Appeals Chamber took the submissions of victims into consideration, implicitly allowing them to participate, see: AC, "Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan", Situation in the Islamic Republic of Afghanistan, 05 March 2020, ICC-02/17-138. For the decision rejecting victims' right to appeal, see: AC, "Reasons for the Appeals Chamber's oral decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan", Situation in the Islamic Republic of Afghanistan, 04 March 2020, ICC-02/17-137 ("AC, Reasons for the decision rejecting the victims' appeals in the Afghanistan situation, 2020").

165 While the Court dealt with victims' applications to participate in the situation phase at the beginning of the Court's existence, it is unclear whether Chambers would do so systematically today. For further details on the first ICC decision granting victims the right to participate, see FIDH Legal Action Group report, "Supporting the participation of victims from DRC before the International Criminal Court: The historic decision of 17 January 2006", November 2006, available here.

166 This issue was raised in discussions with local civil society actors for the purposes of this report.

167 PTC III, Palestine, Decision on Information and Outreach, 2018, ICC-01/18-2, see supra, para. 14. See also PTC III, Myanmar, Order on Information and Outreach, 2020, ICC-01/19-28, supra.

5. Challenges of victim participation in early stages

a) Time limits and local challenges

Based on experience to date, a common challenge faced by those involved in the processes for victim intervention at these early stages is the short timeframe for intervention.

This is particularly the case with regards to Article 15 representations processes. For example, victims had 30 days to submit representations in the Georgia situation and 60 days in relation to Afghanistan. It is widely considered that these periods do not allow for proper engagement of victims.[168] The timeframe is too short to convey adequate information, listen to victims and complete representation forms. This is especially true in light of the Registry's lack of capacity itself to assist victims, and even conduct outreach, which is left to local civil society. This factor has led to significant limitations in terms of the numbers of victims and the numbers of locations reached. A practitioner interviewed for this report pointed out that these timeframes are even more frustrating for victims in the context of the very long delays for Chambers to make decisions afterwards.

It is important to recognise that expeditiousness in these types of proceedings is in the interests of victims, so that, for example, investigations start as soon as possible. However, in the context of deadlines of one or two months so far, it is reasonable to recommend that a few more weeks or months be given to victims to exercise this right more meaningfully.

Furthermore, the time limit applied to the Article 15 representations phase has been identified as a factor in many other challenges, linked to the very difficult environment for civil society to work in, including the security situation, linguistic challenges and low level of understanding of criminal justice processes.[169]

b) Support to legal representatives

Finally, in light of the fact that victims' legal representatives should, and do, play a significant role in facilitating victims' access to the Court in processes at those early stages, consideration should be given to the level of support they receive from the Court at this stage.

Concerns about limitations on (or the lack of) legal aid for victims at early stages of the proceedings, in the situation phase, when the Court has not yet appointed a common legal representative, are discussed in detail above.[170] The failure to provide legal aid at this stage betrays a lack of recognition of the extent of legal representation work during this period, to the detriment of meaningful fulfilment of victims' rights. Chambers should use their power to address this situation.

Beyond financial issues, the Court should ensure that proper support is provided to legal representatives of victims when they try to interact with the Court at these early stages.[171] The LRVs interviewed for this report spoke of significant difficulties in this regard. Basic assistance must be provided from the very beginning. This includes for example receiving basic information on modalities of interaction with the Court, providing a template and instructions on how to file a submission, or facilitating access to legal research, in order to make the Court accessible to those who are not in the Hague. Chambers should instruct the Registry to provide this basic assistance to LRVs, and if necessary, to link it to specific procedures in order to limit its scope.

168 See N. Tsagareishvili, The ICC Investigation into the Situation of Georgia, 2018, supra; K. Wigard, G. Jahangiri and Z. Moballegh, Victims' Representations in Afghanistan, 2018, see supra; L. Nigarura, Victims of Political Violence in Burundi, 2018, see supra.
169 See K. Wigard, G. Jahangiri and Z. Moballegh, Victims' Representations in Afghanistan, 2018, supra.
170 See "Legal aid for victims" in Chapter 2, Fulfilment of victims' rights through legal representation.
171 See "Other challenges" in Chapter 2, Fulfilment of victims' rights through legal representation.

Recommendations

With regards to participation in the preliminary and investigation stages, FIDH recommends that ICC Chambers:

1. Adopt a broader interpretation of the scope of victims' rights in the preliminary examination and investigations stages, in order to enable them to have a meaningful and active role;

2. Adopt a broader and more proactive interpretation of the Pre-Trial Chambers' judicial oversight mandate over the Prosecutor's activities, which in turn will allow for more meaningful exercise of victims' rights;

3. Make full use of the Chamber's discretion under Rule 93 to seek the views of victims as a means of allowing broader and more meaningful participation in the preliminary examination and investigation stages in a simplified manner;

4. Allow victims to appeal decisions where either the Court or the Prosecutor fail to undertake or authorise investigations, thereby hampering victims' rights to truth, justice, and reparations;

5. Allow victims to challenge before a Pre-Trial Chamber the Prosecutor's choices in relation to preliminary examinations and investigations, including the excessive length of certain preliminary examinations;

6. Clarify, as soon as a situation is assigned to a Pre-Trial Chamber, the scope of and procedures for victim participation under Article 68(3) in proceedings related to the situation;

7. Order the Registry, as soon as a situation is assigned to a Pre-Trial Chamber, to establish outreach and public information programmes tailored to the specific situation, focusing on how victims can engage with the ICC, including during a preliminary examination;

8. Recognise, for processes under Articles 15(3), 19(3) and 53(3)(a), that there is no need for victims to be granted the status of victim by a Chamber (following the application process described in Rule 89);

9. Ensure that clear procedures and timelines for victims' Article 15 representations are in place for any Article 15(3) proceedings, allowing sufficient time for victims to make representations; and

10. Instruct the Registry to provide adequate support to victims' legal representatives in their interactions with the Court at the preliminary and investigation stages.

CHAPTER 5:
THE PROCESS TO AUTHORISE THE PARTICIPATION OF VICTIMS

ICC victims' application form.
https://www.icc-cpi.int/itemsDocuments/vprs/abd-al-rahman/2019JointApplicationForm-eng.pdf

WHILE the application process was marked by challenges and shortcomings in the early years of the Court, it seems this is now an area of victim participation that has gained efficiency, at least from the Court's perspective.

In general terms, victims fill in written applications, on the basis of which judges grant them victim status and therefore the right to participate in proceedings. The precise contents of applications and judges' approach to granting victim status have evolved over the years.

The bureaucratic process involved in the submission of applications and judicial determination may be seen as inevitable. However it appears that moves by Chambers to further delegate to the Registry and harmonise their practices have contributed to a more serene practice, at least in relation to the victims' application process under Rule 89 of the ICC Rules of Procedure and Evidence.[172]

1. The process for victims' applications under Rule 89

This chapter focuses on the process to authorise victim participation in proceedings on the basis of Article 68(3).

Procedures related to victims' involvement in specific proceedings under Articles 15(3), 19(3) and 53(3)(a) are discussed above.[173] For those specific processes, given the very precise and limited scope of victims' involvement, there should be no need for a definitive judicial finding recognising victim status under Rule 89, based on applications for participation.[174] Victims should not be required to fill in the standard application forms in order to make legal representations when the Prosecutor requests authorisation to open an investigation (Article 15(3)), when submitting observations on jurisdiction or admissibility (Article 19(3)), and when participating in a review of the Prosecutor's decision not to investigate or prosecute (Article 53(3)(a)).

The written application process and judicial determination that follows should be reserved for general participation under Article 68(3), unless the Chamber uses its discretionary power to seek victims' views in a simplified procedure for the sake of efficiency, for a very specific purpose, including under Rule 93.[175] Judicial clarification on this point would help to respond to concerns regarding the lack of coherence in terms of processes, in particular the question of whether and when victims should fill in application forms. The lack of legal certainty in this regard undermines meaningful victim participation before the Court.[176]

2. Victims' application forms

According to Rule 89, victims must make written applications to the Registrar if they wish to participate in proceedings at the Court.

Victims include any individual (or organisation or institution) having suffered harm as a result of the commission of a crime within ICC jurisdiction (Rule 85).

Regulation 86 of the Regulations of the Court indicates that standard application forms should be elaborated by the Court and made available to victims, who shall use them "to the extent possible". Although the use of standard application forms seems to have become the norm, it is noteworthy that there is no strict obligation within the founding texts to use the forms elaborated by the ICC.

Over the past 15 years, many different types of application forms have been used by the Court. It appears that recent developments have been positive, in comparison to the earlier years when long application forms led to complex litigation procedures and backlogs in processing of applications. This was highlighted by the Independent Expert Review:

> *"The initial application process was cumbersome. Lengthy and detailed application forms were subjected to an intensely bureaucratic approach to verification and adjudication which involved close individual scrutiny by the Judges. A process that needed to be smooth and efficient was not, resulting in lengthy backlogs of applications remaining undecided while the proceedings to which they related were continuing."*[177]

a) The Kenya registration model

In the Kenya cases in 2012, the Court moved away from strict adherence to application forms, instead requesting the Registry to "register" victims.[178] No application forms were transmitted to the parties and therefore it was unnecessary to redact documents, no litigation around applications ensued, preventing additional delays and use of resources.

While some practitioners considered this model a good example of efficiency, many voiced concerns that the registration process gave a disproportionate role to legal representatives of victims. One concern raised was that it deprives victims from an acknowledgement by the Court of their victim status.[179] This model was not used again.

172 For excerpts of some relevant jurisprudence on the application process, see: OPCV, "Representing Victims before the International Criminal Court, A Manual for legal representatives", Fifth Edition, 2019, available here, p. 68.
173 See "Setting up procedures for enabling victim participation" in Chapter 4, Victims' rights in the preliminary and investigation stages.
174 See for example discussions in W. Jordash QC and U. Y. Aysev, Victim Participation in the Rohingya situation, 2018, supra.
175 As Pre-Trial Chamber I in the Bangladesh/Myanmar situation, which accepted victims' observations in Article 19(3) proceedings concerning jurisdiction (ICC-RoC46(3)-01/18-37) and the Appeals Chamber in the Afghanistan situation which allowed victims to participate in an appeal brought by the Prosecutor (ICC-02/17-138) - see "Setting up procedures for enabling victim participation" in Chapter 4, Victims' rights in the preliminary and investigation stages. See also: M. Hirst, Valuing Victim Participation, 2018, supra.
176 See also M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra; REDRESS, Victim Participation After 20 years, 2018, see supra; FIDH/KHRC, The Victims' Mandate of the ICC, 2020, see supra.
177 Independent Expert Report, 2020, see supra, para. 844.
178 "Decision on victims' representation and participation", The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, 3 October 2012, ICC-01/09-02/11-498; "Decision on victims' representation and participation", The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, 3 October 2012, ICC-01/09-01/11-460. See the description of the process in Independent Expert Report, 2020, supra, para. 845.
179 This issue was raised in interviews with several individuals for the purpose of this report. See also Independent Expert Report, 2020, supra, para. 850-851.

b) The one-page form

From 2013, a shorter form of only one page was introduced and used in subsequent cases (e.g., Ntaganda - DRC, Ongwen - Uganda, Al Mahdi - Mali). The one-page individual application form contained only the information strictly required to determine whether an applicant satisfied the conditions set out in Rule 85 on the definition of victims.[180] Additional information was collected and stored separately by VPRS in their database,

This is the form referenced in the "Procedure for the admission of victims to participate in the proceedings" in the Chambers Practice Manual.[181]

While many practitioners appreciated the simplicity and efficiency of this form, some raised concerns. As FIDH has previously underlined, while it is much easier for victims to complete, and for relevant stakeholders to process, the application form should also provide an opportunity for victims to submit any information they consider relevant to their application (e.g., protection concerns, information about their preferences of legal representation, views on reparation, etc.).[182]

c) The current four-page form

Following further decisions in subsequent cases, since 2018 and until today, victims are required to fill in a four-page application form. The Court provides some guidelines on how to complete the form, referencing the key role of VPRS. In addition to the basic information required for admission as a participant, the form also includes some other important information, for example security and protection concerns, preferences in terms of legal representation and views on reparations.[183] The form is used in current cases, including Al Hassan (Mali), Yekatom and Ngaissona (Côte d'Ivoire), and Al Rahman (Sudan).

Interviews with relevant stakeholders conducted for this report confirmed that this form is working well, while making the processing of applications efficient enough for VPRS.[184] It is hoped that this form will become the standard practice and Chambers should update the Chambers Practice Manual to reflect this.

d) General principles

In considering issues related to application forms for participation, Chambers should be mindful of the following considerations, which have been raised by FIDH on previous occasions:[185]

- In any changes made to the victims' application process, the victims' narrative must not be lost. FIDH's work with victims shows that many victims find it important to tell their stories.
- Careful consideration must also be given to understanding the application process from the victims' perspective. A balance needs to be found between collecting the information needed for the Chamber to verify the victims' locus standi, and aspects of the application process that may be important to victims, such as describing what happened to them.
- Beyond the question of what form should be used, adequate support must be given to victims to fill in the forms and to understand the process itself, so that it becomes an empowering process and applications are filled out correctly.
- In designing any new system, it is important to maintain flexibility. While victims from different countries and cultures and of different crimes may share concerns, their differences must be recognised. A system that works in one context, may not work in another context. A balance needs to be struck between consistency and flexibility.
- 'Collective approaches' should be used with caution. Such approaches may not be appropriate to address the rights of victims in certain contexts or with regard to certain forms of criminality, such as sexual and gender-based violence. Although victims' legal representation is mostly collective at the ICC, this does not mean that a collective process of participation should be established as the norm. Most individuals interviewed for this report expressed concerns about the use of a collective application form, other than in very specific circumstances in a particular case.

3. Criteria for recognising victim status

The definition of victims under Rule 85 of the Rules of Procedure and Evidence is "*natural persons who have suffered harm as a result of the commission of a crime within the jurisdiction of the Court*" as well as "*organisations or institutions that have sustained direct harm to any of their property*". Article 68(3) stipulates that victims who may participate in proceedings are those whose "*personal interests*" are affected.

The Court's early jurisprudence helped clarify these concepts,[186] with useful observations by the Appeals Chamber including:

- The notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm;[187]
- The definition of 'victims' in Rule 85(a) emphasises

180 ICC-01/04-02/06-67, para. 17-25; ICC-02/04-01/15-205, para. 14-21; ICC-01/12-01/15-97- Red, para. 15. See also ICC-02/11-01/11-86, ICC-01/09-01/11-460, ICC-01/04-02/06-449. See description of the process in Independent Expert Report, 2020, supra, para. 846.
181 Chambers Practice Manual, para. 95 and onwards.
182 FIDH/KHRC, The Victims' Mandate of the ICC, 2020, see supra; see also Independent Panel of Experts, "Report on Victim Participation at the ICC," July 2013, para. 65, available here.
183 See explanations on the form in Independent Expert Report, 2020, supra, para. 848-849.
184 See also Independent Expert Report, 2020, supra, para. 848-849.
185 FIDH, Enhancing Victims' Rights, 2013, see supra; FIDH, 5 Myths, 2014, see supra.
186 For excerpts of some relevant jurisprudence on the definition of victims, see: OPCV, "Representing Victims before the International Criminal Court, A Manual for legal representatives", 2019, supra, p. 43.
187 AC, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", The Prosecutor v. Thomas Lubanga Dyilo, 11 July 2008, ICC-01/04-01/06-1432 ("AC, Judgment on Victim Participation in Lubanga, 2008"), para. 38.

the requirement of the existence of harm rather than whether the indirect victim was a close or distant family member of the direct victim;[188] and

- A victim applicant who suffered emotional harm as the result of the loss of a family member must provide proof of the identity of the family member and of their relationship with the applicant. What evidence may be sufficient cannot be determined in the abstract but must be assessed on a case-by-case basis.[189]

While there do not seem to be major challenges to the application of this definition, the scope of the Prosecution's charges (e.g. geographical, temporal, types of crimes) inevitably limits the number of victims who may be eligible to participate in cases. This leads to the exclusion of many victims from proceedings that are relevant to them, which is perceived as unfair and arbitrary by victims. A lawyer interviewed for this report said that "*there is a disconnection between the law and the reality*".

Trial Chamber I in the early years tried to remedy this problem by allowing for a broader inclusion of victims, but this was overturned by the Appeals Chamber. The Appeals Chamber took a narrow interpretation of how closely the harm alleged by a victim and the concept of personal interests under Article 68(3) of the Rome Statute must be linked to the charges confirmed against the accused.[190] This is unfortunate, as it may lead, as in the Lubanga case, to the exclusion of victims that have suffered significant harm as the result of crimes closely linked to the case.

Chambers should have an open and progressive approach to the concept of the causal link with the charges, in order to give true meaning to the concept of personal interests. They have a discretionary power to be more flexible in determining the scope of victims' eligibility.

4. The assessment process: the 'A, B, C system'

Initially, the procedure for admitting victims to participate in proceedings was complex and burdensome for all actors involved, including VPRS, the Chambers and the parties. It required the transmission of large volumes of applications, extensive and cumbersome redactions by VPRS (especially as the application form was still long in the early years), and a significant amount of work for Chambers to rule on them, as well as for the Defence and the Prosecutor to make observations. This resulted in significant backlogs in terms of processing applications, especially on the VPRS side.

Over the years, the Court's practice has evolved towards a more simplified process, with welcome developments, based on suggestions by VPRS. A good example of this system can be seen in the Trial Chamber's decision in the Ntaganda case (DRC) in 2015.[191] This process is informally referred to as the "A, B, C system". The Independent Expert Report summarised this system as follows:

> *"The Registry separates [the applications] into three groups according to whether they are complete and fall within the scope of the case, plainly incomplete or manifestly fall outside the scope of the case, or the position is unclear. The task for the Judiciary is greatly simplified and expedited. The Judiciary in turn have streamlined the process categorising the applicants as 'those who clearly qualify as victims (Group A)', 'those who clearly do not qualify as victims (Group B)' and 'those for whom the Registry could not make a clear determination (Group C)'."*[192]

Groups A and C are submitted directly to the Chamber only, with a report by VPRS, on a rolling basis. For Group C, in relation to which the Registry cannot make a clear recommendation, VPRS provides those applications, with any necessary redactions, to the parties for their observations. The Chamber then assesses each application individually and determines which applicants will be granted participatory status.

The wording of Rule 89(1) mandates that the Registry *"shall provide"* all applications to the Prosecutor and the Defence *"who shall be entitled to reply within a time limit to be set by the Chamber"*. However, as a Senior Legal Officer in the Prosecutor's Office explains, jurisprudence has established that the approach whereby the Chamber sets the criteria for assessing victim applications, which the Registry then applies and the Chamber ultimately approves, *"strike[s] a balance between the expeditiousness and fairness of the proceedings, while taking into consideration the particular circumstances of the case"*.[193]

When examining this approach, victims' interests must be considered. Is there a value for victims in judicial determination of individual applications, which is missing here? While the answer will vary between individual victims, a sensible approach is probably to recognise that for most victims, who see the ICC as a whole, a determination by the Registry rather than by a Chamber of their victim status is sufficient to provide acknowledgement of their victimhood.[194]

The vast majority of individuals interviewed for this report expressed support for this A, B, C approach, which

188 AC, "Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute'", The Prosecutor v. Germain Katanga, 9 March 2018, ICC-01/04-01/07-3778-Red.
189 AC, "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06'", The Prosecutor v. Joseph Kony and Vincent Otti, 25 February 2009, ICC-02/04-01/05-371.
190 AC, Judgment on Victim Participation in Lubanga, 2008, see supra, para. 65.
191 TC VI, "Decision on victims' participation in trial proceedings", The Prosecutor v. Bosco Ntaganda, 6 February 2015, ICC-01/04- 02/06-449. See also PTC II, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", Prosecutor v. Yekatom and Ngaïssona, 5 March 2019, ICC-01/14-01/18-141; PTC I, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", Prosecutor v. Al Hassan, 24 May 2018, ICC-01/-12-01/18-37-tENG.
192 Independent Expert Report, 2020, see supra, para. 847.
193 N. Samson, Dual Status Victim-Witnesses, 2020, see supra.
194 This issue was discussed with many of the individuals interviewed for this report. See also M. Hirst, Valuing Victim Participation, 2018, supra; referring to Human Rights Centre UC Berkeley School of Law, "The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court", 2015.

allows for a more pragmatic and efficient process. The Independent Expert Report also stated that: *"There are grounds for optimism that the procedure now followed holds the answer. It appears to be working well and has reduced the burden of dealing with applications to manageable proportions."*[195]

The Chambers Practice Manual should be updated to reflect correctly this practice, in order to harmonise practice across Chambers.

5. Redaction of victims' applications

Article 68(1) of the Rome Statute provides that "*the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses*." As a protection measure, some information from victims' applications is redacted before they are transmitted to the Defence.

In most cases, the information is also redacted from applications transmitted to the Prosecutor, although some Chambers in the past have allowed for transmission of unredacted applications to the Prosecutor. This practice raises concerns as to its consequences for the Prosecutor's own disclosure obligations. Chambers should refrain from using it, as it does not have clear added value in terms of victim participation *per se*.

The disclosure of applications submitted by dual status victims-witnesses follows a specific procedure, which is now, as a matter of practice, handled through protocols adopted in the judicial proceedings.[196]In general, the new system for dealing with applications drastically reduces the number of redactions needed and therefore makes it more feasible for the Registry to handle. The shorter form speeds up the process of redactions by reducing the amount of information to screen and redact. And the use of the A, B, C system, whereby only applications from Group C are provided to the parties for their observations, significantly limits the number of applications that the Registry needs to redact.

Although the jurisprudence of Chambers has not been fully consistent on this issue, the practice is generally that victims' identity remains concealed throughout the proceedings. In rare cases in which Chambers have decided that redacted information be transmitted to the Defence, victims have generally been given the option to "opt out" if the protection concerns are too high.

There have been extremely rare cases in which Chambers have sought to order that unredacted applications be disclosed to the public, which raises fundamental risks for security of victims and those who assist them. Eventually applications were redacted, but this reveals a misunderstanding by some Chambers of the realities in the situation countries. It is paramount that Chambers consult and follow recommendations by the Registry (VPRS and the Victims and Witnesses Section) on these issues, before making any decision.

6. Timing of victims' applications

The application process should start as early as possible, in order to allow as many victims as possible to participate in the proceedings.

The importance of VPRS engaging with victims and making preparations to "facilitate" the application process early during the situation phase is discussed above.[197] Such groundwork will be crucial to enable a simpler and faster process once a case is announced at a later stage.

As soon as a case is announced, VPRS should collect and process victims' applications in relation to that case. The procedure of admission before the Chamber should start immediately and continue on an ongoing basis. The Independent Expert Report also recommends starting the whole process earlier, "*from the point of the issue of an arrest warrant rather than from the submission of the Document Containing the Charges (DCC)*". It is argued that "*since the DCC normally expands the events and crimes originally included in the warrant, the only additional burden on the Court is likely to be verifying whether more applicants qualify to be admitted as participating victims*".[198]

As the Independent Expert Report points out: "*in this area of its work it is important that the Court through its Chambers has particular regard to the need to communicate effectively with the victim communities who are the most important constituency when the legal framework and practical consequences of victim participation are being addressed*".[199] The importance of outreach is discussed in other parts of this report.[200]

Chambers should continue to be fully aware of this and issue timely, clear and comprehensive decisions setting out the process for victims to apply, in accordance with previous practice.[201]

Given the on-the-ground challenges of reaching out to and assisting victims to apply to participate before the Court, including the Registry's limited capacity to conduct proper outreach and hands-on support to victims, there should be no final deadlines for victims to apply to participate. While Regulation 86 of the Regulations of the Court states that victims should "to the extent possible" make their application before the start of proceedings, this does not mean that Chambers should close the door to applications received later, given that trial and appellate proceedings can last for many years. While it is reasonable to impose time limits to suspend the admission procedure in relation to a very specific part of the proceedings (e.g., the opening of the trial), such deadlines should not close the process for an extensive period of time, and certainly not for the duration of a trial.

195 Independent Expert Report, 2020, see supra, para. 849.
196 For an overview of the practice of the Court on this issue, see N. Samson, Dual Status Victim-Witnesses, 2020, supra.
197 See Chapter 4, Victims' rights in the preliminary and investigation stages.
198 Independent Expert Report, 2020, see supra. This was also suggested by OPCV in the interview conducted for this report.
199 Independent Expert Report, 2020, see supra, para. 859.
200 See Chapter 3, Victims' right to information.
201 See for example PTC II, "Decision Establishing Principles on the Victims' Application Process", The Prosecutor v. Bosco Ntaganda, 28 May 2013, ICC-01/04-02/06-67.

7. The role of VPRS

VPRS is responsible for assisting victims to apply to participate and request reparations. As mentioned above, there are some significant concerns regarding its limited capacity to effectively implement this mandate.[202] One of the concerns is that VPRS involvement comes too late.

It is important for Chambers to explicitly give instructions to VPRS in terms of setting up systems at the local level to assist victims to submit applications. With the new administrative structure in place regarding the Registry's in-country staff, and sometimes narrow interpretations by chiefs of Country Offices of the Registry's mandate in relation to engagement with victims (and/or maybe conflicting priorities), there seem to be coordination challenges between VPRS in The Hague and staff placed in situation countries in charge of assisting victims locally. Explicit orders from Chambers could facilitate better coordination within the Registry in this regard.

Recommendations

On the process to authorise the participation of victims, FIDH recommends that ICC Chambers:

1. Recognise that victims do not need to fill in the standard application forms for participation in order to have standing to present their views in proceedings under Articles 15(3), 19(3) and 53(3)(a), and that the formal application process is limited to general participation under Article 68(3);
2. Adopt a broader and more progressive approach to the concept of the causal link between the harm suffered by the victims, their personal interests, and the charges, in order to address the exclusion of some victims from participating in cases due to the Prosecutor's narrow selection of charges;
3. Recognise the use of the current four-page application form for participation as standard practice to be followed, and amend the Chambers Practice Manual accordingly;
4. Recognise the current procedure of victim status determination (known informally as the "A, B, C system") as a standard practice to be followed, and amend the Chambers Practice Manual accordingly;
5. Start the procedure of admission before the Chamber immediately, as soon as a case becomes known (from the issue of an arrest warrant or a summon to appear);
6. Issue timely, clear and comprehensive decisions setting out the process for victims to apply for participation;
7. Give explicit instructions to VPRS in terms of setting up systems at the local level to assist victims with the applications, in consultation with VPRS;
8. Refrain from issuing deadlines after which victims are not allowed to apply to participate in a given proceeding; if needed, suspend the admission process for a (limited) specific part of the proceeding, and reopen the application process as soon as feasible; and
9. Systematically consult and follow recommendations by the Registry's VPRS and Victims and Witnesses Section before making any decision on issues of redaction and protection of a victim's identity.

202 See further FIDH/KHRC, The Victims' Mandate of the ICC, 2020, supra; see also Independent Expert Report, 2020, supra, para. 857.

CHAPTER 6: **MODALITIES OF PARTICIPATION**

Victim participating in the Bemba trial appearing before the ICC without protection measures. ©Frank Schinski / ICC-CPI

WHILE the participation of victims is a cornerstone of the Rome Statute system, little guidance is given by the founding texts as to how such participation should be organised. Some modalities are explicitly stated in various legal provisions, but these are not exhaustive. It is left to Chambers to decide, in each case, how to translate the texts into practice and to set out the modalities at every stage.

Judges thus play a crucial role in making sure that victims are properly represented, protected and informed, and participate fully at all stages of criminal proceedings. It must be recognised as a major achievement for victims' rights that there is now an established practice of participation at the ICC, a significant part of which is no longer questioned, which was not necessarily the case at the beginning of the Court's life.

However, ICC practice to date has been far from consistent with differing modalities of participation for victims in different cases. Indeed, there continues to be a high level of ambiguity, with Chambers deciding victims' participatory rights on an *ad hoc* basis.[203]

This has been problematic as victims' procedural rights in proceedings have in some instances been very limited. One of the major issues is that the way some Chambers have implemented specific modalities of participation in practice reflects a narrow view of victims' role in the proceedings and, arguably, an erroneous, limited interpretation of the rights afforded to them in the Statute.[204]

Furthermore, the case-by-case approach to decisions on modalities of participation has resulted in uncertainty for victim communities, whose rights are different depending on which Chamber is seized of a particular case. This affects their lawyers' ability to effectively represent them.[205] There is also a concern regarding differences in case-law relating to procedural rights at the confirmation of charges stage and at the trial stage. Although jurisprudence of Pre-Trial Chambers in the past few years seems to align itself with practice of Trial Chambers, there is still a need to achieve harmonisation of victims' procedural rights at different stages of the proceedings.[206]

In general terms, established practice under Article 68(3) of the Rome Statute has allowed victims' legal representatives to: attend and participate in hearings; file written submissions; make opening and closing statements; call witnesses; submit and challenge evidence with the permission of the judges; gain access to confidential submissions by the parties and to the evidence; and to be notified of issues or proceedings which could affect the victims.[207]

This Chapter is not intended to provide a comprehensive overview of the current jurisprudence of the Court on these matters, but rather to highlight some issues that were raised by practitioners during interviews conducted for this report and in recent publications.

1. General remarks

a) The role of the presiding judge

Victims' procedural rights should not be narrowly interpreted but instead harmonised and guaranteed throughout criminal proceedings, from the pre-trial to the appeals stage. Efforts must be made to fully integrate victims into ICC proceedings. The role of the presiding judge during trial is therefore essential for meaningful victim participation, notably in relation to: implementing guidelines for systematic questioning of witnesses by victims' legal representatives; allowing victims to present their views and concerns in person in line with the established jurisprudence of the ICC; leading the debates and ensuring victims are given a proper place; and determining the scope and parameters of the type of evidence that victims may present. This requires the judge to be very familiar with the case-law on the matter and to defer decisions and request observations when the issue at hand is particularly complex.[208]

Judge Cotte, while discussing his role in managing proceedings and finding the appropriate balance for involvement of victims' legal representatives, explained that:

> *"With the common law process, court proceedings are often extremely lengthy. […] It is therefore crucial to ensure that the atmosphere in the courtroom is calm, peaceful, serene. It is important that each party, including, of course, the victims' legal representatives, feels that they are recognised, fairly treated, and heard. It is up to the presiding judge to ensure this is the case. Their role in this regard is essential."*[209]

b) The distinction between 'parties' and 'participants'

In order to justify curtailing victims' procedural rights, Chambers have sometimes made the distinction between 'parties' and 'participants'.[210] Most individuals interviewed for this report concurred that this distinction should be abandoned. As a former Senior Legal Adviser

203 M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, see supra; Independent Expert Report, 2020, see supra, para. 865; FIDH, Judges Must Ensure Meaningful Participation, 2020, see supra; G. Bitti, A Court for Victims, 2018, see supra; P. Massidda, The Participation of Victims, 2020, see supra.

204 This was raised by many individuals interviewed for this report.

205 *"There is continuing variance and uncertainty on fundamental questions related to how victims participate. This inevitably affects the efficiency with which lawyers can carry out their work, makes litigation strategy more difficult to develop, and affects the reliability of the advice they can provide to their clients."* See M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra.

206 FIDH, Judges Must Ensure Meaningful Participation, 2020, see supra; G. Bitti, A Court for Victims, 2018, see supra; M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, see supra; Independent Expert Report, 2020, see supra, para. 865. For a discussion of the importance of procedural rights of victims during a confirmation of charges proceedings, see the recent FIDH Amicus Curiae Request, 2021, supra.

207 Rules 91-92, and 144, ICC-01/04-01/06-1119, ICC-01/04-01/07-1788, ICC-01/05-01/08-320.

208 See Chapter 1, Decision-making on victims' rights.

209 FIDH interview with Judge Bruno Cotte on 3 March 2021.

210 Based on interviews conducted for this report, this practice was first used by Trial Chamber I in the Lubanga case (DRC). Although the Rome Statute mainly uses the word "participant" and only refers to "party" in Article 82, Trial Chamber I created this distinction which has been used since. A recent example of this distinction being used to curtail victims' rights is: AC Reasons for the decision rejecting the victims' appeals in the Afghanistan situation, 2020, see supra.

to the Pre-Trial Division wrote, "*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*."[211]

Indeed, there is no need to use the qualification as 'participants' in order to afford different procedural rights to different actors. What is essential is to clarify what the procedural rights of each party to the proceedings are, and to ensure that the procedural rights afforded to victims enable a meaningful and effective exercise of their general right to participation.

One of the main consequences of qualification as a party related to the application of Article 82(1)(d) of the Rome Statute and the right to seek leave to appeal an interlocutory decision.[212] However since, in the practice of the Court, a State has already been authorised to seek such leave to appeal as a 'party', "*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*."[213]

c) Victims' personal interests

Article 68(3) stipulates that victims who may participate in proceedings are those whose "personal interests" are affected, and this concept determines the issues on which victims may present their views and concerns (see below).

A counsel for victims however highlighted that uncertainty persists as to its meaning and scope:

> *"Some early ICC decisions—including from the Appeals Chamber—held that victims' interventions need not be limited to harm they have suffered and that victims can be heard on the individual criminal responsibility of the accused. Part-way through the Ongwen trial, however, Trial Chamber IX ruled that victims could not make submissions on individual criminal responsibility, essentially restricting their contribution to the issue of 'harm'. This fundamental change in the range of matters on which victims could be heard occurred during trial, and must have, one would assume, required a fundamental rethink of counsel's case strategy."*[214]

This narrow interpretation of the scope of personal interests, leading to limiting victims' interventions to issues related to harm, was also adopted to some extent in the Yekatom and Ngaissona case (Côte d'Ivoire), and is problematic. It is an erroneous interpretation to consider that the accused's liability is outside the scope of victims' personal interests: it is at their core.[215] Chambers should refrain from using such restrictive interpretations and align their decisions with the jurisprudence from the Appeals Chamber.

d) Timing issues

Practitioners express difficulties related to the timing of Chambers' decisions on victim participation in proceedings and on common victims' legal representation.[216] They are often issued at a very late stage of the proceedings, which makes it hard for legal representatives of victims to prepare appropriately. In addition, Chambers may set very short deadlines for submitting observations on issues which significantly affect the personal interests of victims, which often makes it extremely difficult, and sometimes impossible, for counsel to conduct timely consultations with clients.

2. Participatory rights

a) Consulting the record and accessing documents[217]

Generally, practitioners consider that access by victims' legal representatives to the record of proceedings is now smooth, after some difficulties at the beginning of the Court's life.

Regarding the level of access to confidential case material, significant limitations had been put in place in the early years, especially by Pre-Trial Chambers. Trial Chambers had required legal representatives of victims to file individual requests demonstrating how specific confidential documents affect the personal interests of victims in order to obtain access to them.[218] It appears that recent practice has been more positive, increasingly permitting general access with appropriate safeguards.[219]

Some individual mishaps have been reported, either due to mistakes by the Registry, or to Chambers failing to consider including victims in specific processes.[220] While this does not seem to reflect a general practice, it demonstrates the extent to which victims' role in proceedings is fragile[221] and at the mercy of Chambers' discretion in every case.

Victims should be granted general access to the case file and proceedings, including confidential matters. There are no appreciable benefits to excluding them,[222] while such access has a significant impact on the effective exercise of their right to participate.

---

211 G. Bitti, A Court for Victims, 2018, see supra.
212 Ibid.
213 Ibid. This was reinforced by individuals interviewed for this report.
214 M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, see supra. Referring to ICC-01/04-01/06-1432, para. 3-4, 94-98; ICC-01/04-01/07-474, para. 35-36, 41-42; ICC-01/05-01/08-1729, para. 15; ICC-02/04-01/15-T-65-Red-ENG, 54- 6.
215 This was expressed by several individuals interviewed for this report.
216 Based on interviews conducted for this report. See also Independent Expert Report, 2020, see supra, para. 866; P. Massidda, The Participation of Victims, 2020, see supra.
217 Rule 131(2).
218 M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, see supra.
219 Based on interviews conducted for this report. See also M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra.
220 On the failure of the Court to notify victims' legal representatives in the Banda case (Sudan) of a confidential status conference and filings on the issue of trial in absentia, and to invite their observations, see M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra.
221 *"It is difficult to avoid the conclusion that the Chamber merely did not turn its mind to the existence of the victims in the proceedings."* M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, see supra.
222 *"It is also worth pondering what, if anything, is gained by limiting counsel's access. Requiring them to litigate access to specific material, […] leads to delays and no appreciable benefits. This holds especially true since the experience of other international tribunals demonstrates that granting access to victims' counsel by default does not lead to delays, nor prejudices the integrity of the judicial process or the accused's fair trial rights."* M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, see supra.

b) Presenting views and concerns[223]

A legal representative of victims may attend and participate in hearings and make both oral presentations and written observations and submissions (unless the Chamber decides otherwise). Legal representatives may make statements at the beginning and the end of proceedings (opening and closing statements).

In addition, victims are allowed to present their views and concerns in person. However, Chambers' practice has not been consistent in this regard, and only very limited numbers of victims have been allowed to appear in person. This is an example of the narrow interpretation of victims' rights at the trial phase.[224]

For example, in the Ongwen case, the Single judge, on repeated occasions, refused to allow victims to present their views and concerns in court in person, including during closing statements. The Single judge stated that the views and concerns of the victims could be presented as meaningfully by the legal representatives as by the victims themselves.[225] Victims were allowed to be called as witnesses, which is a distinct right, as presenting "views and concerns" is distinguished from presenting evidence during testimony.

This example not only illustrates the narrow interpretation of victims' rights by the Chamber and Single judge, but also points to the inconsistency in the Court's jurisprudence on this matter, as victims have been allowed to present their views and concerns in person in several other cases.[226] Although lawyers for victims play an important role in bridging the gap between victim communities and the Court, it is always preferable where possible to allow victims to present their views in their own words, especially as it is provided for under the Statute, and previous ICC chambers have allowed such interventions. A victims' legal representative underlined that allowing victims to present their views and concerns in person is mutually beneficial: judges get a sense of the victimisation, and victims get a sense that justice has been done.[227]

In addition, Chambers should provide proper and clear reasoning to denying or allowing specific practical modalities. This will allow victims' legal representatives and the Court in general to debate these reasons and help advance the Court in finding an appropriate (and consistent) place for victims in the proceedings.

c) Submitting and challenging evidence

Early Appeals Chamber jurisprudence affirmed that participating victims have the possibility to lead evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility or relevance of evidence in the trial proceedings.[228] In most trials, legal representatives of victims have focused on the presentation of evidence by their own clients, although some have also proposed expert witnesses.

The Appeals Chamber also stated that:

> *"The possibility for victims to testify on matters including the role of the accused in crimes charged against them is grounded in the Trial Chamber's authority to request evidence necessary for the determination of the truth and is not per se inconsistent with the rights of the accused and the concept of a fair trial. Whether a victim will be requested to testify on matters relating to the conduct of the accused will depend on the Trial Chamber's assessment of whether such testimony: (i) affects victim's personal interests, (ii) is relevant to the issues of the case, (iii) is necessary for the determination of the truth, and (iv) whether the testimony would be consistent with the rights of the accused and a fair and impartial trial."*[229]

Chambers should clearly determine the scope and parameters of the type of evidence victims may present.

Chambers have often adopted a restrictive approach to the number of experts and witnesses that victims were allowed to present, and the time allocated to them. In the Ongwen case (Uganda) for example, only eight days were allocated to the presentation of victims' evidence, in contrast to a trial that lasted more than three years, and of the 13 witnesses which victims sought leave to call, only seven were allowed.[230] The Chamber limited counsel's questioning time to between one and a half and three hours for each witness, in contrast to some prosecution and defence witnesses being questioned for more than a day by the calling party.[231] It appeared to counsel that this time limitation had been set arbitrarily and not in relation to the materials the witnesses were going present or other needs related to the courtroom schedule. This was unfortunate given the efforts required for the victim to travel to the Hague and become familiar with Court proceedings.[232]

Judges should not be afraid of giving space in the courtroom for victims' counsel to intervene, in accordance with the legal texts. Indeed, the Court's experience has shown that victims can contribute significantly to establishing the truth by bringing different perspectives and contextual elements.

223 Rule 91(2).
224 FIDH, Judges Must Ensure Meaningful Participation, 2020, see supra.
225 TC IX, "Decision on Legal Representatives of Victims Request to Present Views and Concerns in Person", ICC-02/04-01/15-1655, 4 November 2019.
226 ICC-01/05 01/08- 2138; ICC-01/05-01/08-2027; ICC-01/09-02/11-498; ICC-01/04-01/06-2032-Anx; ICC-01/04-02/06-1780- Red.
227 Interview conducted for the purpose of this report.
228 AC, Judgment on Victim Participation in Lubanga, 2008, see supra, para. 105.
229 AC, "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial'", The Prosecutor v. Germain Katanga, 16 July 2010, ICC-01/04-01/07-2288, para. 3.
230 M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, see supra.
231 Ibid.
232 Interview conducted for the purpose of this report.

d) Questioning witnesses[233]

Victims' legal representatives may question a witness, an expert or the accused. Rule 91(3) of the Rules of Procedure and Evidence provides that the LRV must make an application to the Chamber, and that the Chamber may require the LRV to provide a written note of the questions.

The practice of various Chambers in this regard has been inconsistent, with differing approaches regarding the procedure to allow questioning and its scope. This has led to confusion and uncertainty, as well as restrictive implementation of victims' rights in practice.[234]

LRVs report that in some cases, a more cumbersome procedure was put in place, requiring the submission of questions in advance for the judge to review (e.g., Lubanga, Bemba, Kenyatta, Katanga cases), while in other cases Chambers have been more flexible and have not required advance requests (e.g., Ongwen, Ngaissona and Yekatom cases). In other cases, LRVs have had to file a request in advance, but only to specify the general theme of questioning (e.g., Ntaganda, Al Hassan cases). Practice also appears inconsistent in terms of whether or not the Chamber asks the parties if they have any objection to the questioning.

It seems that the practice of requiring advance submission of questions has now been abandoned. The current practice is for LRVs to submit their request to ask questions at the relevant moment during the hearing, and the Chamber decides on a case-by-case basis. Practitioners interviewed for this report consider that this is the most efficient procedure in terms of judicial economy and the workload of all involved, and the most respectful of the victims' counsel's own strategy. This should become the standard practice and be recognised as such in the Chambers Practice Manual.

In any case, it is important for Chambers to issue detailed guidelines regarding the questioning of witnesses by victims' legal representatives and harmonise their practices. The role of the presiding judge is also central in this regard, as s/he needs to be familiar with case-law on the issue and accept questions from legal representatives more systematically in order to ensure a smooth process.[235]

Regarding the scope of questioning, Chambers should be careful not to apply an excessively narrow interpretation to the requirement that questioning be "*limited to matters relevant to the personal interests of victims, such as the harm suffered*".[236] In the Ongwen case, the Trial Chamber adopted a restrictive approach to this requirement, stating that LRVs should not attempt to "*elicit evidence which aims to prove the elements of the crimes charged or Mr Ongwen's role in their commission*".[237]

Such a decision is problematic in many regards. It potentially has very broad consequences for the exercise of victims' rights and puts victims' counsel in a very difficult position. It is hard to see how it is possible to ask questions and obtain evidence about the consequences of a crime (the harm) without touching on the crime itself. In addition, as stated above, it is an erroneous approach to consider the accused's liability to be outside the scope of victims' personal interests.[238]

Most importantly, this decision clearly contradicts Appeals Chamber jurisprudence on the issue, which affirmed explicitly that participating victims have the possibility to lead evidence pertaining to the guilt or innocence of the accused.[239] However, the ruling in the Ongwen case was made orally by the Trial Chamber, in the course of a hearing, without obtaining written submissions on the issue and without consideration of past jurisprudence on the matter. This is a clear example of an area in which greater consideration must be given to the specificities of victims' procedural rights.

e) Receiving notifications

Pursuant to Rule 92(5) and (6) of the Rules of Procedure and Evidence, victims or their legal representatives participating in proceedings shall be notified by the Registrar in a timely manner of hearings, filings and decisions. The Registry's administrative procedures in this regard now seem to be relatively smooth in terms of notifying counsel involved in cases at the pre-trial and trial stages.

There are however concerns and challenges related to the implementation of this right in specific instances. For example, in "dormant" cases, LRVs acting in those proceedings are often not notified of filings. More generally, counsel selected by victims who have not been appointed formally as common legal representative by a Chamber, face difficulties at the early stages in obtaining proper and timely notification of filings and other information.[240] It has been suggested that these problems may be due to the fact that the Registry notifies individuals mentioned on the cover page of filings. However, this cannot be the right approach as it would mean that those notified would be determined by the party filing a submission.

Chambers should issue a framework decision at the beginning of an investigation to clarify the modalities of victim participation, stating the procedure for victims to file submissions and receive notification of documents, including in the period prior to a decision on their applications.

233 Rule 91(3).
234 Based on interviews conducted for this report. See also M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, supra; FIDH, Judges Must Ensure Meaningful Participation, 2020, see supra; G. Bitti, A Court for Victims, 2018, see supra.
235 G. Bitti, A Court for Victims, 2018, see supra.
236 In the Ongwen case: ICC-02/04-01/15-1199-Red, para. 18 and ICC-02/04-01/15-1248, para. 13. In the Yekatom and Ngaissona case in 2020, victims' counsels were informed that they do not need to submit questions in writing in advance but were reminded that questioning must be limited to matters relevant to the personal interests of victims, such as the harm suffered. ICC-01/14-01/18-631.
237 Oral Decision, ICC-02/04-01/15-T-65-Red-ENG, p. 54-56; reaffirmed in ICC-02/04-01/15-1199-Red, para. 18 and ICC-02/04-01/15-1248, para. 13.
238 This was underlined by several individuals interviewed for this report.
239 AC, Judgment on Victim Participation in Lubanga, 2008, see supra, para. 105.
240 These concerns were emphasised in interviews conducted for this report.

f) Participating in appeals

It is recognised that victims have a right to participate in appeals, however in some specific circumstances the application of this principle by the Appeals Chamber has been inconsistent.

In the Lubanga case (DRC), the Appeals Chamber authorised victims who participated in the trial proceedings to participate in the appeals proceedings against the conviction and the sentencing decisions, "*as their personal interests are affected by the appeal in the same way as during trial*".[241] This makes sense and is in principle considered standard practice.

In another instance, however, in the Gbagbo and Blé Goudé case (Côte d'Ivoire), the Appeals Chamber in 2020 refused to consider applications for participation.[242] In this instance, victims had submitted applications to the Court during the trial, but those applications had not been submitted by the Registry to the Trial Chamber for its consideration. As a result, these victims had not been formally authorised by the Trial Chamber to participate in the trial proceedings, and the question was whether the Appeals Chamber should consider the applications. In a controversial interpretation of victims' place in the proceedings, the Appeals Chamber held that "*only victims who participated in the trial proceedings may participate in the ensuing appeal proceedings*",[243] notwithstanding the fact that victims had submitted their applications to the Court years before the proceedings in appeal and that they have a separate right to participate in the appeals stage.

In a strong dissenting opinion to this decision, Judge Ibáñez Carranza stated that such an approach from the Appeals Chamber is contrary to the rights afforded to victims in the Rome Statute framework and under international law.[244] She reminded the Chamber that "*victims have the right to participate in all stages of the proceedings*" and that "*the law of this Court allows victims to participate even only at the appellate stage*".[245] She further wrote that the decision is "*inconsistent with the applicants' substantive and procedural rights, under both the Statute and their internationally recognised human right of access to justice, [as well as] the proper administration of justice*".[246]

The Appeals Chamber must ensure victims have proper access to justice and give consistent consideration to victims' applications to participate.

In relation to interlocutory appeals, for some time there was a practice of requiring victims to seek prior authorisation to make submissions in appeals proceedings, but in 2015 the Appeals Chamber stated: "*For appeals arising under article 82 (1) (b) and (d) of the Statute, victims who have participated in the proceedings that gave rise to the particular appeal need not seek the prior authorisation of the Appeals Chamber to file a response to the document in support of the appeal.*"[247] Following this decision, it has been consistent practice that victims who have participated in the proceedings that gave rise to the particular appeal have an automatic right to file such a response.[248]

However, the right to participate in an appeal is significantly different to the right to make an appeal.

3. The right to appeal

In relation to the right to appeal, victims' participatory rights have in some instances been interpreted narrowly by ICC judges, negatively impacting the value of such participation.[249] It appears that, to date, victims have not been allowed to make an appeal of any decisions other than those related to reparations.

In significant recent developments a number of victims' legal representatives in the Afghanistan situation requested authorisation for victims to appeal, in exceptional circumstances, decisions which negatively affect their established rights to truth, justice, and reparations. In this particular instance, the Pre-Trial Chamber had failed to authorise the Prosecutor's request to commence investigations in Afghanistan, stating that such investigations would not be in the interests of justice and essentially extinguishing all hope of attaining justice for victims of crimes against humanity and war crimes in Afghanistan. In March 2020, the Appeals Chamber held that victims could not be termed a 'party' to the proceedings resulting from a Prosecutor's request for authorisation to initiate an investigation under Article 15 and were therefore not allowed to make an appeal against the decision.[250] The Appeals Chamber further argued that the inability to appeal the decision of the Pre-Trial Chamber not to open an investigation in Afghanistan had no bearing on victims' rights to an effective remedy.[251]

This decision demonstrates a restrictive interpretation of victims' role at the ICC, while at the same time potentially opening a door for the future. Indeed, while the Appeals Chamber's majority opinion denied victims the right to appeal the decision in this specific procedure, it also appeared to hold that victims can, in some instances, be a 'party' with the right to seek an appeal under Article

241 AC, "Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions", The Prosecutor v. Thomas Lubanga Dyilo, 13 December 2012, ICC-01/04-01/06-2951, para. 3.
242 AC, "Decision on the Registry's transmission of applications for victim participation in the proceedings", The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, 25 March 2020, ICC-02/11-01/15-1319.
243 Ibid para. 11.
244 "Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the 'Decision on the Registry's transmission of applications for victim participation in the proceedings', whereby the majority declined to consider the applications", The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, 25 March 2020, ICC-02/11-01/15-1319-Anx.
245 Ibid, paras. 1 and 10.
246 Ibid, para. 7.
247 AC, "Reasons for the 'Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention (ICC-02/11-01/15-134-Red3)'", The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, 31 July 2015, ICC-02/11-01/15-172, para. 12-19. See also ICC-02/11-01/15-158.
248 OPCV Manual, 2019, see supra.
249 FIDH, Judges Must Ensure Meaningful Participation, 2020, see supra.
250 AC, Reasons for the decision rejecting the victims' appeals in the Afghanistan situation, 2020, see supra.
251 Ibid.

82(1) of the Statute.[252] However, the majority did not clarify when this could occur, ruling only that this was not the case in Article 15 proceedings.[253]

In addition, as discussed above, the decision reinforces the need to abandon the distinction between 'parties' and 'participants'. Since, in the practice of the Court, a State has already been authorised to seek such leave to appeal as a 'party', *"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."*[254]

In general, the narrow interpretation of victims' rights at the early stages of proceedings is problematic: victims should be able to appeal decisions where either the Court or the Prosecutor fail to undertake or authorise investigations, thereby hampering victims' rights to truth, justice, and reparations.

Indeed, in a powerful dissenting opinion to the above decision on Afghanistan, Judge Ibáñez Carranza stated that: "*To deny victims standing to appeal, as the majority did, necessarily contradicts the Statute and the internationally recognised human rights of access to justice and to have an effective remedy.*"[255] Judge Ibáñez Carranza added:

> *"Victims have substantive and procedural rights under the Statute to participate in all stages of the proceedings, including the appellate stage. A contextual interpretation of article 82(1) in light of the Statutes object and purpose, articles 13(c), 15(3) and (4), 68(3), and rule 50 of the Rules, allows this Court to put victims on an equal footing with the Prosecutor to appeal a decision that seriously affects their interests".*[256]

There are issues on which victims' interests are deeply affected, and therefore in respect of which they should be recognised as a 'party'. This includes for example decisions on the recognition (or denial) of their victim status, decisions on their legal representation, and, as in the Afghanistan example, decisions to deny an investigation requested by the Prosecutor.

In the Afghanistan appeals proceedings, the Appeals Chamber was satisfied that victims were ultimately allowed to participate in an appeal on the impugned decision, brought by the Prosecutor. This argument does not appropriately address victims' right to access justice. Furthermore, victim participation in the appeal proved extremely beneficial to the Court. The Appeals Chamber explicitly followed the position put forward by the victims that the Pre-Trial Chamber should not have addressed the 'interests of justice' at all. This contrasted to the position advanced by the Prosecutor, which was based on the assumption that this factor should be taken into consideration by the Pre-Trial Chamber.[257]

The added value and importance of victims' right to appeal has been widely recognised in the Inter-American Court of Human Rights system,[258] and ICC Chambers must ensure that this element of the right to access to justice is implemented at the Court.

Chambers should identify a non-exhaustive list of issues in relation to which victims will always be authorised to appeal and, most importantly, grant leave to appeal on these issues in order to promote clarification and harmonisation. Judge Ibáñez Carranza emphasised, *"victims should keep bringing their appeals to the Appeals Chamber under their internationally recognised human rights to do so."*[259]

252 M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, see supra.
253 Ibid.
254 G. Bitti, A Court for Victims, 2018, see supra.
255 Dissenting Opinion of Judge Ibáñez Carranza to the Decision on Victim's Appeals in the Afghanistan situation, 2020, see supra, para. 3.
256 Dissenting Opinion of Judge Ibáñez Carranza to the Decision on Victim's Appeals in the Afghanistan situation, 2020, see supra, para. 78.
257 AC, "Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan", Situation in the Islamic Republic of Afghanistan, 05 March 2020, ICC-02/17-138, paras. 23-46.
258 This was underlined by many people interviewed for this report. See also Dissenting Opinion of Judge Ibáñez Carranza to the Decision on Victim's Appeals in the Afghanistan situation, 2020, supra, para. 29.
259 Ibid para. 4.

Recommendations

In relation to modalities of participation, FIDH recommends that ICC Chambers:

1. Ensure that all judges, and particularly Presiding Judges, have extensive experience in leading courtroom proceedings and have adequate knowledge of victims' procedural rights including the Court's jurisprudence;

2. Clarify and harmonise the procedural rights of victims as one of the 'parties' in ICC proceedings, enabling a meaningful and effective exercise of their general right to participation;

3. Align interpretation of the notion of 'personal interests of victims' with the Appeals Chamber's jurisprudence on the issue, recognising that, in the context of presenting evidence and questioning witnesses, such interests include the individual criminal responsibility of the accused in addition to issues related to the harm suffered;

4. Provide proper and clear reasoning for denying specific practical modalities of participation and allow appeals on decisions where they contradict the Court's previous jurisprudence;

5. Consistently allow victims to present their views and concerns in person;

6. Refrain from overly restricting the number of experts and witnesses that victims are allowed to present, and the time allocated to questioning them;

7. Refrain from requiring victims' legal representatives to submit questions in advance when they seek to question witnesses, and allow them to make a request to ask questions at the relevant moment in the hearing, with the Chamber deciding on a case-by-case basis;

8. Issue a framework decision at the beginning of an investigation to clarify the modalities of victim participation, stating the procedure for victims to file submissions and receive notification of documents, including in the period prior to a decision on their applications;

9. Ensure consistent application of victims' rights to participate in appeals in accordance with victims' right to access to justice; and

10. Identify a list of issues on which victims will be authorised to appeal and grant victims leave to appeal those decisions when they seek to do so. Such issues might include, for example, decisions on their victim status, decisions on their legal representation, and decisions to deny an investigation requested by the Prosecutor.

CHAPTER 7: **REPARATIONS**

©ICC-CPI / TFV

THE right to reparation is a well-established principle of international law, and its inclusion in the Rome Statute was hailed as a major achievement for the rights of victims of mass atrocities. Under the ICC system, the reparations framework is based on the principle of individual criminal responsibility, which means that a person who commits a crime is personally responsible and individually liable.[260] The Court may award individual and/or collective reparations. The Trust Fund for Victims (TFV), an independent body, was established to implement reparations awards, in addition to providing more general assistance to victims.

So far, only four cases have reached the reparation phase: the Lubanga (DRC), Katanga (DRC) and Al Mahdi (Mali) cases, as well as the Ntaganda (DRC) case in which the reparations order was issued in March 2021. Preparations for reparations had taken place in the Bemba case (CAR), but they were discontinued following acquittal.

In the context of the unique and novel ICC reparations system, significant progress in terms of development of practices and case law must be seen as an achievement. Seriousness and professionalism are evident in reparations orders. Substantial efforts by all actors involved, including the Chambers, the Trust Fund, VPRS and victims' legal representatives must be recognised.

However, as Redress emphasises, "*despite the progress made so far, the actual realisation of the right to reparations has become a complicated and protracted process that has delivered little by way of tangible results*".[261] There are indeed significant shortcomings in the ICC's efforts to turn the Rome Statute's principles into concrete reality, leading to disappointment among stakeholders.[262]

Specialists have lamented that reparations in the first cases at the ICC have moved at "*a snail's pace – it has taken a long time to get to a final decision on reparations, but even then, the delays in implementation have been significant, and unacceptable*."[263]

In addition, the various Chambers have applied different and at times inconsistent approaches to reparation proceedings, resulting in a lack of clarity and predictability, and leading to calls for court-wide principles or guidelines on reparations.[264] For example, Chambers have applied different application processes for reparations, different approaches to the assessment of harm and to the type of reparations awarded, whether individual or collective reparations, and different interpretations regarding the Trust Fund's role in implementing reparation orders.

This Chapter is not intended to provide a comprehensive analysis of how the ICC reparations framework could work. Such a broad study is beyond the scope of this report. Reparations at the ICC is a complex issue with a lot of ramifications, and, in terms of recommendations, a delicate balance needs to be found between fundamental principles and the practical reality of the implementation process. In addition, the latest decision in the Lubanga case[265] and the reparations order in the Ntaganda case[266] were both issued during the final writing phase of this report, therefore there has not been an opportunity to analyse their impact in -depth. This chapter aims to highlight reflections on key issues based on FIDH's experience[267] and research conducted for this report, including interviews with experts and practitioners. Others have analysed the Court's reparations procedures to date in more detail,[268] in particular Redress in a major report which forms the basis of many findings in this chapter.[269]

1. What are effective reparations?

Shortcomings in implementation of the ICC's reparations mandate call for review of its effectiveness.

As Carla Ferstman stated, there is a "*need for a human rights-based approach to effectiveness*". Adopting such an approach would help the Court to develop victim-centred thinking, which is essential for effective reparations.[270] Article 21(3) of the Rome Statute requires the Court to interpret law consistently with internationally recognised human rights. Viewing reparation within such a human rights framework leads to adopting the following fundamental principles:

- Timeliness of reparations is a key human rights principle and must guide decisions on reparations.
- It is essential for victims to be able to express their views and concerns about reparations, and for these to be taken into account. There is an obligation of consultation and engagement with victims.
- All reparations processes should be conducted in such a way as to guarantee the dignity, security and privacy of victims.
- Reparations awards should, as far as possible, address the particular harms suffered by victims. They should be adequate and effective.[271]

260 Article 25 of the Rome Statute.
261 REDRESS, "No Time to Wait: Realising Reparations for Victims before the International Criminal Court", January 2019, available here ("REDRESS, No Time to Wait, 2019").
262 Most of the individuals interviewed for this report clearly articulated this disappointment and frustration.
263 C. Ferstman, Human Rights Based Approach, 2020, see supra. See also Independent Expert Report, 2020, see supra, paras. 876 and 887.
264 See for instance REDRESS, No Time to Wait, 2019, supra; C. Ferstman, Human Rights Based Approach, 2020, see supra.
265 TC II, "Rectificatif de la Version publique expurgée de la Décision faisant droit à la requête du Fonds au profit des victimes du 21 septembre 2020 et approuvant la mise en œuvre des réparations collectives prenant la forme de prestations de services", The Prosecutor v. Thomas Lubanga Dyilo, 05 March 2021, ICC-01/04-01/06-3495-Red-Corr.
266 Ntaganda Reparations Order, 2021, see supra.
267 See for instance FIDH/KHRC, The Victims' Mandate of the ICC, 2020, supra; FIDH, "All I want is reparation – Views of victims of sexual violence about reparation in the Bemba case before the International Criminal Court", November 2017, available here.
268 Luc Walleyn, "The Participation of Victims in the Process of Collective Reparations at the ICC", in "Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice", (texts by practitioners), edited by R. Jasini and G. Townsend, November 2020, available here ("L. Walleyn, Victims in the Process of Collective Reparations, 2020").
269 REDRESS, No Time to Wait, 2019, see supra.
270 C. Ferstman, Human Rights Based Approach, 2020, see supra. See also Dr Sunneva Gilmore (expert on reparations in the Ntaganda case), speaking at the webinar "Victim Participation and Reparation at the ICC, – Assessing the Impact of the IER", November 2020, Redress & Tallawah Justice Talks, available here.
271 C. Ferstman, Human Rights Based Approach, 2020, see supra.

These principles lead to further reflections in a context where *"effectiveness should not be sacrificed in the name of efficiency"*.[272] This means for example that victims' preferences should not be merely acknowledged, as secondary to considerations of efficiency, they should be given a central role. Victims' experiences of the reparations process must be part of an assessment of effectiveness. Reparations should focus on what is appropriate to address the actual harm suffered by victims, and not be guided primarily by expediency. There should be a wider causal link between the crimes for which the individual was convicted, and the harm suffered by victims, in order to give reparations their full potential. All these crucial questions are extremely difficult to address when moving from theoretical principles to practical reality of implementation. The first stage must be to clarify the legal framework according to which reparations take place.

2. Towards institutional principles on reparations

The provisions on reparations in the Rome Statute framework are general and therefore relatively vague. The Court has not adopted institution-wide principles on reparations, leaving the process to individual Chambers in the context of specific cases. This lack of clarity has contributed to administrative delays.[273]

To many practitioners, the legal framework for reparations remains confusing.[274] A legal representative of victims involved in the Lubanga case considered that:

"*As a result of conflicting legal interpretations and decisions, the present picture of reparations before the ICC is quite chaotic. Victims and their counsel do not know what to expect. The Defence and the victims appealed all reparation decisions. The judicial character created by the chambers for the implementation of collective reparation orders is time consuming and a huge burden on the victims. It is also using the time and energy of the judges, Court officials and counsel, and entails a huge cost without real purpose or utility for the victims or even for the convicted person.*"[275]

The Independent Expert Review also stated that "*the Court's conceptual and procedural processes for reparations are laden with complexity and uncertainty, which gravely affects the victims' rights to meaningful participation and reparations*" and "*a simplification of and consistency in the application of procedures by Chambers is vital*".[276]

Some acknowledge that the ICC is slowly developing a practice that becoming more consistent, including as a result of several Appeals Chamber judgments on the issue.[277] The recent reparations order in the Ntaganda case will also hopefully contribute to the development of consistent jurisprudence.

As a general principle, Chambers have a duty to ensure a certain level of certainty and consistency between themselves, in order to enable victims to meaningfully exercise their rights.[278] In the absence of an updated court-wide Victims Strategy, it is even more important for Chambers to provide legal clarity, including to enable the Registry to effectively assist victims. This should come in the form of court-wide Principles on Reparations, as mandated under Article 75(1) of the Rome Statute.[279] It is a positive development that, in the recent order in the Ntaganda case,[280] the Trial Chamber not only adopted the principles established in previous cases, but also adapted and expanded them, following guidance from the Appeals Chamber.[281] These can be used as a basis for the adoption of principles at an institutional level.

3. The role of Chambers

The Appeals Chamber outlined that:

> *"[R]eparations proceedings can be divided into two distinct parts:*
>
> *1) the proceedings leading to the issuance of an order for reparations; and*
>
> *2) the implementation of the order for reparations, which the Trust Fund may be tasked with carrying out."*[282]

Beyond these two broad phases, it is possible to further define the various steps based on the past practice of the Court:

- Organisation of the reparations process
- Appointment of experts
- Issuance of a reparations order
- Authorisation of the Trust Fund's implementation plan
- Approval of the reparation projects
- Monitoring and oversight.

a) Organisation of the reparations process

Chambers should issue decisions at the earliest stage

272 C. Ferstman, Human Rights Based Approach, 2020, see supra.
273 C. Ferstman, Human Rights Based Approach, 2020, see supra; L. Walleyn, Victims in the Process of Collective Reparations, 2020, see supra; REDRESS, No Time to Wait, 2019, see supra.
274 This was expressed by many individuals interviewed for this report. See also L. Walleyn, Victims in the Process of Collective Reparations, 2020, supra; C. Ferstman, Human Rights Based Approach, 2020, see supra; REDRESS, No Time to Wait, 2019, see supra. See also Independent Expert Report, 2020, supra.
275 L. Walleyn, Victims in the Process of Collective Reparations, 2020, see supra.
276 Independent Expert Report, 2020, see supra, para. 879 and 897.
277 C. Ferstman, Human Rights Based Approach, 2020, see supra; REDRESS, No Time to Wait, 2019, see supra.
278 See Chapter 1, Decision-making on victims' rights.
279 C. Ferstman, Human Rights Based Approach, 2020, see supra.
280 Ntaganda Reparations Order, 2021, see supra, para. 23.
281 Appeals Chamber jurisprudence clarified that *"[t]he 'principles relating to reparations' of article 75 (1), first sentence, of the Statute must be distinguished from the order for reparations, i.e. the Trial Chamber's holdings, determinations and findings based on those principles. Principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers."* AC, "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) and public annexes 1 and 2", The Prosecutor v. Thomas Lubanga Dyilo, 3 March 2015, ICC-01/04-01/06-3129 (Lubanga AC Judgment, 2015), para. 3.
282 AC, "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", The Prosecutor v. Thomas Lubanga Dyilo, 14 December 2012, ICC-01/04-01/06-2953, para. 53.

possible outlining the steps to be taken by various stakeholders in the period leading to the issuance of a reparations order. In doing so, it is important to take "*a holistic and integrated approach which views the reparations proceedings in their entirety, including the post-reparations order implementation stage*".[283]

As the Trial Chamber in the Ntaganda case reaffirmed, "*chambers must ensure that the proceedings are as expeditious and effective as possible, leading to prompt, responsive, and efficient reparations*". The Chamber underlined the need to "*streamlin[e] the proceedings as much as possible with a view to ensuring a smooth transition between the preparation of the reparations order and the implementation stage […]*".[284]

In the Ntaganda case, the Chamber first issued an "Order setting deadlines in relation to reparations",[285] in which it gave directions to the Registry and others to undertake preparations in relation to identification of potential beneficiaries. It also outlined the process and deadlines for the appointment of experts, submissions by the parties, the Registry and the Trust Fund on issues relevant to the preparation of a reparations order, and submission of *amici curiae*. Then the Chamber issued a "First Decision on Reparations Process",[286] in which it set out procedures for the identification of the victims potentially eligible for reparations, in order to make as much progress as possible before the issuance of the reparations order. This approach is to be welcomed.

An early clarification of the process along these lines is very useful for all actors involved. This first stage of the process should enable the Chamber to collect the information required for its reparations order.

b) Appointment of experts

Recourse to experts on reparations, pursuant to Rule 97(2) of the Rules of Procedure and Evidence, can be very valuable for Chambers. Such experts can assist them in determining the scope and extent of any damage, loss or injury to, or in respect of victims. They can also contribute to consideration of various options on the appropriate type or modalities of reparations, and any other issue deemed appropriate by the Chamber.

The assistance of experts is especially valuable in respect of particular types of harm which require very specific expertise for reparations to be meaningful and effective. This is the case for instance in relation to sexual and gender-based crimes, which require a specific approach to the definition of reparations.[287]

Early commissioning of experts can help save time in the reparations phase, as illustrated by the Ntaganda case.[288]

c) Issuance of reparations orders

The Appeals Chamber clarified that an order for reparations must contain, at a minimum, five essential elements:

> *"1) it must be directed against the convicted person;*
>
> *2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order;*
>
> *3) it must 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) it must 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) it must 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."*[289]

The various elements of a reparations order are explored further below.

d) Authorisation of the Trust Fund's implementation plan and approval of reparation projects

The Court's experience so far has shown the need to clarify the extent and timing of the Chamber's role in monitoring implementation of reparations after the reparations order is issued. For example, the Chamber needs to be involved in approving the Trust Fund's initial implementation plans and the reparation projects proposed.

Chambers have an important role to play in ensuring that the Trust Fund has sufficient guidance and clarity on the elements to be included in a draft implementation plan. Where such guidance is lacking or insufficient, this may negatively impact on the Trust Fund's proposed implementation plan. Chambers should therefore issue comprehensive reparations orders that may form the basis of an implementation plan, and refer to them in subsequent authorisation of plans and approval of projects.

283 TC VI, "First Decision on Reparations Process", The Prosecutor v. Bosco Ntaganda, 26 June 2020, ICC-01/04-02/06-2547 (Ntaganda Decision on Reparations Process, 2020), para. 23.
284 Ntaganda Decision on Reparations Process, 2020, see supra, paras. 22 and 23.
285 TC VI, "Order setting deadlines in relation to reparations", The Prosecutor v. Bosco Ntaganda, 5 December 2019, ICC-01/04-02/06-2447.
286 Ntaganda Decision on Reparations Process, 2020, see supra.
287 FIDH, "Sexual and gender-based violence: a glossary from A to Z", November 2020, available here.
288 TC VI, "Public redacted version of "Decision appointing experts on reparations"", The Prosecutor v. Bosco Ntaganda, 14 May 2020, ICC-01/04-02/06-2528-Red. See also Independent Expert Report, 2020, supra, para. 918.
289 Lubanga AC Judgment, 2015, see supra, para. 1.

e) Monitoring and oversight of implementation

The oversight role that the Chamber should have over the Trust Fund's actions depends very much on the role that is given to the Trust Fund. For example, in instances where the Trial Chamber tasked the Trust Fund with identifying beneficiaries based on an individual screening process, this raises serious issues concerning the delegation of judicial functions to the Trust Fund.

The Appeals Chamber held that:

> *"The oversight of the Trial Chamber exercising judicial control over the screening process shall include that the Trial Chamber finally endorse the results of the screening, with the possibility of amending the conclusions of the Trust Fund for Victims on the eligibility of applicants for individual reparations, upon request of those applicants, or proprio motu by the Trial Chamber."*[290]

It was highlighted that such a practice may raise "*legal problems, in particular when chambers decide to verify the beneficiaries of collective reparations implemented with 'other funds of the TFV,' or seek to impose appellate, judicial review of decisions of the Board of Directors of the TFV, where the Statute is silent and such review is not foreseen by the Regulations*".[291]

In any case, whether or not the Trust Fund is tasked with an administrative screening process (for example jointly with VPRS), the Chamber should retain an oversight role over the implementation of reparations, by requesting regular reporting from the Trust Fund (and VPRS if relevant) on the status of implementation of its order, and scrutinising their performance in relation to its various aspects. It is suggested that the Chamber should impose a clear timeline on implementation by the Trust Fund and hold the Trust Fund accountable to it.[292] Such a timeline and greater clarity on the role of the Chamber in relation to the Trust Fund could also help to address the important question of how long a case should be kept open and how long judicial oversight should continue.

f) Timing of reparations proceedings

Chambers have the duty to ensure an expeditious reparations process: "*The legal framework leaves it for chambers to decide the best approach to take in reparations proceedings before the Court. […] However, in the exercise of their discretion, it is clear that proceedings intended to compensate victims for the harm they suffered, often years ago, must be as expeditious and cost effective as possible and thus avoid unnecessarily protracted, complex and expensive litigation.*"[293]

An important question concerns when to start reparations proceedings. The Court's experience in the first cases has been very painful, with long and repeated procedures on appeal that have delayed the start of implementation. The Lubanga case was an extreme example in this regard, with a guilty verdict rendered in March 2012 (confirmed on appeal in December 2014) and reparations proceedings starting in August 2012, but with the implementation phase of collective reparations still ongoing and incomplete. There are therefore strong reasons for starting preparations for reparations before the conclusion of appellate proceedings. According to the Appeals Chamber in the Lubanga case, the reparations process could commence prior to the determination of a final appeal on conviction and sentence. However, especially after the Bemba case experience, views are mixed among practitioners about this, with risks that precious time and resources will be wasted on an uncertain process, and the danger of unduly raising expectations among victims.[294]

It is interesting to note the consideration given to this matter by the Trial Chamber in the Ntaganda case, which issued its First Decision on the Reparations Process and the Reparations Order prior to the delivery of the appeals judgment on the conviction and sentence.[295] The Independent Expert Review was also of the view that reparations and appellate proceedings, where applicable, should proceed simultaneously.[296] They considered that this could lead to at least a year in time saved. This seems to be the most sensible approach.[297]

4. The identification of beneficiaries

a) Unpredictability of the process

The different approaches taken by Chambers to the procedures for establishing who should benefit from reparations awards has led to uncertainty and confusion among practitioners and those interacting directly with victims, in particular as to whether victims are required to fill in application forms.298 As Redress underlines, *"the unpredictability caused by these divergent approaches has been exacerbated by two factors. The first is that different options for identifying beneficiaries have been developed in an ad hoc manner by individual Chambers, often with the need for adjustments on appeal and many procedural questions remaining unanswered. The second is the tendency of Chambers to settle on a procedure at a very*

290 AC, "Public redacted judgment on the appeal of the victims against the "Reparations Order"", The Prosecutor v. Ahmad Al Faqi Al Mahdi, 8 March 2018, ICC-01/12-01/15-259-Red2, para. 2.
291 L. Walleyn, Victims in the Process of Collective Reparations, 2020, see supra.
292 REDRESS, No Time to Wait, 2019, see supra.
293 AC, "Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute"", The Prosecutor v. Germain Katanga, 9 March 2018, ICC-01/04-01/07-3778-Red ("Katanga AC Judgment 2018"), para. 64.
294 This was raised by several individuals interviewed for this report. See also REDRESS, No Time to Wait, 2019, supra; See submissions mentioned by the Chamber in the Ntaganda case: Ntaganda Decision on Reparations Process, 2020, supra, para. 39.
295 Ntaganda Reparations Order, 2021, see supra, para. 5-6; Ntaganda Decision on Reparations Process, 2020, see supra, para. 39-41.
296 Independent Expert Report, 2020, see supra.
297 See also REDRESS, No Time to Wait, 2019, supra.
298 *"Different approaches have been taken by chambers in respect to whether reparations awards should be restricted to, or should privilege, individuals that submitted applications for reparations. According to some, it is "still unclear whether individual victims are de facto required to request reparations during the proceedings in order to be considered as potential beneficiaries".* C. Ferstman, Human Rights Based Approach, 2020, see supra. See also REDRESS, No Time to Wait, 2019, supra; Mikel Delagrange, "The Path towards Greater Efficiency and Effectiveness in the Victim Application Processes of the International Criminal Court", 2018, 18(3) *Intl Crim L Rev* 540, 548; L. Walleyn, Victims in the Process of Collective Reparations, 2020, see supra; M. Hirst and S. Sahyouni, Effective Legal Representation, 2020, see supra.

late stage in the proceedings."[299]

While this issue was addressed by the Trial Chamber in the Ntaganda case (as attempts were made to clarify the process at an early stage), the impact of its approach remains to be assessed. In any case, it is highly possible for another Trial Chamber to take a different approach in another case. Clarifying procedures for identifying beneficiaries and their practical implications in court-wide reparations principles would go a long way towards addressing the uncertainty faced by victims.[300]

b) A system with two procedures

Pursuant to Article 75 of the Rome Statute, a Chamber may either *"upon request"* or *"on its own motion"* determine the scope and extent of victims' harm.[301]

This means that reparations may be assessed in response to individual victims' applications, but also that Chambers may initiate themselves a process to determine the eligibility of beneficiaries. Another approach is to combine both by supplementing victims' applications with an 'own motion' approach, contributing to a more holistic picture.[302]

To date, both approaches have been used by the Court, with different practical procedures (in particular related to individual assessment of applications, see below).

When ordering a determination on their own motion, Chambers have requested the Registry (VPRS), the Trust Fund and/or others such as OPCV to identify potential beneficiaries. (The issue of their respective roles is discussed further below.) This approach requires effective procedures for identifying additional beneficiaries outside those who submitted applications, based on eligibility criteria outlined by the Trial Chamber and a more administrative screening process conducted by VPRS and the Trust Fund.

Based on the Court's experience to date, it seems that an approach which combines both the reception of individual applications and an additional separate process of identification should be preferred. However, there are questions as to how this should be carried out in practice, including the weight to be given to individual applications in terms of assessment of harm and modalities of reparations.

c) The application-based process

Victims have a right to apply for reparation, the Registry has a duty to assist them in doing so, and the Chambers have a mandate to consider those requests. It is therefore difficult to see how the Court could decide to do away all together with individual applications. Without leading necessarily to a detailed individual assessment of those applications, they must be taken into account in the process of identification of beneficiaries.[303]

There are also instances where the Chambers may decide to rely on an individual determination based on applications, for example when the pool of potentially eligible victims is limited to a specific group of people.

According to a member of a victims' legal representatives' team interviewed for this report, in the context of lawyers representing very large groups of victims, applications will be useful for them to start the process of understanding the types of harm suffered and the needs, in order to begin categorising and drawing statistics. It was noted that in this context applications should be the starting point.

The standard application forms for participation should include the issue of reparations.[304] This appears to be the case in the four-page form for participation currently used.[305] While *"there are several disadvantages involved in making a procedural link between participation and reparations processes",*[306] it would be a missed opportunity not to enable victims to become involved in the reparations process at that point, given the challenges encountered by the Court in communicating with and assisting victims. However, this does not mean that victims should be excluded from the reparations process if they choose not to participate in the trial proceedings. This was reaffirmed by Trial Chamber I.[307]

The Trial Chamber in the Ntaganda case recognised the benefits of involving victims in the reparations process at this stage, ordering that VPRS identify victims potentially eligible for reparations amongst those who participated in the trial; that participating victims who have not yet expressed their wish to receive reparations shall be presumed willing to be considered as potential beneficiaries of reparations; and that their consent may be sought at the implementation stage.[308]

However, applying a purely request-based procedure at the ICC would exclude a significant number of potential beneficiaries of reparations.[309]

299 REDRESS, No Time to Wait, 2019, see supra.
300 REDRESS, No Time to Wait, 2019, see supra.
301 See also the Appeals Chamber jurisprudence: *"The second sentence of article 75(1) of the Statute concerns, inter alia, the trigger for reparations proceedings: upon conviction of a person by the Court, the trial chamber will enter into the reparations phase of proceedings (i) if it has received requests for reparations by individuals identifying themselves as victims, or (ii) on its own motion, if exceptional circumstances exist."* AC, "Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'", The Prosecutor v. Thomas Lubanga Dyilo, 18 July 2019, ICC-01/04-01/06-3466-Red ("Lubanga AC Judgment, 2019"), para. 1.
302 C. Ferstman, Human Rights Based Approach, 2020, see supra.
303 Katanga AC Judgment 2018, see supra, para. 3.
304 REDRESS, No Time to Wait, 2019, see supra; Independent Expert Report, 2020, see supra, para. 901.
305 Independent Expert Report, 2020, see supra, para. 902.
306 REDRESS, No Time to Wait, 2019, see supra. This issue was also raised by several individuals interviewed for the purpose of this report.
307 *"All victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings."*: TC I,"Decision Establishing the Principles and Procedures to Be Applied to Reparations", The Prosecutor v. Thomas Lubanga Dyilo, 7 August 2012, ICC-01/04-01/06-2904, para. 187.
308 Ntaganda Decision on Reparations Process, 2020, see supra, para. 26-30.
309 REDRESS, No Time to Wait, 2019, see supra.

The Appeals Chamber stated that:

> *"It would be incorrect to assume that the number of victims may only be established based on individual requests for reparations received by the Court. It would be undesirable for the trial chamber to be restrained in that determination simply because not all victims had presented themselves to the Court by making a request under rule 94 of the Rules of Procedure and Evidence. In making that determination, the trial chamber should consider the scope of damage as it is in the current reality, based on the crimes for which the convicted person was found culpable."*[310]

As stated above, there must therefore be effective procedures for identifying additional beneficiaries outside those who submitted applications. There does not necessarily need to be an application process for additional victims to be considered eligible during the administrative screening process.

The Trial Chamber in the Ntaganda case for example tasked VPRS with identifying as many potential beneficiaries for reparations as possible, while also clarifying that the use of an application form for reparations is not mandatory, and that victims may provide information through other means.[311] In the reparations order, the Chamber stated: *"Considering its decision to award collective reparations with individualised components, the Chamber sees no need to rule on the merits of individual applications for reparations, pursuant to rule 94 of the Rules."*[312]

This is in line with jurisprudence from the Appeals Chamber which stated that:

> *"When only collective reparations are awarded pursuant to rule 98(3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations."*[313]

There was indeed a lot of procedural activity around the issue of the screening of beneficiaries in the context of collective reparations. The verification process of individual applicants by the Trust Fund ordered in the Lubanga case was clearly problematic in many regards and has been widely rejected by experts and practitioners.[314] The Appeals Chamber also found the individual assessment of applications by the Chamber in the Katanga case to be inappropriate.[315] Despite Appeals Chamber jurisprudence that an individual approach to reparations only suits crimes with a small number of victims, it appears that Trial Chamber II continues to monitor all decisions of the Trust Fund on individual beneficiaries of collective reparations.[316] This practice should be changed.

Whatever the procedure chosen for identifying potential beneficiaries, it is most important to focus on how victims can be empowered to be part of the process. This includes providing clarity on the requirements and procedures, and establishing a strong Court presence in situation countries to inform and assist victims. Chambers should ensure that the Registry and the Trust Fund are proactive in this regard, and issue decisions as early as possible to clarify the procedures to be followed.

As stated above, clarifying such procedures in court-wide reparations principles would go a long way in addressing the uncertainty faced by victims.

d) Timing issues

It seems clear that the process of identification of potential beneficiaries should start as early as possible, from the very beginning of a case.[317] Victims should be able to "register" throughout the process, either by submitting a request for reparation combined with an application for participation, or separately. The Registry, through VPRS, should map out eligible victims before the end of a trial, including those who have not applied to participate.

Some consider that the Court has discouraged early applications for reparation in an attempt to manage expectations.[318] Moreover, there seems to be an interpretation by some that the Registry is prohibited, during the trial, from collecting applications for reparations from individuals not participating in the trial.[319] Such an interpretation seems dubious and goes against the meaningful practical implementation of victims' rights. As the Independent Expert Report emphasises, *"fair trial rights and due process guarantees dictate that there should be continued identification and collection of applications [for reparations] from victims".*[320]

The "registration" and identification procedure should continue after the order on reparations, as this opens a new opportunity to reach out to victims with clearer details about what reparations they might be entitled to. The opportunity to manifest themselves should be open to victims in the implementation phase.[321]

310 Lubanga AC Judgment, 2019, see supra, para. 2.
311 Ntaganda Decision on Reparations Process, 2020, see supra, para. 35-36.
312 Ntaganda Reparations Order, 2021, see supra, para. 196.
313 Lubanga AC Judgment, 2015, see supra, para. 7. The Appeals Chamber also stated that *"The determination that it is more appropriate to award collective reparations operates as a decision denying, as a category, individual reparation awards".*
314 This was raised as a major concern by many individuals interviewed for this report. See L. Walleyn, Victims in the Process of Collective Reparations, 2020, supra.
315 *"The Appeals Chamber is not persuaded that the approach chosen by the Trial Chamber for the reparations proceedings in this case, which was based on an individual assessment of each application by the Trial Chamber, was the most appropriate in this regard as it has led to unnecessary delays in the award of reparations."* Katanga AC Judgment 2018, see supra, para. 1.
316 See L. Walleyn, Victims in the Process of Collective Reparations, 2020, supra.
317 This was strongly expressed by most of the individuals interviewed for this report. See also REDRESS, No Time to Wait, 2019, supra; Independent Expert Report, 2020, see supra, Recommendation 345.
318 C. Ferstman, Human Rights Based Approach, 2020, see supra.
319 *"Another substantial procedural cause of delay in the reparations scheme is the bar in the Chambers Practice Manual on the collection of individual victim application forms sufficiently before the commencement of the trial hearings. This has been interpreted and effectively understood as prohibiting the Registry from any continued collection of information from new potential beneficiaries who have not applied for admission to participate at the trial, but who might only intend to subsequently request reparations, should a conviction follow. A delinking by the Registry in the continued identification and collection of any new requests for participation at trial and/or reparations, immediately before the commencement of and during the trial is also attributed to this bar."* Independent Expert Report, 2020, see supra, para. 914.
320 Independent Expert Report, 2020, see supra, para. 915.
321 This point was strongly underlined by most of the individuals interviewed for this report.

e) Eligibility criteria

The Appeals Chamber held that:

> *"It is important for trial chambers to provide a clear indication to victims who have already been authorised to participate in proceedings, and to other victims seeking reparations, as to the standard of proof that will apply to the assessment of their eligibility for reparations."*[322]

The Court's jurisprudence has progressively determined the beneficiaries that may be eligible for reparations. This case-law is recalled in detail in the recent reparations order in the Ntaganda case.[323]

While the Court's practice in this regard has been clarified, as noted above,[324] there is an inherent problem regarding the very limited scope of victims eligible because of the limited scope of prosecutions, leading to the exclusion of many victims that have suffered significant harm as the result of crimes closely linked to the case.[325]

Chambers should have an open and progressive approach to the concept of the causal link with the charges, in order to give meaning to the concept of personal interests. They have a discretionary power to be more flexible in determining the scope of victims' eligibility.

5. Assessment of the harm

According to the Appeals Chamber, the Trial Chamber has the responsibility of identifying or defining the types or categories of harm suffered by victims and these must be contained in the reparations order. The assessment of the extent or monetary value of that harm may, on the other hand, be made either by the Trial Chamber (with or without the assistance of experts[326]), or by the Trust Fund, based on criteria set out by the Trial Chamber in its reparations order.[327]

According to Redress, "*the Court's approach to determining the amount to be awarded as reparation has not always been clear. Chambers have taken divergent approaches to determining the amounts to be awarded, the methodology used was unclear and, in some cases, the final amount did not correspond to any of the submissions of the parties or experts.*"[328]

In terms of the methodology to be used, the Court's experience shows that an individual assessment of harm is generally not appropriate, unless there are only a small number of victims. The Appeals Chamber held that:

> *"There may be circumstances where a trial chamber finds it necessary to individually set out findings in respect of all applications in order to identify the harms in question (for example, if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations). However, when there are more than a very small number of victims, this is neither necessary nor desirable. This is not to say that trial chambers should not consider those applications – indeed the information therein may be crucial to assess the types of harm alleged and it can assist a chamber in making findings as to that harm. However, setting out an analysis for each individual, in particular in circumstances where a subsequent individual award bears no relation to that detailed analysis, appears to be contrary to the need for fair and expeditious proceedings."*[329]

The experts in the Ntaganda case recommended: "*An individual assessment of each victim's harm and the extent of the harm is neither feasible nor desirable due to the lack of documentary evidence, and the length of time it would take to assess each individual claim. Therefore, presumptions should be used.*"[330]

Indeed, many individuals interviewed for the purpose of this report highlighted concerns regarding the methods that were used to conduct such individual assessments in the Lubanga case, including in terms of re-traumatisation of victims. This was strongly underlined by a victims' legal representative in a recent article, who stated that victims may feel that it "*amounts to a form of harassment*".[331]

Rather than an individual assessment of applications, practice shows that the use of a sample is more appropriate, to gain an understanding of the type of victimisation and the needs and wishes of a group of victims, in order to make wider recommendations based on this sample, while consulting victims more generally.

This approach was adopted in the Ntaganda case, where the Chamber instructed VPRS to "*prepare a sample of potential beneficiaries of reparations, in consultation with the parties and TFV from the group of participating victims in the case, those that are eligible for reparations in the Lubanga case, and potentially new identified beneficiaries*".[332] The experts in that case recommended "*a wider use of sampling at an earlier stage of the reparation procedure than is the current practice.*"[333]

322 Lubanga AC Judgment, 2019, see supra, para. 5.
323 Ntaganda Reparations Order, 2021, see supra, paras. 31-40.
324 See "Criteria recognising victim status" in Chapter 5, The process to authorise the participation of victims.
325 According to Carla Ferstman: *"A first challenge is reparations tied to individual criminal responsibility - against 'a convicted person'. The Lubanga Appeals Chamber determined that reparations orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability is determined in a sentence. While some authors of submissions had encouraged the Court to take a broader approach to reparations, the Appeals Chamber held that reparations had no autonomous meaning outside of the conviction. In this light it held, for instance, that because they were not included in the sentence on guilt, sexual and gender-based violence could not be defined as a harm for the purposes of reparations resulting from the crimes for which Mr Lubanga was convicted."* C. Ferstman, Human Rights Based Approach, 2020, see supra. There was also a challenge in the Al Mahdi case related to the fact that the scope of victims' eligible for reparations was different to the scope of those who had been authorised to participate.
326 Rule 97(2).
327 REDRESS, No Time to Wait, 2019, see supra. Referring to Lubanga AC Judgment, 2015, see supra, paras. 181-184.
328 REDRESS, No Time to Wait, 2019, see supra.
329 Katanga AC Judgment 2018, see supra, para. 3.
330 "Expert report on reparations", The Prosecutor v. Bosco Ntaganda, K. Bonneau, E. M. Malolo, N. Wühler, 29 October 2020, ICC-01/04-02/06-2623-Anx1-Red2 (Ntaganda Expert Report, 2020), para. 283.
331 L. Walleyn, Victims in the Process of Collective Reparations, 2020, see supra.
332 Ntaganda Decision on Reparations Process, 2020, see supra, para. 38.
333 Ntaganda Expert Report, 2020, see supra, para. 283.

It is crucial not to wait until the end of a trial to start assessing harm. Many individuals interviewed for this report expressed dismay at the fact that the Court arrives at the end of procedures which have lasted for years without an understanding of the harm suffered by and the needs of victims. Significant work is required by the Chamber, VPRS, the legal representatives of victims and the Trust Fund during years of proceedings, to prepare for this stage of the process. From an early stage, the limited information provided in application forms should be studied, victims' legal representatives can start consulting their clients (while being mindful of expectations) and, importantly, relevant evidence presented in the courtroom during the trial should be collected.

As will be discussed below, making use of the Trust Fund's assistance mandate at an early stage, which is separate from its reparations mandate, is essential to address victims' immediate needs. It can also help identify further needs related to the harm suffered and the possible modalities of reparations, which can subsequently inform the reparations stage.

6. Determining the accused's liability

As highlighted by Redress, at the ICC to date "*all the Chambers have adopted different approaches to determining the monetary liability of the convicted person based on the specificities of each case.*"[334]

There is some relevant jurisprudence from the Appeals Chamber on the issue, although Redress has underlined that some of the decisions have not been consistent, calling for more specific guidance from the Appeals Chamber to provide increased clarity and certainty.[335] Relevant findings from the Appeals Chamber include:

> *"A convicted person's liability for reparations must be proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case."*[336]

> *"The amount of the convicted person's liability should be fixed taking into account the cost of reparations considered to be appropriate and that are intended to be put in place (which can include reparations programmes) and the different harms suffered by the different victims, both individual victims (direct and indirect) in addition to, in particular circumstances, the collective of victims. In setting the amount, the trial chamber must also ensure that it takes into account the convicted person's rights and interests."*[337]

> *"In principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person's liability to repair that harm. While a reparations order must not exceed the overall cost to repair the harm caused, it is not, per se, inappropriate to hold the person liable for the full amount necessary to repair the harm."*[338]

> *"Rather than attempting to determine the "sum-total" of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy. The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair."*[339]

A victims' legal representative involved in one of the cases highlighted the fact that, since all accused so far have been considered indigent, none of them have actually had to pay anything in reparations. He suggested that there should be efforts in the future by victims' legal representatives, the Registry and the Court to continue monitoring the accused's financial situation in order to potentially attempt to have them contribute financially to reparations, even if only symbolically.[340]

7. Types and modalities of reparations

In addition to restitution, compensation and rehabilitation, which are explicitly mentioned in Article 75 of the Rome Statute, reparations may also include satisfaction and guarantees of non-repetition.[341]

Several judgments have incorporated such measures. Trial Chamber I in Lubanga for example held that "*Other types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate*".[342] The recent order in the Ntaganda case also includes some forms of symbolic reparations: "*the modalities of reparations may include measures of restitution, compensation, rehabilitation, and satisfaction, which may incorporate, when appropriate, a symbolic, preventative, or transformative value*".[343]

In interviews conducted for this report it was underlined that an important issue for the Court to consider is

334 REDRESS, No Time to Wait, 2019, see supra.
335 REDRESS, No Time to Wait, 2019, see supra.
336 Lubanga AC Judgment, 2015, see supra, para. 6.
337 Lubanga AC Judgment, 2019, see supra, para. 4.
338 Katanga AC Judgment 2018, see supra, para. 6.
339 Katanga AC Judgment 2018, see supra, para. 2.
340 Interview conducted for this report. The Appeals Chamber held that: *"In cases where the convicted person is unable to immediately comply with an order for reparations for reasons of indigence, the Trust Fund may advance its "other resources" pursuant to regulation 56 of the Regulations of the Trust Fund, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable and must reimburse the Trust Fund."* Lubanga AC Judgment, 2015, see supra, para. 5.
341 United Nations General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", A/RES/60/147 of 21 March 2006.
342 TC I, "Decision Establishing the Principles and Procedures to Be Applied to Reparations", The Prosecutor v. Thomas Lubanga Dyilo, 7 August 2012, ICC-01/04-01/06-2904, para. 222.
343 Ntaganda Reparations Order, 2021, see supra, para. 199.

whether and to what extent reparations should respond to what victims want. This raises further questions, for example, whether reparations should be individual or collective, and to what extent financial compensation should be ordered (insofar as other measures such as rehabilitation are less controversial).

a) Individual versus collective reparations

The Rome Statute and the Rules of Procedure and Evidence[344] are vague as to the factors to be considered in deciding whether to order individual and/or collective reparations.

As stated by the former UN Special Rapporteur on the Right to Truth, Justice and Reparation:

> *"The term 'collective reparation' is ambiguous, as 'collective' refers to both the nature of the reparation (i.e. the types of goods distributed or the mode of distributing them) and the kind of recipient of such reparation (i.e., collectivities)".*[345]

According to the experts in the Ntaganda case:

"reparations in their complexity and specificity really need to address victims' rights and needs, and therefore so-called collective reparation may also include individual reparative measures. Complementary, individual and collective reparations serve different purposes, and therefore 'collective reparations are not a substitute for individual reparations'."[346]

While the Court has a tendency to favour collective reparations, often victims show a preference for individual reparations, and sometimes even reject the notion of collective reparations.[347] According to Redress, "*Individual reparations can respond more adequately to the specific experiences of each victim in terms of the harm suffered as a result of the crimes that have occurred. Ideally, individual reparations should be awarded where the circumstances so warrant, and collective reparations should not become a substitute for individual reparations.*"[348] Redress underlines that, "*collective awards may be more appropriate in situations of clear violations of collective rights; or to address the individualised harm of a large number of persons; or when it is the best way to remedy the harm (for example, to provide treatment facilities for victims); or when memorialisation (or other forms of satisfaction) and guarantees of non-repetition are what the victims really want.*"[349]

In the Lubanga case, the Chamber's choice to favour community-based reparations was criticised.[350] In the Katanga and Al Mahdi cases, Chambers included both individual and collective reparations. In the Bemba case, the experts had recommended a mixture of individual and collective reparations. They stated that, "*whether symbolic forms of reparations should be ordered and what they might entail should be revisited after material reparations were designed and delivered*".[351]

The approach adopted in the recent reparations order in the Ntaganda case is interesting:

> *"the Chamber has concluded that collective reparations with individualised components are the most appropriate in the present case, as they may provide a more holistic approach to the multi-faceted harm suffered by the victims. This award ensures a more efficient, prompt, and practical approach, as the potential large number of victims would make an individual assessment of their harm for the purposes of granting individual reparations, resource-intensive, time consuming, and, in the end, disproportionate to what could be achieved."*[352]

While the Chamber's reasoning to reach this conclusion is questionable,[353] the decision seems to show a sensible attempt by the Chamber to address the individual needs of victims.[354] It also addressed (to some extent) victims' requests for financial compensation: "*the Chamber agrees with the TFV's and CLR2's suggestion that compensation awards proposed by the Appointed Experts appear collective in character and can fall within the category of collective reparations with individualised components*".[355] This is in line with Appeals Chamber jurisprudence.[356]

It remains to be seen how the individual components envisioned by the Chamber will be translated into concrete modalities in the Trust Fund's implementation plan, how they will be implemented in practice, and in turn how they will be perceived by victims. Attention to what reparations mean for victims is key.

In the first cases, Carla Ferstman stresses that, "*arguably, too little emphasis has been placed on what victims themselves want, whether for reasons of perceived efficiency or possible paternalism – that the Court or Trust Fund is somehow better placed to understand their needs.*"[357] This concern was raised by many of those interviewed for

344 Rule 97(1).
345 "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non- recurrence, Report on Reparation", A/69/518, 14 October 2014, cited in Ntaganda Expert Report, 2020, see supra, para. 149.
346 Ntaganda Expert Report, 2020, see supra, para. 149.
347 This was raised by several individuals interviewed for this report, and corresponds to FIDH's experience. See also REDRESS, No Time to Wait, 2019, supra.
348 REDRESS, No Time to Wait, 2019, see supra.
349 REDRESS, No Time to Wait, 2019, see supra.
350 *"In the Lubanga case, this way of working led to an award which arguably bore too little correlation with the harm suffered or victims' submissions about their needs and circumstances."* C. Ferstman, Human Rights Based Approach, 2020, see supra
351 C. Ferstman, Human Rights Based Approach, 2020, see supra, referring to Expert Report on Reparation, "Public Redacted Version of 'Annex, 28 November 2017, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2'", The Prosecutor v. Jean-Pierre Bemba Gombo, 28 November 2017, ICC-01/05-01/08-3575-Anx- Corr2-Red.
352 Ntaganda Reparations Order, 2021, see supra, para. 194.
353 *"The Chamber thus concurs with the TFV's submission that the occurrence of group victimisation beyond individual levels of harm is a relevant feature of the nature of harm in this case, requiring reparations that are collective in character."* Ntaganda Reparations Order, 2021, see supra, para. 188.
354 *"Despite their collective nature, due to their individualised components, the collective reparations in this case will also focus on the individual members of the group and include individual benefits that respond to the specific needs and current situation of individual victims within the group."* Ntaganda Reparations Order, 2021, see supra, para. 189.
355 Ntaganda Reparations Order, 2021, see supra, para. 193.
356 *"By including the payment of sums of money to individuals, even in the context of collective reparations, the ICC Appeals Chamber appears to merge individual and collective reparations into a sui generis reparation scheme, still guided by the purpose to restore the victims, as far as possible, in the circumstances before the crimes occurred."* L. Walleyn, Victims in the Process of Collective Reparations, 2020, see supra, referring to Lubanga AC Judgment, 2019, see supra, para. 40.
357 C. Ferstman, Human Rights Based Approach, 2020, see supra.

this report, with discussions taking place around the question, "Is it reparation if it is not what victims want?".

In the Katanga case, it seems that the reparations order was more or less in line with victims' expectations, including requests for financial compensation (implementation is more problematic). However, many have argued that the approach was feasible in this case because of the limited number of victims, but that it might not be possible to replicate it with large numbers of victims. This is debatable.

b) Financial compensation as a form of reparations

While some consider it complex and controversial, financial compensation in the context of large number of victims should not necessarily be excluded, if only for the reason that this is often the request expressed by victims.[358] Even for large groups of victims, it might be possible in many contexts to implement such measures, and lessons can be learned from other legal systems that have attempted to implement them, including for example at the Inter-American Court of Human Rights.[359] The possible drawbacks within a community could be mitigated, for example by coupling them with measures of accompaniment, support and advice.

In the Ntaganda case, the Chamber found that:

> *"Compensation, as a form of economic relief consists in the award of monetary funds for an economically assessable damage and may be appropriate to redress certain harms which cannot be addressed by other means. In this regard, the Chamber endorses the TFV's request for sufficient flexibility to prepare an implementation plan that is responsive to the needs of the victims and adjusted to the field realities. […] Accordingly, the Chamber instructs the TFV to include in its draft implementation plan a recommendation as to compensation, including the amount of compensation, if any. The Chamber will then determine whether compensation for any harm may be appropriate in this case."*[360]

Therefore, much depends on the Trust Fund's capacity and willingness to propose creative ways to implement such modalities of reparations. However, from the Chamber's perspective, it is the right approach to rely on the Trust Fund and VPRS to move the practical implementation of victims' right to reparations forward, while at the same time ensuring that they fulfil their expert mandate in an effective way.

8. The roles of the TFV and VPRS

a) The Trust Fund for Victims

i) Mandate

The Trust Fund for Victims (TFV) was established pursuant to Article 79 of the Rome Statute. According to Article 75(2), "*the Court may order that the award for reparations be made through the Trust Fund*". The modalities are set out in Rule 98 of the Rules of Procedure and Evidence, which also describes the two-fold mandate of the Trust Fund: implementing reparations orders from Chambers, and providing broader forms of assistance to victims and their families. The Regulations of the Trust Fund further clarify its role.

The Trust Fund, at the request of the relevant Chamber, plays a critical role in facilitating victims' access to reparation as ordered by the Court. It has been ordered to identify beneficiaries at different stages of the proceedings (see below), and to complement – from its own resources - awards in particular where the convicted person is indigent.[361] To date, the Trust Fund has been asked to consider advancing the full amount ordered in the first three cases to reach the implementation phase. In the Ntaganda case, the Chamber "*encourages the TFV to complement the reparation awards to the extent possible and engage in additional fundraising efforts to the extent necessary to complement the totality of the award*".[362]

The Court, relying on Article 75(2) and Rule 98, has asked the Trust Fund to implement reparation awards in all four cases. The Trust Fund is required to draft an implementation plan, setting out proposed activities which correspond to the modalities identified by the Chamber.[363] The Trust Fund's regulations lack detail on what exactly a reparation/implementation plan should contain and how it should be drafted. This makes a precise and detailed reparation order from the relevant Chamber particularly important. In the absence of such an order, there is a risk that the Trust Fund may submit implementation plans that lack sufficient detail, resulting in significant delays and additional litigation, as demonstrated in the case of Thomas Lubanga.[364]

These are delays that can and should be avoided, as they are impossible to justify to victims, many of whom have waited years if not decades for the Court to deliver some form of tangible justice. However, it must be recognised that implementation delays, for example in the Lubanga case, are not due only to the Trust Fund's pace of work, but also to the issue of the timing of implementation of reparations in relation to appellate proceedings (see above).

The first cases before the Court have shown some tensions surrounding the authority and independence of

358 For example, in the Ntaganda case, the experts stated that *"[t]he Chamber should be mindful of the victims' overwhelmingly uniform request and expectation that they be provided financial compensation as one form of reparation"* and recommended that each victim should receive a standard compensation amount. Ntaganda Expert Report, 2020, see supra, para. 283.
359 This was discussed with many of the individuals interviewed for this report.
360 Ntaganda Reparations Order, 2021, see supra, para. 202.
361 See Regulation 56 of the Regulations of the Trust Fund.
362 Ntaganda Reparations Order, 2021, see supra, para. 257.
363 Regulations 54 and 57 of the Regulations of the Trust Fund.
364 See REDRESS, Moving Reparation Forward, p. 7.

the Trust Fund, and in particular the extent of the Trust Fund's discretion in relation to its use of its voluntary resources.[365] The Trust Fund does not have the power to refuse the task of implementing the Court's orders though it does control the use of its voluntary resources.[366]

The Appeals Chambers stated that:

> *"The determination, pursuant to regulation 56 of the Regulations of the Trust Fund, of whether to allocate the Trust Fund's 'other resources' for purposes of complementing the resources collected through awards for reparations falls solely within the discretion of the Trust Fund's Board of Directors."*[367]

It further clarified that:

> *"In cases where the convicted person is unable to immediately comply with an order for reparations for reasons of indigence, the Trust Fund may advance its 'other resources' pursuant to regulation 56 of the Regulations of the Trust Fund, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable and must reimburse the Trust Fund."*[368]

In the Ntaganda case, as noted above, the Chamber "*encourages the TFV to complement the reparation awards to the extent possible*".[369]

ii) Role in identifying beneficiaries

As noted above, in the Lubanga and Katanga cases the Trust Fund was given a role in identifying beneficiaries, through "an administrative screening".

The Appeals Chamber found that:

> *"It is within the discretion of a trial chamber to request, on a case-by-case basis, the assistance of, for example, the Trust Fund for Victims to undertake the administrative screening of beneficiaries of individual reparations meeting the eligibility criteria set out by the trial chamber."*[370]

The use of the Trust Fund in assessing the eligibility of victims is controversial and has led to many difficulties in the implementation of reparations orders (see below). In the Ntaganda case, the Chamber decided to put VPRS in charge of identifying beneficiaries. These issues and the respective roles of the Trust Fund and VPRS are discussed further below.

iii) Criticisms

The Trust Fund's performance was criticised by Chambers in the Lubanga and Al-Mahdi cases.[371] While many of these criticisms are justified, it is important not to overlook the role played by the contents of orders issued by Chambers themselves.[372] In the Lubanga case, for example, the Trust Fund has complained that compliance with orders is impossible or overly burdensome, and has expressed concerns over the Chamber's approach to implementing collective reparations.[373]

It also appears that, until recently, the Trust Fund had not fully realised the nature of the role it should play in the judicial debate and had not asserted itself enough in judicial arguments.[374] By providing clearer explanations of its perspectives, based on its concrete experience at the local level, the Trust Fund may be able to improve its image and at the same time help Chambers make decisions that are more adapted to the reality in the country.[375]For example, the Trust Fund should explain the extent to which its operational capacity is limited (including in terms of personnel)[376] and slowed by the administrative, legal and financial framework of the Court,[377] with a view to obtaining progress in this regard and finding an appropriate balance between the need for good governance procedures and the absolute necessity to speed up processes.

It would also help to improve transparency in the implementation of reparations orders. At present, many aspects of the Trust Fund's work are kept confidential, and this is not always based on the Trust Fund's own assessment of a potential risk. Chambers should be more open to making information public. In this context, it is noteworthy, and welcome, that Trial Chamber II in its March 2021 decision in the Lubanga case not only decided to finally make public certain information related to the implementation of reparations in that case, but it also dedicated a significant portion of the decision to outlining the details of the procedure so far, for the purpose of publicity.[378]

Finally, given that the capacity of the Trust Fund to successfully and effectively implement its mandate is dependent on its fundraising, it is hoped that the recent

365 C. Ferstman, Human Rights Based Approach, 2020, see supra, referring to Lubanga AC Judgment, 2015, see supra, paras. 111-114.
366 *"[S]hould it choose, the Trust Fund for Victims can apply a portion of its voluntary resources towards the implementation of a reparations award against an indigent convicted perpetrator; however, the Court does not have the power to oblige the Trust Fund for Victims to apply its voluntary resources in this way."* C. Ferstman, Human Rights Based Approach, 2020, see supra.
367 Lubanga AC Judgment, 2012, see supra, para. 4.
368 Ibid para.5.
369 Ntaganda Reparations Order, 2021, see supra, para. 257.
370 AC, "Public redacted Judgment on the appeal of the victims against the 'Reparations Order'", The Prosecutor v. Ahmad Al Faqi Al Mahdi, 8 March 2018, ICC-01/12-01/15-259-Red2, para. 1.
371 "Order instructing the Trust Fund for Victims to supplement the draft implementation plan", The Prosecutor v. Thomas Lubanga Dyilo, 9 February 2016, ICC-01/04-01/06-3198-tENG, para 20; Trust Fund for Victims, "First submission of victim dossiers", The Prosecutor v. Thomas Lubanga Dyilo, 31 May 2016, ICC-01/04-01/06-3208, para. 8-9; "Public Redacted Version of 'Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations' 12 July 2018", The Prosecutor v. Ahmad Al Faqi Al Mahdi, 12 July 2018, ICC-01/12-01/15-273-Red, paras. 9-22.
372 Based on interviews conducted for the purpose of this report.
373 C. Ferstman, Human Rights Based Approach, 2020, see supra, referring to "Request for Leave to Appeal against the 'Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre'", The Prosecutor v. Thomas Lubanga Dyilo, 15 February 2016, ICC-01/04- 01/06-3200; Trust Fund for Victims, "First submission of victim dossiers", The Prosecutor v. Thomas Lubanga Dyilo, 31 May 2016, ICC-01/04-01/06-3208.
374 Based on interviews conducted for the purpose of this report. See also REDRESS, No Time to Wait, 2019, supra.
375 Based on interviews conducted for the purpose of this report.
376 REDRESS, No Time to Wait, 2019, see supra.
377 An example that is often raised in discussions concerns the financial rules around the procurement process which are not adapted to how the Trust Fund needs to make partnerships in the situation countries.
378 TC II, "Rectificatif de la Version publique expurgée de la Décision faisant droit à la requête du Fonds au profit des victimes du 21 septembre 2020 et approuvant la mise en œuvre des réparations collectives prenant la forme de prestations de services", The Prosecutor v. Thomas Lubanga Dyilo, 05 March 2021, ICC-01/04-01/06-3495-Red-Corr, paras. 90 to 115.

(and overly delayed) recruitment of a fundraising officer will improve its capacity. As Redress noted, "*the ICC reparations system is almost completely dependent on the Trust Fund's ability to secure funding.*"[379]

b) The complementary roles of VPRS and TFV

Many discussions have taken place with regards to the respective roles of the Registry's VPRS and the Trust Fund for Victims in relation to reparations.[380] This is due in part to diverging approaches by Chambers as to their roles, which have created confusion; the weak performance of the Trust Fund in implementing the first reparations orders, as described above; a lack of appropriate leadership in both organs; and harsh (and sometimes controversial) statements made by the Independent Expert Review in their 2020 report.

Beyond the reasons for this in-fighting, the Court, as a whole, must rise above this lack of coordination between actors in charge of such a crucial mandate towards victims. It is a matter of legitimacy for the Court. While these issues will not be resolved without appropriate action from the leadership of the Registry and the Trust Fund, Chambers can play a role in forcing their hand towards proper collaboration.

First, Chambers' practice must be more consistent and straightforward in terms of their expectations of these bodies, in relation to handling victims' applications, identification of beneficiaries and assessment of harm.

It must be clarified that the responsibility for facilitating, collecting, assessing and processing victims' applications falls within the mandate of VPRS.[381] While some Chambers have created confusion and uncertainty by tasking the Trust Fund to assess victims' applications in specific circumstances, even this practice does not call into question the centrality of the VPRS mandate in this regard. This does not mean that the Trust Fund should not be given access to applications and/or to the data they contain. It means that it is widely recognised that VPRS is the body with the experience, expertise and technology to handle victims' applications for reparations.

When it comes to identification of beneficiaries, different approaches have been taken by Chambers. In the Lubanga and Al Mahdi cases, this task was given to the Trust Fund, while in Ntaganda (and to some extent Katanga) it was given to VPRS. In the Ntaganda case, the Chamber considered that VPRS is "*the right entity to lead the identification of potential beneficiaries*", taking into consideration its familiarity with the case, its experience in the country and in assisting victims to participate, as well as its significant role in outreach.[382]

The important aspect of the Chamber's decision, which the Independent Expert Review seems to overlook,[383] is the reaffirmation of the need for collaboration and cooperation between VPRS and the Trust Fund: "*The approach adopted seeks to rely on the full collaboration and cooperation of the Registry's VPRS and the TFV, as well as that of the LRVs, to benefit from their combined knowledge, expertise, and experience in assisting victims and dealing with reparations, in particular in the field. The Chamber notes in particular the importance of including the TFV's input at this stage given its operational experience at the implementation stage of reparations orders. The Chamber considers that it is essential to combine the limited resources available to facilitate the efficient and effective conduct of the reparations proceedings, particularly in the current circumstances.*"[384]

Combining expertise and resources is crucial for the implementation of such a complex mandate.

Indeed, transferring the Trust Fund's competences in terms of implementation of reparations to VPRS, as recommended by the Independent Expert Review,[385] does not seem to provide an adequate answer to the overall lack of capacity and resources of the Court as a whole, including the Trust Fund, to implement reparations in a speedy way. It would be more strategic to combine the strengths of both bodies to maximise the Court's capacity.

The need for the Trust Fund and VPRS to work together in a complementary way emerged strongly from the interviews conducted for this report.[386] It would not be appropriate for VPRS alone to conduct the preparatory work, such as identification of beneficiaries, as it would impede the Trust Fund's ability to meaningfully implement modalities of reparations at a later stage. The implementing body must have some level of ownership over beneficiary identification and assessment of harm, in order to create a link with victims and better understand their situation.

However, it was emphasised that Chambers should be clear and direct in relation to the various steps that they expect the Trust Fund and VPRS to conduct together (in collaboration with victims' legal representatives and the outreach section, when appropriate). For example, implementation plans should be the result of joint work. It was also highlighted that the process would gain from being public, as it would provide a level of accountability of the different actors, including in relation to planning, strategy, design of implementation plans, monitoring and evaluation mechanisms.

379 REDRESS, No Time to Wait, 2019, see supra. See also: "the Chamber acknowledges that in order to fully complement the award, substantial fundraising will need to take place", Ntaganda Reparations Order, 2021, supra, para. 257.
380 Based on interviews conducted for the purpose of this report.
381 This was underlined by the Independent Expert Report, 2020, see supra, para. 905.
382 Ntaganda Decision on Reparations Process, 2020, see supra, para. 27.
383 Independent Expert Report, 2020, see supra, para. 913.
384 Ntaganda Decision on Reparations Process, 2020, see supra, para. 25.
385 Independent Expert Report, 2020, see supra, recommendations 358 and 359.
386 See also REDRESS, No Time to Wait, 2019, supra.

9. Consultation with victims: a fundamental element of reparations

FIDH has repeatedly emphasised the vital importance of consultations with victims in relation to issues that affect them, in particular reparations.[387] Victim inclusion at all stages of the reparations process, in a timely and effective way, including in the design and the implementation of reparations awards, is crucial to provide satisfaction and ensure that appropriate reparations are delivered.[388] This involvement is as an integral aspect of victims' right to reparations.

The UN Guidance Note on reparations for Conflict-related Sexual Violence powerfully states that:

> *"[P]articipation of and consultations with victims will ensure that reparations have the intended impact, are perceived as such, and that there is ownership of the process. This is also important to ensure that reparations are accessible and that they do not exclude or marginalise any group of victims".*[389]

Victim inclusion is required for reparations to make sense at all. As Carlos Beristain points out:

> *"[R]eparation from a legal perspective includes a number of rights. But from the practical and psychosocial point of view, what is also important is that it be carried out in a manner consistent with their meaning and that compliance be effective for the victims, reparation should be the most tangible manifestation of the (...) efforts to remedy the harm they have suffered."*[390]

The importance of consultation was insisted upon by the experts in the Ntaganda case, who stated:

> *"The process of obtaining reparations should itself be empowering and transformative, giving to victims the opportunity to assume a proactive role in obtaining reparations."*[391] *They highlighted that victims should be included meaningfully "in the different steps of the procedure of reparation: mapping, design, implementation, monitoring and evaluation".*[392]

The experts stated: *"Adhering to the process will legitimise it. By giving victims a voice to define what measure will effectively repair their harm, will start the reparative process, and who else apart from them can truly know it?"*[393] The experts pointed out that such consultation helps to manage victims' expectations and to *"answer the debates over what amount of money would be the equivalent of the harms."*[394] Finally, they highlighted the importance of awareness-raising and outreach in consultations.[395]

The Trial Chamber in the recent reparations order in the Ntaganda case reaffirmed these principles, dedicating a whole section of the order to *"Victim-centred approach: Accessibility and consultations with victims".*[396] Key statements from the Chamber include:

> *"[A] 'victim-centred' approach accords due consideration to the victims, properly involving them in the criminal justice process, so that their rights to truth, justice, and reparations are respected and enforced. It requires the involvement of victims at all stages of the proceedings, allowing them to gain a sense of ownership and recognising their active contribution to the process. A 'victim-centred' approach is necessary in order for reparations to be impactful and successful. It requires full and meaningful consultation and engagement with victims, giving them a voice in the design and implementation of reparations programmes and allowing them to shape the reparation measures according to their needs."*[397]

> *"Direct and indirect victims should […] receive adequate support in order to make their participation substantive and effective."*[398]

> *"The Court should consult with victims on issues relating to, inter alia, the identity of the beneficiaries and their priorities. Whenever possible, it should also consult with victims as to the modalities of reparations to be awarded."* [399]

The Trust Fund and VPRS therefore need to develop effective procedures and strategies for meaningful involvement of victims in the different steps of the reparations process. In particular, they need to find ways to balance the need not to raise expectations with the need to consult victims from an early stage in all aspects of the reparations process.

In some countries, the Trust Fund seems to have started establishing interesting processes with local civil society to undertake consultations with victims, and with local partners to tailor their implementation projects to the results of consultations. This approach should be systematised throughout the Trust Fund's work in all countries, and should be developed in collaboration with VPRS.

Of course, meaningfully involving victims in the reparations process requires the Court to prioritise resources and efforts for staff and activities in the country. Chambers can play a role in this by reaffirming the fundamental importance of victims' consultations in their decisions.

387 FIDH, Enhancing Victims' Rights, 2013, see supra.
388 C. Ferstman, Human Rights Based Approach, 2020, see supra; REDRESS, No Time to Wait, 2019, see supra.
389 United Nations, "Guidance Note of the Secretary-General – Reparations for Conflict-Related Sexual Violence", June 2014, cited in Ntaganda Expert Report, 2020, see supra, para. 131.
390 C. Berstain, "Acompañar los Procesos con las Victimas : Atención Psicosocial en las Violaciones de Derechos Humanos (Programa Promoción de la Convivencia, 2012)", p. 84, cited in Ntaganda Expert Report, 2020, see supra, para. 128.
391 Ntaganda Expert Report, 2020, see supra, para. 131.
392 Ibid.
393 Ibid.
394 Ibid.
395 Ibid, para. 134.
396 Ntaganda Reparations Order, 2021, see supra.
397 Ibid para. 45.
398 Ibid para. 46.
399 Ibid para. 48.

10. Urgent assistance as a form of interim relief

As set out above, in addition to implementing reparations orders, the Trust Fund has a more general "assistance" mandate. The assistance mandate is aimed at providing victims with physical and psychological rehabilitation and/or material support. This mandate can be applied to victims regardless of their participation in a specific case, and is triggered as soon as a situation is under investigation and once the Fund has notified the Pre-Trial Chamber of its intent to undertake relevant activities. It therefore has the potential to reach a larger number of victims and, potentially, to provide urgent interim relief, which is particularly important in view of the length of ICC proceedings.[400]

While recent jurisprudence of the Appeals Chamber has made it clear that 'reparations orders' may only take place after the trial has concluded,[401] there is no reason for the Trust Fund not to use its assistance mandate to provide relief to victims at an early stage.

According to Carla Ferstman, "*an important part of the purpose of the assistance mandate as originally conceived was to ensure benefits for some of the most vulnerable victims with urgent needs that could not wait for the conclusion of a lengthy trial*".[402] Unfortunately, the Trust Fund has, in its legal filings, interpreted the requirement that it notifies the Court before starting assistance projects as meaning that it should avoid undertaking any activity that addresses the needs of victims affected by ongoing Court proceedings, out of concern about potential prejudice to the presumption of innocence.[403]

Such an interpretation would lead in practice to a senseless discrimination between victims of the most serious crimes (those falling within the scope of a case, which was selected by the Prosecutor because of its gravity, and other victims), and defeats one of the key purposes of the Trust Fund's assistance mandate: to provide urgent support to victims while the Court works its way through years of procedures.

Some argue that Chambers should order 'reparations' at the very early stages of a case as a form of urgent relief, on the basis of a determination of the harm suffered by victims (rather than on the basis of the responsibility of any person or a conviction).[404] While this is an interesting argument, it is clear for now that the Appeals Chamber will not follow this interpretation of the legal provisions.[405]

Others argue that the fact it is referred to as 'assistance' rather than 'reparations' puts the Trust Fund in a position to provide the much-needed relief: "*It is not a morally supportable outcome that participating victims die waiting for justice because of concerns that providing urgent medical assistance would violate the presumption of innocence. There is a clear distinction between urgent assistance and court ordered reparations.*"[406]

However, Judge Eboe-Osuji underlines:

> *"As a practical matter, not much will turn on the nomenclature of 'reparation' in contrast to 'assistance'. It is more important that efforts are made to repair the demonstrable harm that victims suffered, notwithstanding the successful apprehension and eventual conviction of the right culprit. Where all value for such repair is placed on a stylised idea of 'reparation', as following conviction, one questions whether many victims will really value such an idea of 'reparation' that follows the conviction of an indigent convict, as opposed to substantive 'assistance' such as the TFV is able to give in the circumstances regardless of the question of conviction."*[407]

In conclusion, there is no reason for the Trust Fund to purposefully and actively avoid undertaking activities that might address the urgent needs of victims potentially eligible to participate in cases before the Court. The requirement of notification to the Pre-Trial Chamber is a sufficient safeguard against potential prejudice to the presumption of innocence, which would be an issue only in very rare circumstances.[408] In addition, iit is highly possible that victims of crimes included in cases before the Court have already benefited from assistance projects financed by the Trust Fund.

On the contrary, the Trust Fund must proactively use its 'assistance' mandate to provide much-needed urgent relief to victims of cases, in order to address their immediate needs, in a way that 'reparations' ordered through ICC judicial procedures will never be able to achieve.[409] Indeed, Pre-Trial Chambers should encourage the Trust Fund to do so from an early stage.

400 See also Dr Sunneva Gilmore (expert on reparations in the Ntaganda case), speaking at the webinar "Victim Participation and Reparation at the ICC, – Assessing the Impact of the IER", November 2020, Redress & Tallawah Justice Talks, available here.

401 AC, "Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 18 August 2020 entitled 'Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute'", The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), 18 December 2020, ICC-02/05-01/20-237, para. 20.

402 C. Ferstman, Human Rights Based Approach, 2020, see supra. This was confirmed by experts consulted for the purpose of this report who participated in the negotiations of the Rome Statute and the Trust Fund regulations. See also REDRESS, No Time to Wait, 2019, supra.

403 C. Ferstman, Human Rights Based Approach, 2020, see supra, referring to TFV, "Additional Programme Information Filing", The Prosecutor v. Thomas Lubanga Dyilo, 7 June 2016, ICC-01/04-01/06-3209, para. 75.

404 This was advanced by some individuals interviewed for this report. See also the arguments of the Defence for Mr Abd-Al-Rahman in AC, "Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 18 August 2020 entitled 'Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute'", The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), 18 December 2020, ICC-02/05-01/20-237.

405 It is however noteworthy that Judge Eboe-Osuji stated: "Another sense in which it is unnecessary to interpret the Lubanga reparation appeal judgment as establishing a principle of conviction as a necessary condition of reparation at the ICC is because there is no general principle of law that requires conviction as a prerequisite to reparation." In "Reasons of judge Eboe-Osuji, 'Decision on Defence Application for Judgments of Acquittal'", The Prosecutor v. Ruto and Arap Sang, ICC-01/09-01/112027-Red-Corr., para. 20.

406 Anushka Sehmi, "Now that we have no voice, what will happen to us?: Experiences of Victim Participation in the Kenyatta Case", (2018) 16 *J Intl Crim J* 571, 586.

407 Separate Opinion of Judge Eboe-Osuji, Lubanga AC Judgment, 2019, see supra, ICC-01/04-01/06-3466-Anxl, para. 15.

408 C. Ferstman, Human Rights Based Approach, 2020, see supra.

409 C. Ferstman, Human Rights Based Approach, 2020, see supra. See also L. Walleyn, Victims in the Process of Collective Reparations, 2020, supra; REDRESS, No Time to Wait, 2019, see supra.

Recommendations

On the issues of reparations, FIDH recommends that ICC Chambers:

1. Adopt institution-wide principles on reparations on the basis of the existing jurisprudence in this area, with a view to ensuring greater consistency, clarity and predictability of the Court's decisions on reparations;

2. Ensure an expeditious reparations process by, inter alia issuing, as early as possible, decisions on the reparations process that outline the steps to be taken in the period leading to the issuance of a reparations order, commissioning experts on reparations at an early stage, and commencing the reparations process prior to the determination of a final appeal on conviction and sentence;

3. Issue comprehensive reparations orders, with sufficient guidance and clarity, that may form the basis of draft implementation plans of the Trust Fund;

4. Facilitate victim's access to reparation by ensuring that the standard application forms for participation also include the option to request reparations, making a presumption that victims who submitted applications for participation are willing to be considered as potential beneficiaries of reparations, and clarifying that the use of an application form for reparations is not mandatory in the process of beneficiary identification;

5. Refrain from ordering an individual assessment of each victim's harm and the extent of the harm, and rely rather on presumptions based on sampling of a group of potential beneficiaries undertaken at an early stage;

6. Do not shy away from ordering individual modalities of reparations, including financial compensation, when this is the primary request of victims;

7. Order the Trust Fund and VPRS to conduct all preparations for reparations jointly, in order to combine their limited resources and their respective expertise and experience—including for processes related to beneficiary identification and development of a Draft Implementation Plan—ensure that their joint work is made public as far as possible, and monitor implementation based on a clear timeline;

8. Ensure victims' inclusion in the different steps of the reparations procedure (mapping of beneficiaries, design, implementation, monitoring and evaluation) through full and meaningful consultation and engagement with victims, and ensure that their needs are properly reflected in the reparations ordered—including by ordering individual modalities of reparations, e.g. financial compensation, when this is the primary request of victims;

9. Lead the development by the Court of a strengthened policy on identification and freezing of assets of accused persons; and

10. Encourage the Trust Fund to use its 'assistance' mandate to provide much-needed urgent relief to victims of cases, in order to address their immediate needs.

CONCLUSION

Rohingya refugees arriving at the border between Myanmar and Bangladesh, October 2017. ©Fred Dufour, AFP

VICTIMS, as right holders, are an essential part of the Rome Statute system and have significant contributions to make at the ICC. Judges play a crucial role in ensuring a meaningful and effective implementation of victims' rights and they must ensure that they are not too narrowly interpreted. It is also paramount that Chambers harmonise their practices to provide legal certainty to victims and practitioners, which is essential to render victims' access to the Court effective, to respect the spirit and the letter of the founding texts, and to ensure that they are in line with victim-centred delivery of justice.

At the heart of victims' access to justice is adequate and effective legal representation. The Court must also ensure that victims' communities are properly informed in order to be in a position to realise their rights. This is true at all stages, including at the preliminary and investigation stages, when judges must guarantee victims can play a meaningful role in shaping future investigations and prosecutions.

In order for victims to have proper access to the Court, Chambers must also make sure that the processes for victims to obtain formal recognition are adequate and efficient. After authorising victim participation, judges must ensure that the practical modalities of their contributions to the proceedings do not overly restrict their role.

Finally, Chambers must ensure that the Court undertakes timely preparation for reparations proceedings, in order to ensure a smooth and prompt implementation phase.

The primary ICC constituents, victims, deserve no less.

BIBLIOGRAPHY

FIDH publications

- FIDH, "New ICC Judges Must Ensure the Meaningful Participation of Victims in Criminal Proceedings", November 2020, available here (cited as "FIDH, Judges Must Ensure Meaningful Participation, 2020")
- FIDH/KHRC, "The victims' mandate of the International Criminal Court: disappointments, concerns and options for the way forward, Observations and recommendations for the IER", June 2020, available here (cited as "FIDH/KHRC, The victims' mandate of the ICC, 2020")
- FIDH, "5 Myths about victim participation in ICC proceedings", 2014, available here (cited as "FIDH, 5 Myths, 2014")
- FIDH, "Enhancing Victims' Rights Before the ICC - A View from Situation Countries on Victims' Rights at the International Criminal Court", 2013, available here (cited as "FIDH, Enhancing Victims' Rights, 2013")
- FIDH, "Cutting the Weakest Link: Budget Discussions and their Impact on Victims' Rights to Participate in the Proceedings", 2012, available here (cited as "FIDH, Cutting the Weakest Link, 2012")
- FIDH, "Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs", 2007, available here

Other publications

- "Independent Expert Review of the International Criminal Court and the Rome Statute System", Final Report, 30 September 2020, available here (cited as "Independent Expert Report, 2020")
- "Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice" (texts by practitioners), edited by R. Jasini and G. Townsend, November 2020, available here, in particular:
  - Carla Ferstman, "Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness" (cited as "C. Ferstman, Human Rights Based Approach, 2020")
  - Megan Hirst and Sandra Sahyouni, "Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions" (cited as "M. Hirst and S. Sahyouni, Effective Legal Representation, 2020")
  - Paolina Massidda, "The Participation of Victims Before the ICC: A Revolution Not Without Challenges" (cited as "P. Massidda, The Participation of Victims, 2020").
  - Nicole Samson, "Dual Status Victim-Witnesses at the ICC: Procedures and Challenges" (cited as "N. Samson, Dual Status Victim-Witnesses, 2020")
  - Luc Walleyn, "The Participation of Victims in the Process of Collective Reparations at the ICC" (cited as L. Walleyn, Victims in the Process of Collective Reparations, 2020)
- REDRESS, "No Time to Wait: Realising Reparations for Victims before the International Criminal Court", January 2019, available here (cited as "REDRESS, No Time to Wait, 2019")
- "Victims at the center of justice, From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC", (texts by practitioners), edited by FIDH, 2018, available here, in particular:
  - Gilbert Bitti, "A Court for Victims?" (cited as "G. Bitti, A Court for Victims, 2018")
  - Megan Hirst, "Valuing victim participation: why we need better systems to evaluate victims' participation at the ICC" (cited as "M. Hirst, Valuing Victim Participation, 2018")
  - Nada Kiswanson, "Beyond Victim Participation during Proceedings: Outreach and Information Activities during Preliminary Examination in Palestine" (cited as "N. Kiswanson, Outreach in Palestine, 2020")
  - Fergal Gaynor and Anushka Sehmi, "The Perfect Storm: Obstruction, Intimidation and Inaction in the Kenya Situation" (cited as "F. Gaynor and A. Sehmi, The Perfect Storm, 2018")
  - Nino Tsagareishvili, "The ICC Investigation into the Situation of Georgia: lack of victims' involvement and related challenges" (cited as "N. Tsagareishvili, The ICC Investigation into the Situation of Georgia, 2018")
  - Wayne Jordash QC and Uzay Yasar Aysev, "Victim participation in the pre-situation phase: insights from the Pre-Trial Chamber's Rohingya decision" (cited as "W. Jordash QC and U. Y. Aysev, Victim Participation in the Rohingya situation, 2018")
  - Kyra Wigard, Guissou Jahangiri and Zia Moballegh, "Victims' Representations in Afghanistan: Unprecedented Challenges and Lessons Learned" (cited as "K. Wigard, G. Jahangiri and Z. Moballegh, Victims' Representations in Afghanistan, 2018")
  - Lambert Nigarura, "Victims of political violence in Burundi: What participation before the ICC?" (cited as L. Nigarura, Victims of Political Violence in Burundi, 2018")
  - Joseph A. Manoba and Francisco Cox, "Victims' Participation in the Ongwen Case: Strengths, Weaknesses and Lessons Learned"
- REDRESS, "Victim participation after 20 years of the Rome Statute: A few reflections", December 2018, available here (cited as "REDRESS, Victim Participation After 20 years, 2018")
- Human Rights Watch, "Who Will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond", August 2017, available here (cited as "HRW, Who Will Stand For Us, 2017")

Keep your eyes open

Establishing the facts - Investigative and trial observation missions

Supporting civil society - Training and exchange

Mobilizing the international community - Advocacy before intergovernmental bodies

Informing and reporting - Mobilizing public opinion

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.

Its primary beneficiaries are national human rights organisations who are members of the Movement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change. Keep your eyes open

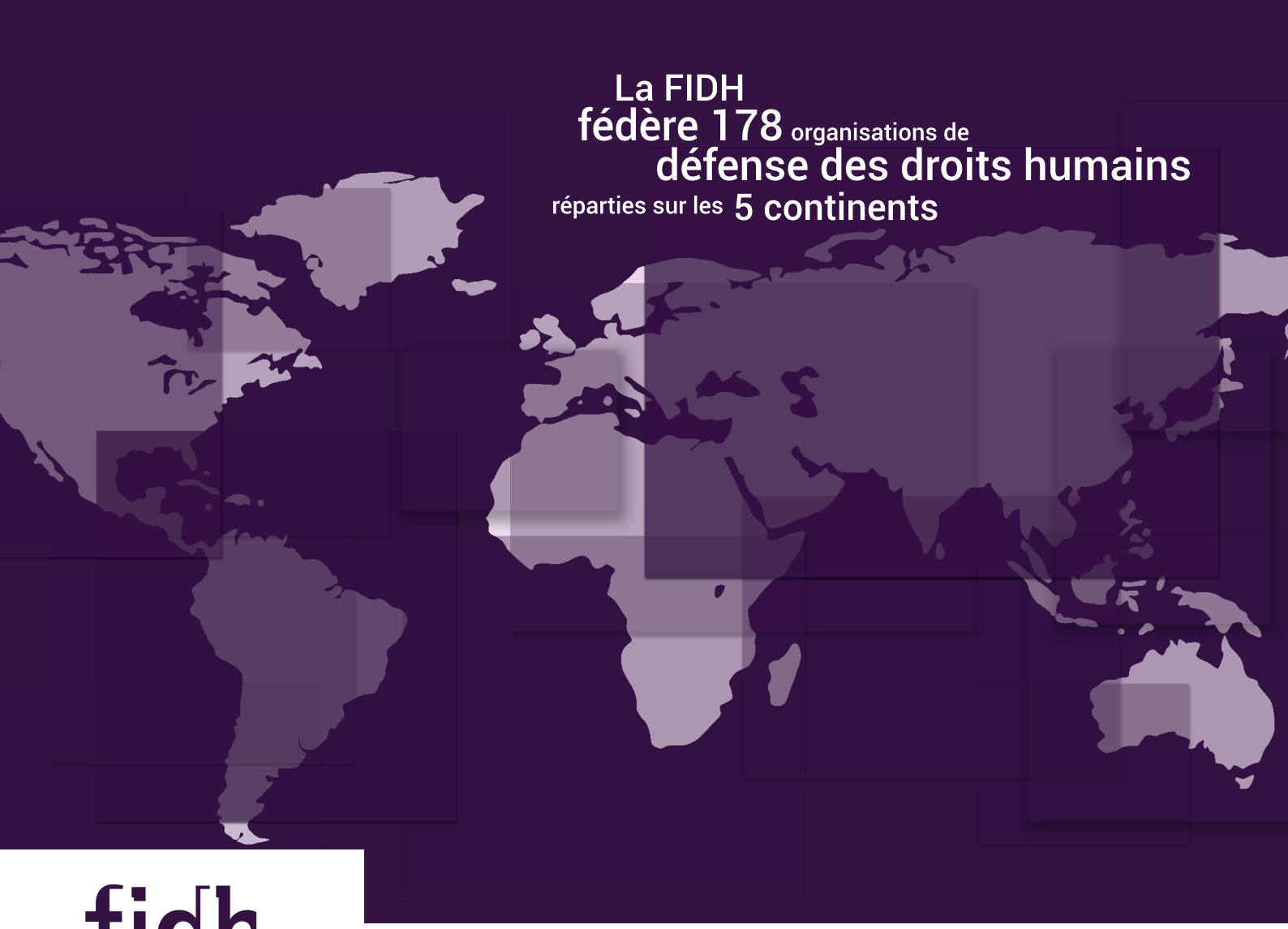
Director of publication:
Alice Mogwe
Editor in chief:
Cyril Blin
Author of the report:
Laetitia Bonnet
Coordinator:
Delphine Carlens
Design:
Alex Storer

fidh

CONTACT

FIDH
Fédération Internationale
des Ligues des droits de l'Homme
17, passage de la Main d'Or
75011 Paris
CCP Paris: 76 76 Z
Tel: (33-1) 78 56 90 54
Fax: (33-1) 45 67 32 12
www.fidh.org

Dépôt légal juin 2021- FIDH (Éd. anglaise) ISSN 2225-1804 - Fichier informatique conforme à la loi du 6 janvier 1978 (Déclaration N°330 675)



fidh

ABOUT FIDH

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

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 192 member organizations in 117 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

An independent organisation

Like its member organizations, FIDH is not linked to any party or religion and is inde-pendent of all governments.