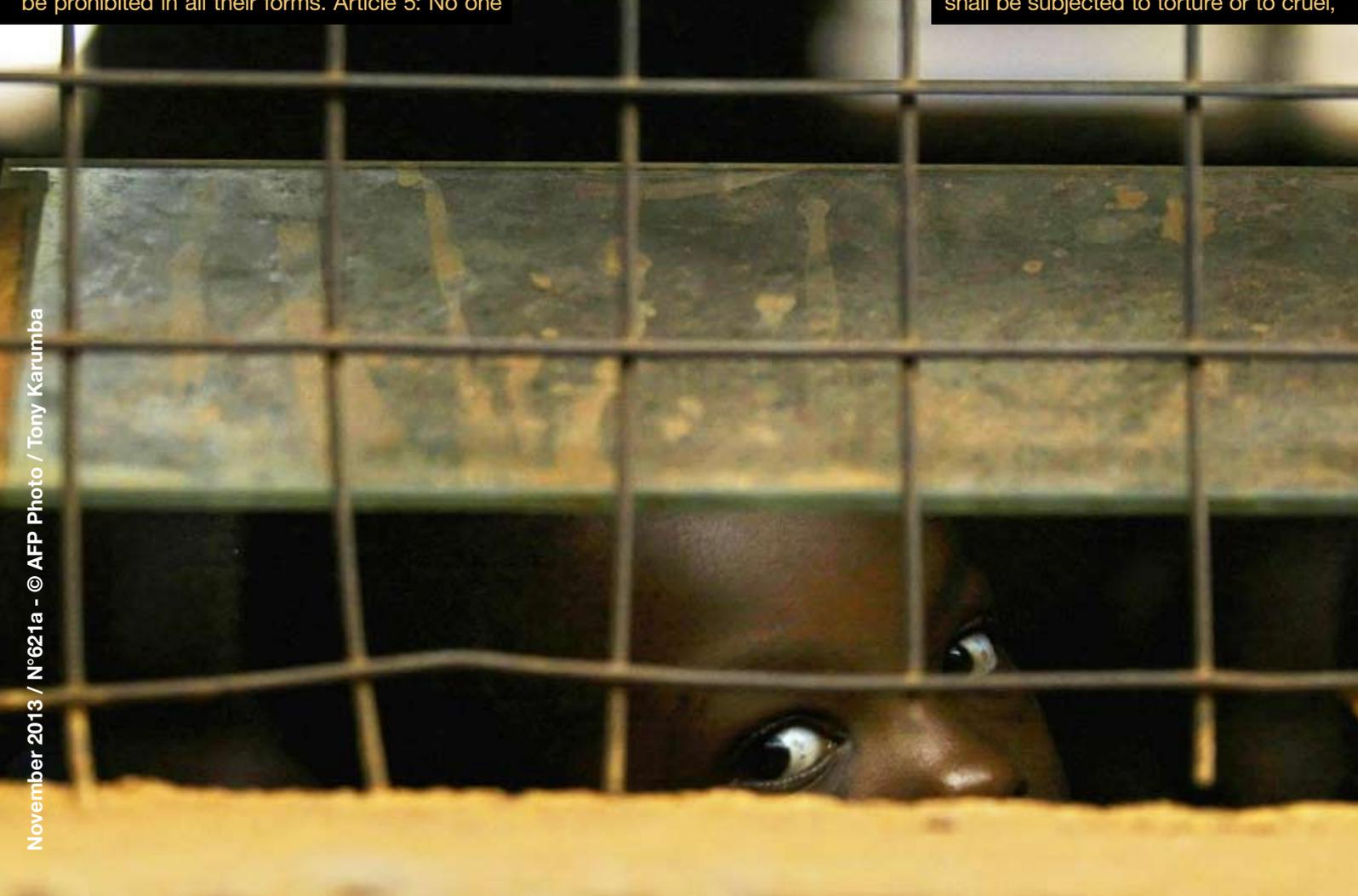


# ENHANCING VICTIMS' RIGHTS BEFORE THE ICC

## A View from Situation Countries on Victims' Rights at the International Criminal Court

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,





## List of abbreviations

|      |   |
|------|---|
| FIDH | International Federation for Human Rights     |
| ASP  | Assembly of States Parties                    |
| CAR  | Central African Republic                      |
| CLRV | Common Legal Representative for Victims       |
| DRC  | Democratic Republic of Congo                  |
| ICC  | International Criminal Court                  |
| ICJ  | International Court of Justice                |
| MLC  | Movement for the Liberation of Congo          |
| OPCV | Office of Public Counsel for Victims          |
| OTP  | Office of the Prosecutor                      |
| PIDS | Public Information and Documentation Section  |
| RPE  | Rules of Procedure and Evidence               |
| TFV  | Trust Fund for Victims                        |
| VPRS | Victims Participation and Reparations Section |

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## INTRODUCTION

The Rome Statute (The Statute) establishing the International Criminal Court (ICC, the Court), affirmatively and explicitly recognised the rights of victims to participate in proceedings at the ICC to present their “views and concerns”. It also provided for their right to seek reparation and established the Trust Fund for Victims (TFV, Trust Fund) for that purpose. The inclusion of such rights was a major development for an international criminal tribunal. This innovation reflected on international law developments, in particular human rights laws, jurisprudence and standards on access to justice and the right to reparation for victims of international crimes. It also drew upon the experience of the ad-hoc tribunals, where the absence of a particular status for victims made their work more distant and negatively impacted their legitimacy. This development was supported not only by civil society but also by many delegations during the Rome Conference of Plenipotentiaries that adopted the Statute in 1998, and confirmed by 122 States Party with their ratification. As the Draft resolution on victims and affected communities presented to the 12th Session of the Assembly of State Parties (ASP) clearly recognises, victims' rights constitute a cornerstone of the Rome Statute system.

The rights of victims are central to the concept of criminal justice the Rome Statute was based on: it is not meant to be only retributive but seeks to have a restorative aspect too, bridging what had falsely been viewed as a divide between the two. Indeed, retributive and restorative have never been mutually exclusive approaches.

Victims bring to the Court their own narrative about the crimes they suffered, provide judges with contextual information, ensure a connection with the field and a degree of local ownership of ICC proceedings thereby advancing the legitimacy of the ICC mandate.

Benefits from victims' participation and reparation are not obtained automatically. They are dependent on the guarantees, and the respect and fulfilment of the rights embodied in the Statute, as reflected in the jurisprudence and the institutional policies.

Since the establishment of the ICC there has been endless discussion on the scope of victims' rights and the institutional policies on their implementation. Discussions and debates have taken place in the courtroom, The Hague Working Group, during each session of the ASP, during the Kampala Review Conference of the Rome Statute in 2010, and in relation to the adoption of internal policies of the various organs of the Court. Academics and experts have also written extensively about victims' rights.

FIDH and its member organisations, together with other civil society groups, in particular those gathered in the Victims' Rights Working Group, have insisted on the need to consult victims, victims' representatives and local actors about the convenience and impact of the adoption of different approaches and policies related to their rights to participate and seek reparations. Unfortunately, there seems to be a tendency to forget the voices from the field, leaving victims and affected communities silenced about decisions that are taken on matters that affect their lives and rights.

One of the greatest concerns of FIDH is the tendency to address victims' rights from a purely financial point of view. Discussions at the Court and within different bodies of the ASP have a propensity to address victims' challenges solely as a matter of budgetary concerns, portraying victims' participation as a "cost driver"<sup>1</sup> or an administrative burden.<sup>2</sup> In fact no evidence has been presented that confirm that victims are a major financial cost to the Court. To the contrary, a macro-analysis shows that the cost of support to victims and witnesses together would represent less than 10% of the Court's 2014 budget.<sup>3</sup>

While in fact, dealing with applications of victims of international crimes may present some challenges, the problem is not the fact that victims may want to participate in the proceedings but that the Court has an increased number of situations and cases to deal with, without a corresponding increase in resources.

Some states have called for collective approaches to applications, participation and reparation, without explaining what they mean by "collective", but more importantly, without considering how these approaches may impact the rights of victims to meaningful participation and redress. Whilst FIDH is not, in principle, opposed to a collective approach, it takes the position that the legal texts recognise an individual right. Therefore, any "collective" approach would certainly require consultation with victims to allow them to express their views as to whether they want to exercise their rights collectively or individually.

During 2013 States considered key issues for victims' rights during The Hague Working Groups of the Bureau of the Assembly of State Parties. Unfortunately, most of the discussion remains driven by financial considerations.

The silence imposed on victims during these discussions and the financial approach to those issues suggests that victims are perceived as passive beneficiaries. A change in perspective is thus necessary to ensure that victims are given their place as active right holders. This change should start by listening to their views.

### **Bringing the Views of Victims from the Field to The Hague**

FIDH wanted to create a space where the views from situation countries could be heard. FIDH chose a group of 11 men and women, experts and representatives from local civil society from situation countries that have worked with victims of Rome Statute crimes in the field and/or have interacted with the ICC staff or have good knowledge of the Court. They came from Democratic Republic Congo (DRC), Kenya, Mali, Côte d'Ivoire, Sudan and Central African Republic.

Between 30 September and 4 October 2013, the participants, joined FIDH representatives led by its President, Karim Lahidji, in The Hague to discuss issues pertaining to victims' and affected

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<sup>1</sup> ICC-ASP/11/5, Report of the Committee of Budget and Finance on the work of its 18th session, 9 August 2012, para. 36.

<sup>2</sup> See for instance: C. Van den Wyngaert, Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge 44 CASE W. RES. J. INT. L. (2012) 475-496, p. 495. *in*: The Participation of Victims in International Criminal Court Proceedings A Review of the Practice and Consideration of Options for the Future, REDRESS, October 2012

[http://www.redress.org/downloads/publications/121030participation\\_report.pdf](http://www.redress.org/downloads/publications/121030participation_report.pdf)

<sup>3</sup> ICC- ASP/12/10, Proposed Programme Budget for 2014 of the International Criminal Court, para 27 and Chart No. 1.

communities' views on investigations, victims' participation, representation and reparations. Their opinions and perspectives are the basis of these pages.

The participants shared their views with ICC officials. They met with the Prosecutor, Fatou Bensouda and members of her Office; Paolina Massida, Head of the Office Public Counsel for Victims; Pieter de Baan, Executive Director of the TFV; legal advisers from Chambers as well as representatives from the Victims Participation and Reparations Section (VPRS) and the Public Information and Documentation Section (PIDS) of the Registry.

They also met with representatives of State Parties, in particular, with the Ambassadors who facilitate relevant discussions on victims at The Hague Working Group Level: Eduardo Pizarro Leongómez from Colombia and Karim Ben Becher from Tunisia, both co-facilitators of Victims, Affected Communities and Reparations; as well as with Ambassador Gyula Sümeghy of Hungary, facilitator of Legal Aid.

Civil society organisations also met the group, in particular REDRESS, the Coalition for the International Criminal Court and Amnesty International.

This report follows the contents of the discussions, in which the participants first highlighted the importance and relevance of victims' rights and the interaction with local NGOs in fulfilling the object and purpose of the Rome Statute. It is followed by a general overview of the main concerns expressed by persons representing voices from the field. The second part summarizes the discussions on investigations, participation, representation and reparation.

The discussions with ICC staff and members of the diplomatic community in The Hague helped the participants to better understand the nature of the debates in The Hague, and prepare recommendations that are contained at the end of this document. They filled the absence of the voice from the field in the current debate, explaining an unknown perspective, as recognised by officials.

The main message of the discussions is that victims should be brought back to have a more central role in the operations of the ICC to ensure its legitimacy and its capacity to have a deterrent effect in the communities, or as a participant stated, for the Court "*to recover its humanity*".

## PART I. VICTIMS' RIGHTS ARE ESSENTIAL TO THE COURT'S MANDATE

The Rome Statute of the ICC seeks to contribute to peace and prevent the commission of atrocities through the fight against impunity by means of international criminal proceedings. According to its Preamble, States Parties to the Statute agreed to create the ICC because they were:

“Determined to put an end to impunity for the perpetrators of these [most serious] crimes and thus to contribute to the prevention of such crimes”

(...)

“Resolved to guarantee lasting respect for and the enforcement of international justice”.<sup>4</sup>

The Rome Statute relies on the idea that criminal proceedings would help bringing justice for victims and affected communities and sending a strong message of condemnation of such crimes, and by that, assuring lasting peace. Indeed, if mass crimes are not addressed, the wounds of the past are likely to reopen.<sup>5</sup> It may also be argued that, without investigations, prosecutions and punishment against those responsible, there would not be a sign of social rejection for committing those atrocities. This could foster recidivism and leave victims and communities defenceless, or spark more crimes carried out as a form of retribution.<sup>6</sup> The Statute, thus, supposes that proceedings in The Hague shall have an impact on different societies so as to reject the use of violence amounting to international crimes.<sup>7</sup>

The main challenge remaining is how to bring international law “home”<sup>8</sup>, to local communities. In other words, how the preliminary examinations, investigations, proceedings and judicial decisions conducted in The Hague can contribute to the internalisation of the values embodied in the Rome Statute in countries and communities so as to prevent the commission of future atrocities.<sup>9</sup>

The only way to achieve the desired deterrent effect is to ensure a variety of interactions, not only at the international level, but also with and within “situation countries”. In this sense, FIDH believes

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<sup>4</sup> Rome Statute, Preamble.

<sup>5</sup> Lee, Roy S., (ed). *The International Criminal Court. The Making of the Rome Statute*. Kluwer Law International, Geneva, 1999, page 1.

<sup>6</sup> See for instance, Inter-American Court of Human Rights, *Paniagua Morales v. Guatemala*, Decision of 8 March 1998, Series C. No. 37, para 173. The Court defined impunity as the “total lack of investigation, prosecution, capture, trial, and conviction”.

<sup>7</sup> The main purpose of any norm is the internalization of some values that inform how a society of subjects must behave. International law is not an exception, in particular when dealing with international criminal law. International criminal law seeks the rejection of the use of violence that leads to the commission of international crimes by local communities. According to the Rome Statute, the defiance of such limit deserves its enforcement through a judicial mechanism. See Koh, Harold Hongju, *The 1998 Frankel Lecture: Bringing International Human Rights Home*, 35 *Hous. L. Rev.* 623, 642 (1998), page 628.

<sup>8</sup> *Id.*

<sup>9</sup> This idea is consistent with legal theory, including international legal theory. In this sense, Lauterpacht saw the function of international law as the regulation of “the conduct of men by reference to rules whose [formal validity] lies, in the last resort, in a precept imposed from outside” Cited in: Vos, Jan Anne, *The Function of Public International Law*, TMC Asser Press, The Netherlands, 2013.

that interactions with victims and affected communities and local NGOs in the countries where the ICC carries investigations or that are subject to its prosecutions, are essential to meet this goal. Outreach programs and mechanisms to ensure local ownership of ICC proceedings - such as victims' participation and reparations - are central to fulfilling the objectives of the Rome Statute. Without them, ICC proceedings will be nothing more than an expensive foreign judicial exercise, with little impact in the field, and thus with a limited contribution to changing the conduct of individuals in situation countries and thus to preventing future crimes.

Victims' participation in the proceedings should not be considered as merely symbolic since, if appropriately implemented, it provides an essential link between the trials in The Hague and the national level. It is a first step in the reparation process since it addresses real damage caused by real atrocities.

## 1. The Central Role of Victims and Affected Communities

If international justice seeks to prevent the commission of future crimes, it must strengthen its relationship with local communities in general, and victims in particular. Putting victims and affected communities at the centre of ICC discourse and mainstreaming their interests in all ICC policies is a major challenge.

### *a) Victims as Rights Holders*

There is an abundance of articles insisting on victims' participation as one of the novel features of the Rome Statute. Indeed, the ICC introduced a number of provisions on victims' participation and reparation that were innovative for international criminal tribunals. By doing so, international criminal law started to catch up with substantial developments in international law especially, international human rights law of the 20th century.<sup>10</sup>

As explained by Judge Antonio A. Cançado Trindade of the International Court of Justice (ICJ), the recognition of victims' rights in the Rome Statute shows a complementarity between international criminal law and international human rights law.<sup>11</sup> The inclusion of victims' participation in international criminal proceedings should not be treated as the export of an element of civil law traditions to international criminal proceedings. The answer to many of the debates over the foundation and extent of the rights recognised to victims in the Rome Statute may be better addressed from that complementarity of international human rights law, and the growing

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<sup>10</sup> 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, ECOSOC Resolution 2005/30, 25 July 2005. (<http://www.un.org/en/ecosoc/docs/2005/resolution%202005-30.pdf>), Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005 ([http://ap.ohchr.org/documents/dpage\\_e.aspx?m=138](http://ap.ohchr.org/documents/dpage_e.aspx?m=138)), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985 (<http://www.un.org/en/ecosoc/docs/2005/resolution%202005-30.pdf>), EU Directive establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Directive 2012/29/EU, Of the European Parliament and of the Council of 25 October 2012 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>).

<sup>11</sup> Cançado Trindade, Antônio Augusto, *The Access of Individuals to International Justice*, Oxford University Press, 2011, pages 201-204.

recognition of the individual “as *titulaire* of rights and bearer of duties, which emanate directly from international law”.<sup>12</sup>

Under the Rome Statute, victims are not passive beneficiaries but must be recognised as active individuals and right holders. As expressed by ICC Judge, René Blattman the rights recognised to victims under the Rome Statute are not concessions.<sup>13</sup> As rights, they must be respected, protected and fulfilled. The rights of victims to participate in ICC proceedings should be interpreted through the lens of international provisions and decisions on the right to truth and justice. Reparations must also be consistent with international standards and jurisprudential developments.

The importance of reaching out to victims cannot be overstated, as they are an essential element of the Court's legitimacy. Victims' views, expressed in the courtroom provide a necessary link between affected communities and the Court; they provide the judges with key information about the local context and the damages caused of such crimes within the communities affected. As a participant stated “they provide a voice and a face to the realities of the commission of a crime”. Those views and their stories may be central to bringing about social rejection of the violence at issue in a particular case.

#### *b) Reaching Out to Affected Communities*

The benefits of victims' rights in ICC proceedings can reflect positively on their communities. Education of victims and their communities about their rights and how to exercise such rights can contribute to increasing awareness of the victims' place as rights holders not only in relation to the ICC but vis-à-vis their national institutions,<sup>14</sup> and thus contribute to a more active citizenship.

The exercise and awareness of victims' rights can actually further the denunciation of other crimes at the national level, and as such, increase the demands for the fight against impunity in local courts.

Outreach, as a two-way dialogue with affected communities, is essential to managing expectations and ensuring that these communities can experience justice from ICC proceedings despite geographical and cultural distance. Without outreach, there would be little deterrent effect from the activities of the Court.

#### *c) The Importance of Local NGOs and Intermediaries*

Local civil society has an important role to play in the process of victims' participation. It documents crimes, is in direct contact with victims, helps them to fill in the application forms for participation and reparation, provides training for local lawyers, helps to the understanding of the scope of the rights before the ICC and ensures a flow of information towards affected communities. This work is essential for the internalisation of the norms and values of the Rome Statute and as a result, in helping the Court to develop more of a deterrent effect.

Different organs of the Court have worked through intermediaries because of the physical and cultural distance between the ICC and affected communities. In some situation countries, grassroots

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<sup>12</sup> Id. page 203.

<sup>13</sup> ICC 01/0401/06, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation of 18 January 2007. Para 13 page 59.

<sup>14</sup> FIDH, *ICC Review Conference: Renewing Commitment to Accountability*, 2010, page 9.

NGOs and local community leaders have worked as intermediaries for different organs of the Court, helping victims to apply to participate in the proceedings. Ensuring good communication with and support to these intermediaries is essential to ensuring good communication with affected communities, the provision of information and a sense of uptake of ICC activities.

For many years, the ICC has carried out consultations with civil society to work on the *Draft Guidelines governing the Relations between the Court and Intermediaries*. Finally, in 2013, the Court presented these guidelines, which for many organs and sections merely embodies common practice. The guidelines were shared with States for implementation and the provision of the corresponding funds. It is expected that the Guidelines will be adopted at the next ASP in November 2013.

## 2. Delivering On the Promises and Facing Disappointments

Victims and local communities are not indifferent to the Court's mandate and outcomes. To the contrary, they place their hopes in the activities of the Court. They want justice, to tell their stories and, eventually, to obtain reparation. But for many of them their main objective is achieve justice. As a former legal representative said during the meeting: "I never met a victim who only wanted reparation".

Victims, according to local voices, see justice as a means to ensure recognition of the gravity of their suffering as a crime. The Court proceedings are capable of sending a powerful message for victims. As one participant stated, for victims it is important to see the perpetrator "becoming small" in front of the judges.

They want justice that is independent and impartial, justice that they were not able find in their own countries.

However, there are serious concerns among local NGOs about the disappointment of victims and affected communities in relation to ICC activities. The reasons are many: high expectations, the length of the proceedings, a lack of understanding on the criteria used in the selection of cases and charges, lack of information and a perception that victims' views are not taken into account during investigations and proceedings.

There is a sense of despair in many affected communities of situation countries. In Kenya, the political climate has led to enormous frustrations since victims' voices are not heard. In the DRC, there were high expectations at the opening of ICC activities that contrast with today's reported negative opinion about the Court's activities due to very targeted prosecutions and narrow charges that leave out many of the victims. In CAR, the length of the proceedings has allowed doubts to grow among victims and affected communities.

More worrying is that the deterrent nature of the Court's mandate starts to be called into question. In some areas of Eastern DRC, civilians have lost hope in finding justice and in the rule of law. As a result, without any trust in institutional mechanisms, they are reportedly arming themselves. One of the most problematic situations for the credibility of the Court in the fulfilment of the Rome Statute is CAR. Since the *coup* in March 2013,<sup>15</sup> many crimes that may fall under the ICC jurisdiction have

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<sup>15</sup> See: FIDH, *République Centrafricaine: Un pays aux mains des criminels de guerre de Seléka*, 20 September 2013.

been committed. "The same perpetrators, the same crimes and sometimes the same victims" as in 2003 have reappeared, said an expert from the country. In this particular situation, the Prosecutor issued a statement on 7 August 2013 calling those allegedly responsible to desist to commit crimes under the ICC jurisdiction.<sup>16</sup> The participants recognised the importance of this statement but it cannot replace the investigative and prosecutorial activities of the Prosecutor's Office, and the need for actual investigations to take place in relation to these more recent crimes.

#### *a) Sources of Disappointment*

One of the major problems is the misinformation generated at the beginning of the Court's activities in a situation country. To avoid this scenario, FIDH has constantly stated that early outreach by the ICC is essential to match expectations with the realities of the mandate of the Rome Statute.

However, local critics of the Court are sometimes louder than those supporting ICC activities and victims' calls for justice. As one participant said, "victims have no space to express themselves; the perpetrators are the ones being heard". Indeed, beyond the courtroom, the discussions that reach the general public seem to be too highly focused on the perpetrators and the politics behind some of the high-level defendants. The interests of victims seem to be relegated to a second place. In one participant's view, "the Court spends a lot of time talking about the suspects and very little time on victims." One key example is Kenya, where the discussion centred on the political implications of the prosecution of the sitting President and Vice President and less on the victims' rights to justice and the importance of the fight against impunity for the atrocities committed during the post-election violence of 2007-2008 that amount to international crimes.

Interactions with some ICC officials may also be a source of disappointment. Local voices express concerns about the lack of awareness of local traditions and culture. Bureaucracy appears to override the interests and the wellbeing of victims and affected communities.

Another major challenge is the length of time of ICC proceedings. The victims' patience is exhausted after reaching no justice at the national level. They want justice, and soon. It is difficult for them to understand why ICC proceedings have so many stages and take so long. As years pass by, victims' trust in the Court decreases and they lose faith in the proceedings. It is essential that the Court intensifies its outreach activities in those communities, especially at times where there is no courtroom activities.

Another challenge is the lack of arrests. When alleged offenders are not arrested, victims face enormous risks if they want to contribute to justice. Their wait for a possible arrest becomes exhausting and sometimes the perpetrators continue to be their neighbours or even their rulers. Any interaction with the Court would put them in significant danger.

What is even more disappointing for victims, however, is when they do not feel represented in the charges laid by the Prosecutor, by their legal representatives or in the Court's decisions. That lack of connection widens the distance between the victims and The Hague, which can lead to disengagement. This is a real problem that impacts the legitimacy of the Court among affected communities.

FIDH has clearly indicated in the past, that victims have not always been satisfied with the Prosecutor's decisions, and resent the lack of consistency and clarity in the choices taken by the

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<sup>16</sup> OTP, Prosecutor's Statement in Relation to Central African Republic, 7 August 2013.

OTP (Office of the Prosecutor). The selection of cases and charges are perceived as too narrow and not always reflective of the range of criminality in a situation. Local voices complain about the prosecutorial decisions that target only one party to the conflict, which taints the image of independence of the OTP.<sup>17</sup> These problems are still current. As a participant said, “victims do not understand that victims of similar crimes will not all become part of proceedings because of the specific places or dates that were chosen. That has a very important psychological effect”.

The tone of the budgetary discussions and the money-saving policies, as well as calls for more “collective approaches” to victims’ participation, were met with disappointment by the participants who urged the ICC and State Parties to make sure that financial difficulties do not override the principles of the Statute.

Intermediaries are the people who provide information about the Court and help victims fill in applications. They are also the ones who face all the disappointment and have to confront the rejection expressed by the local communities. In situation countries, the intermediaries, although not on the ICC staff, are seen as the face of the Court in the field. They are essential to maintaining trust in the Court.

It is critical for the Court and State Parties to address these disappointments by providing adequate capacity and necessary resources to prevent disengagement by victims. Victims’ perceptions about the Court are essential to its credibility. Unfortunately, in the present highly volatile African political environment, detractors of the ICC and the Rome Statute may use this disappointment to their advantage.

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<sup>17</sup> FIDH, *ICC Review Conference: Renewing Commitment to Accountability*, 2010, page 11.

## PART II. VIEWS FROM THE FIELD

### 1. Participation

In the context of the economic and financial crisis affecting globally and in particular to several of the main ICC State Parties contributors, victims' participation in ICC proceedings has been increasingly presented as a time-consuming and costly burden that is generating delays in judicial proceedings. In front of the increasing criticism of victims' participation, based on numerous misconceptions, and the volatile jurisprudence, it seemed necessary to go back to the basics of victims' right to participate and its scope and modalities, as well as to the meaning of such participation for victims and its important added value for the Court, in the framework of the Rome Statute system.

The Rome Statute and the Rules of Procedure and Evidence (RPE) of the ICC grant victims an independent role in the proceedings. Victims are not only seen as potential witnesses of the Prosecution – as was the case at the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda for example – but are now given the possibility to present their views and concerns to the judges. This is usually done through their legal representatives, under certain conditions determined by the Court.<sup>18</sup> With the creation of the ICC the idea that international justice is not only aimed at providing retributive justice, through the punishment of the guilty, but also restorative justice, has been reinforced.<sup>19</sup> According to the Rome Statute,<sup>20</sup> the right of victims to participate in proceedings is granted where their personal interests are affected; and, if the Court considers it to be appropriate, in a manner, which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The provisions of the Statute concerning victims' participation are quite innovative for an international criminal court but, as they are concise, also leave a lot of room to the judges for interpretation. As a right, the Judges should always determine the extent and modalities of victims' participation. This is a limit that needs to be constantly reiterated, so resolutions and discussions of the ASP do not infringe in the judicial sphere.<sup>21</sup>

However, the jurisprudence of the ICC relating to the scope and modalities of victims' participation has not been consistent and has led to situations where, for example, victims had very different application processes and conditions of participation depending on the Chamber before which they were to appear.

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<sup>18</sup> See section 2 below : *This is my lawyer: the importance of counsel*.

<sup>19</sup> For an overview of the evolution of victims' access to justice, see in particular Chapter I of the FIDH Guide for Victims, their Legal Representatives and NGOs on Victims' Rights before the ICC, April 2007, available in English, French and Spanish: <http://www.fidh.org/en/international-justice/international-criminal-court-icc/Victims-Rights-Before-the>.

<sup>20</sup> Article 68(3), Rome Statute.

<sup>21</sup> See FIDH contribution at the experts meeting on victims' participation, The Hague, 22-26 April 2013.

### a) Application to Participate in the Proceedings

Victims who wish to participate in proceedings have to send a written request to the Registrar of the ICC.<sup>22</sup> To facilitate the process, the Registry conducts outreach activities and provides standard forms.<sup>23</sup> However, the application forms vary depending on the Chamber and/or the case, which means that outreach activities have been more or less successful, depending on the situation and/or the case.

After lengthy consultation with organisations working with victims and careful consideration of lessons learned from the first cases,<sup>24</sup> the Court decided in 2010 to simplify and shorten victims' application forms, moving from a 17-page to a still complex 7-page standard application form for both participation and reparation.

The increase in the number of cases that the ICC must deal with has naturally led to an increase in the number of victims' applications to process of course. But the Court has not allocated a concomitant increase in the human and financial resources. In light of the difficulties faced by the Registry and the Chambers to effectively process all the applications in a timely and efficient manner, the Court reviewed the system of victims' applications, submitted reports to the ASP and presented various ways to overcome the backlog and ensure a sustainable, efficient and effective system.<sup>25</sup>

At the same time, judges have been moving forward, without necessarily taking into account the ongoing evaluation and analysis, and in more recent cases, different types of application processes and forms have been established. In the Kenyan cases for example, Trial Chamber V decided early in October 2012 to establish a new and differentiated scheme for the participation of victims. In both Kenyan cases, in order to respond to a backlog in the processing by the VPRS and the common legal representatives of the more than 4000 victims' applications, the judges created three "categories" of victims: victims who can participate individually and ask to appear before the Court, victims who can shortly register without passing through the whole application process, and victims who for some reasons - including for security reasons - cannot apply nor register but whose interests the common legal representatives shall take into account.<sup>26</sup>

In the case against Bosco Ntaganda (DRC), the Pre-trial Chamber decided in May 2013 to let victims apply through a 1-page individual application form,<sup>27</sup> to which they could, if needed, add

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<sup>22</sup>Rule 89(1), Rules of Procedure and Evidence.

<sup>23</sup>[http://www.icc-cpi.int/EN\\_Menus/icc/structure%20of%20the%20court/victims/pages/forms.aspx](http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/victims/pages/forms.aspx). See the application form for individuals : <http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0026ADD32553D/0/SAFIndividualEng.pdf>. See the application form for organisations in: <http://www.icc-cpi.int/NR/rdonlyres/D670BB98-0F00-4E01-BA390BECC411B83F/0/SAFOrganisationEng.pdf>

<sup>24</sup>FIDH paper: "ICC Review Conference: Renewing Commitment to Accountability", May 2010. <http://www.fidh.org/IMG/pdf/KampalaCPI543a-2.pdf>

<sup>25</sup> See in particular the Court's first report on the review of the system for victims to apply to participate in proceedings, 5 November 2012: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-22-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-22-ENG.pdf)

<sup>26</sup>See ICC Trial Chamber V decision in *The Prosecutor v. Ruto and Sang* case, 3 October 2012: <http://www.icc-cpi.int/iccdocs/doc/doc1479374.pdf> ; as well as the FIDH-KHRC press statement issued in reaction of this decision: "FIDH and KHRC call upon the ICC to ensure a meaningful participation and legal representation for Kenyan victims", 9 October 2012: <http://fidh.org/en/africa/Kenya,260/Kenya-ICC/FIDH-and-KHRC-call-the-ICC-to-12266>

<sup>27</sup> See the application form in *The Prosecutor v. Bosco Ntaganda*, 25 May 2013: <http://www.icc->

additional pages to complete their testimony. In the case against Laurent Gbagbo (Côte d'Ivoire), in February 2012, victims were granted the right to participate individually, although they were to apply as a group. Each applicant had to submit an individual declaration requesting to participate and detailing the harm they suffered, "but information relating to the crime/incident and other elements common to the group was recorded in a collective form".<sup>28</sup> Only the VPRS was allowed to facilitate the process, thus excluding the intermediaries. The Pre-trial Chamber hereby adopted a semi-collective approach to victims' participation.<sup>29</sup>

Even if judges' discretion and adaptability to each particular situation are important to judicial decisions, there has to be a certain consistency in ICC jurisprudence on the victims' participation application processes, taking the results of a thorough evaluation of existing and possible application systems into account. Creating various modalities to apply and also to participate, with different rights attached to each could add to the complexity and length of the application process, and also move away from or even fail to comply with the letter and the spirit of the Rome Statute.

As the participants to the October 2013 FIDH meeting recalled, it is indeed of extreme importance that in the changes made to the victims' application process, the victims' narrative is not lost. The voices of victims have to be protected and not impaired by an exercise of pick-and-choose or excessive summarizing.

#### *b) Outreach and Assistance to Victims*

It is of utmost importance for the application process to be understood and effectively used, and for the Court to undertake genuine outreach activities, especially in the countries where investigations have been opened. VPRS, with PIDS undertook numerous outreach activities, especially in the first years of the Court, to explain the objectives, application process and modalities of victims' participation in ICC proceedings, and to support victims in the process of applying.

However, in the last few years, outreach has been particularly restrained by policies of zero nominal growth, while the need for information among victims is growing with each new investigation or case. This has contributed to some confusion in certain situations as to the purpose of victims' participation and to some abuse of the victims' situation.

A participant in the FIDH October 2013 exchange session explained, for example, that at the early stage of the Kenyan cases, victims were told that the main purpose of their participation was to receive compensation, so the more than 4000 application forms that were submitted were rarely complete, as often only the second part on reparation was filled in. Some lawyers also saw the opportunity of victims application to be appointed counsel for victims, and would thus fill in a lot of forms in a small period of time, with few details on the actual interests of victims and the harm they had suffered.

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[cpi.int/iccdocs/doc/doc1597385.pdf](http://www.cpi.int/iccdocs/doc/doc1597385.pdf)

<sup>28</sup> See the Court's report on the review of the system for victims to apply to participate in proceedings, 5 November 2012, §32: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-22-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-22-ENG.pdf)

<sup>29</sup> See the application form in *The Prosecutor v. Laurent Gbagbo*, 29 February 2012: <http://www.icc-cpi.int/iccdocs/doc/doc1344297.pdf>

### c) Modalities of Participation

Victims have been granted the right to participate in ICC proceedings as 'participants'. As such, they have a more limited role in the courtroom than the Prosecution or the Defence, who have wider rights in terms of presenting evidence and appeals and accessing records. The modalities of victims' participation vary depending on the stage of proceedings and whether participation is collective or not, a scenario increasingly mentioned in current debates.

Under the Rome Statute and the RPE,<sup>30</sup> victims can participate in all the phases of proceedings, including the 'situation phase', when an investigation has been opened. However, as ICC jurisprudence is developing, victims' can only enjoy their full procedural rights after an arrest warrant has been issued.

During the investigation, the jurisprudence has determined that victims do not have a general right to participate, but are entitled to participate in judicial proceedings conducted at this stage of the proceedings. Judicial proceedings in this phase include for example the review by the Pre-Trial Chamber of a decision by the Prosecutor not to investigate or prosecute, the preservation of evidence or the protection of victims and witnesses.<sup>31</sup> Victims can participate in these proceedings after having demonstrated that their interests are affected. Victims may also be invited by the Chamber to express their views, "provided that the Chamber considers it appropriate".<sup>32</sup>

The victims can exercise their rights at this stage of the proceedings but it is difficult to assess the effects except to say that they are quite limited. Victims have for example tried to challenge decisions by the Prosecutor not to investigate certain crimes or prosecute an accused for other charges concerning another situation, without success. For example, Congolese victims of crimes committed by troops of Jean-Pierre Bemba's Movement for the Liberation of Congo (MLC), who were represented by lawyers from the FIDH Litigation Action Group and participated in proceedings on the situation in the DRC, asked the Prosecutor in June 2010 to explain his decision not to prosecute Jean-Pierre Bemba, facing charges in the situation in (CAR, for crimes committed on Congolese territory. The Pre-Trial Chamber I decided in October 2010 to dismiss the victims' request on the ground that, in the absence of an explicit decision not to prosecute Bemba for crimes committed in Ituri, it could be considered that the Prosecutor's investigation was still open.<sup>33</sup>

During the stage of a case, following an arrest warrant or a summons to appear, victims may participate according to different modalities in the pre-trial, trial and appeals phases. Nevertheless, Chambers can limit the participation of victims or their legal representatives-to the involvement of legal representatives in 'written observations or submissions'.<sup>34</sup>

Through their legal representatives, victims can, at the pre-trial stage, request to question witnesses, and make opening and closing statements and other oral but also written submissions during the

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<sup>30</sup> In particular Article 68(3) of the Rome Statute, and Rule 93 of the Rules of Procedure and Evidence.

<sup>31</sup> See in particular Pre-Trial Chamber II *décision* of 3 November 2010 relating to the situation in Kenya (No. ICC-01/09-24) and of 11 November 2010 relating to the situation in the Central African Republic (No. ICC-01/05-31).

<sup>32</sup> The Office of Public Counsel for Victims (OPCV), *Representing Victims before the International Criminal Court, A Manual for Legal Representatives*, December 2012, p.85.

<sup>33</sup> See FIDH-ADADHO-LE-GL press statement: "Victims question the ICC about lack of proceedings against Jean-Pierre Bemba for crimes committed in the DRC: judges dismiss the request considering that the Prosecutor's investigation is still open", 3 November 2010: <http://www.fidh.org/en/africa/Democratic-Republic-of-Congo,637/DRC-ICC/Victims-question-the-ICC-about>

<sup>34</sup> Rule 91(2) of the Rules of Procedure and Evidence.

confirmation of charges hearing. However, victims have not been allowed to present their own evidence at this hearing.<sup>35</sup>

During the trial phase, victims have broad rights, exercised through their counsel under certain conditions, which is generally to ask for the Chamber's permission, and sometimes sending questions in advance. They can for example participate in judicial proceedings concerning the extension of charges, requalification requests, release of the accused. They can file written submissions and question witnesses, experts and the accused. It is also possible for victims to appear before the court during trials to testify, provide evidence or share their views and concerns.

Victims have also to apply each time they want to participate in interlocutory appeals, contrary to the OTP and the Defence. The Appeals Chamber determines whether the issues on appeal affect the victims' personal interests and whether their participation is appropriate and not prejudicial to the rights of the accused. This procedure is time-consuming. It also has to be noted that victims cannot appeal a decision by the judges to dismiss their application for participation and to refuse to grant them a victims status, even though there is no decision that affects their personal interests more than this one. Moreover, victims can only appeal judges' decisions on awarding reparation after a conviction at trial.

Concerning sentencing, victims are allowed to submit written observations about the sentence and make oral submission at the sentencing.

#### *d) Individual versus Collective Participation*

Victims can participate individually; a common legal representative and/or a lawyer from the Office of Public Counsel for Victims (OPCV) represent(s) their personal interests, views and concerns. With the financial constraints of States Parties and the Court's backlog in the processing of victims applications to participate, the collective participation option is being seriously considered. However, there is still some question about the meaning of a collective approach to participation, and whether it would really be more cost effective.

Although FIDH is not opposed, in principle, to a collective approach, changes to the participation scheme should not be driven solely, by budgetary constraints.<sup>36</sup> FIDH has stressed that the Rome Statute recognises an individual right. Victims' participation is also a first form of reparation for very real individual suffering and damage. As a result, a collective approach requires an informed decision by the right holder – the victim - to allow the exercise of his/her rights in a collective manner.

A semi-collective approach to the victims' application process and to the victims' participation in proceedings has been implemented in one case (Bosco Ntaganda). A fully collective participation of victims, through a group of applicants, would have several implications, as the Court described in its report of November 2012 on the review of the system for victims to apply to participate in

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<sup>35</sup> See in particular AMICC and Columbia University Institute for the Study of Human Rights, *Victim's participation at the ICC: purpose, early developments and lessons*, March 2013: [http://www.amicc.org/docs/Victims\\_Participation.pdf](http://www.amicc.org/docs/Victims_Participation.pdf)

<sup>36</sup> FIDH position paper for the 11th session of the Assembly of States Parties to the ICC Statute, *Cutting the Weakest Link, Budget Discussions and their Impact on Victims Rights to Participate in the Proceedings*, November 2012: <http://www.fidh.org/IMG/pdf/cpiasp598ang2012.pdf>

proceedings,<sup>37</sup> e.g. the need for victims to form associations for joint representation, and the identification of a representative acting on behalf of an affected community, who would relay its collective views and concerns.

Participants in the training and exchange session strongly opposed collective participation, arguing that in particular sexual crime victims could not be part of a collective action, due to the stigmatisation they often suffer – or would be suffering if this would be known – within their community and even close family. Victims have suffered individual harm and have individual views and concerns; it would certainly not be appropriate to have a victim of looting be represented within a same group and by the same person as a victim of rape. Furthermore, as one participant mentioned: **“victims all suffer, but this does not mean that they are united”**. It would indeed be quite difficult for certain victims to lay their trust in someone they do not necessarily know and who would be appointed to ‘represent the community’. Creating victims organisations for the sole purpose of participation in ICC proceedings could increase risks of opportunism and manipulation.

Moreover, in their attempt to limit the victims' role in ICC proceedings, some judges adopt procedures, established in jurisprudence, that are very time consuming. Judges may ask victims to submit a request for the right to participate in interlocutory appeals each and every time; in this process both the OTP and Defence have to submit observations on the interest of having the victims participate in this particular procedure. Instead of this time-consuming procedure, judges could decide to automatically allow victims to participate in these proceedings, as is the case for the Prosecution and the Defence.

| <b>Number of Victims Participating in ICC Proceedings per Case</b><br><i>(by September 2013)</i>                 |  |
|--|--|
| <b>Case</b>  | <b>Number of Victims Participating</b> |
| <u>The Prosecutor v. Thomas Lubanga Dyilo</u>  | 144                                    |
| <u>The Prosecutor v. Germain Katanga</u>   | 366                                    |
| <u>The Prosecutor v. Bosco Ntaganda</u>  | N/A                                    |
| <u>The Prosecutor v. Callixte Mbarushimana</u>   | 132                                    |
| <u>The Prosecutor v. Sylvestre Mudacumura</u>  | N/A                                    |
| <u>The Prosecutor v. Mathieu Ngudjolo Chui</u>   | 366                                    |
| <u>The Prosecutor v. Jean-Pierre Bemba Gombo</u>   | 5547                                   |
| <u>The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen</u>                             | 41                                     |
| <u>The Prosecutor v. Ahmad Muhammad Harun (‘Ahmad Harun’) and Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)</u> | 6                                      |

<sup>37</sup> See the Court's report on the review of the system for victims to apply to participate in proceedings, 5 November 2012, §§39-49: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-22-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-22-ENG.pdf)

|  |     |
|--|-----|
| <u>The Prosecutor v. Omar Hassan Ahmad Al Bashir</u>                   | 12  |
| <u>The Prosecutor v. Bahar Idriss Abu Garda</u>                        | 87  |
| <u>The Prosecutor v. Abdallah Banda Abakaer Nourain</u>                | 89  |
| <u>The Prosecutor v. Abdel Raheem Muhammad Hussein</u>                 | N/A |
| <u>The Prosecutor v. William Samoei Ruto et Joshua Arap Sang</u>       | 327 |
| <u>The Prosecutor v. Uhuru Muigai Kenyatta</u>                         | 233 |
| <u>The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi</u> | N/A |
| <u>The Prosecutor v. Laurent Gbagbo</u>                                | 139 |
| <u>The Prosecutor v. Simone Gbagbo</u>                                 | N/A |

e) *Meaning of Victims' Participation: Why do Victims Participate?*

***“How is it possible that you have to convince the judges and states about the importance of victims' participation? Who is ‘humanity’ in ‘crimes against humanity’ other than the victims? And what is the essence of the ICC if there is no humanity?”***

*Participant to the FIDH meeting, October 2013*

As the persons who have been directly working with victims explain, victims' participation represents recognition of what victims experienced and suffered. It contributes to personal validation and brings back some of the lost confidence. Giving an active and independent role to victims in proceedings allows them to face the perpetrators of the crimes they suffered, even if they do not all appear in court, establishing full equality and thereby contributing to moral satisfaction. Enabling victims, who are turning to the ICC to escape from national inability or lack of willingness to investigate and prosecute perpetrators of international crimes, to experience genuine justice, that alone can lay the foundation for reconciliation and the prevention of potential future crimes.<sup>38</sup> Participating in proceedings that establish truth and accountability represents sometimes more for victims than actual reparation in the sense of compensation. A woman who lost everything and whom one of the lawyers was legally representing at the ICC asked him while discussing the importance of victims' participation: ***“what reparation will give me back my husband? What reparation will make my dead children return?”***

<sup>38</sup>□ See in particular the article by Mariana Pena, “Victim Participation in the International Criminal Court: Achievements Made and Challenges Lying Ahead”, in ILSA Journal of International & Comparative Law, Winter 2010.

*f) Importance of Victims' Role in Proceedings*

***“Victims give a face and a voice to the indictment and to the reality of the crime.”***

*Participant to the FIDH meeting October 2013*

Victims' participation can help the ICC establish the truth, facts and responsibilities and bring **concrete reality** to the courtroom. In the *Lubanga* case (DRC), victims have made significant contributions to clarifying contextual elements, as well as to bringing witnesses to testify in Court. Victims shed light on the issue of identity and the use of names DRC. To respond to the Defense's position that discredited victims on the basis of inconsistencies in their names and to overcome the Prosecution's difficulties in this matter, the victims' legal representatives suggested hearing an expert of the reality of civil status in DRC. The Chamber heard the expert and consequently avoided, undue rejection of victims' applications. Legal representatives from the field rendered the testimony of a victim of crimes of sexual violence possible during the trial, by referring to traditions and customs that were little known by the Prosecution or the OPCV.

At various stages of the *Bemba* case (CAR), victims' legal representatives from the field clarified the relevance of the different languages spoken by the different actors in CAR during the commission of the crimes.

“In both cases, the information they provided assisted the judges in interpreting the evidence and arguments put forward by the parties”<sup>39</sup>.

The interests of victims do not always coincide with the interests of the Prosecution, refuting the common misconception that the OTP already represents the victims' interests. The victims have a point of view and perspective that does not always correspond to that of the Prosecutor, who for example is anxious to obtain the full cooperation of various actors or rapid convictions. That is why it is so important for victims to participate actively in the proceedings.

Active participation enables victims and, hence the affected communities, to assimilate the proceedings thereby maximising their impact in the field. Recognition of the role of victims in proceedings contributes to the prevention of future crimes and the temptation of personal vengeance.

## **2. The Importance of the Victims' Legal Representative**

At the ICC, victims have a right to be assisted by a legal representative, funded by the Court if they are indigents.<sup>40</sup> Proper and quality legal representation ensures meaningful participation. The right to legal advice, at no cost when the person cannot provide for his or her own lawyer,<sup>41</sup> is recognised

<sup>39</sup> Mariana Pena, Gaëlle Carayon, "Is the ICC making the most of victim participation ? », in *The International Journal of Transitional Justice*, Vol. 7, September 2013 : <http://ijtj.oxfordjournals.org/content/7/3/518.full.pdf+html>

<sup>40</sup> Rules of Procedure and Evidence, Rule 90.

<sup>41</sup> The right to legal aid is a right recognised under international law. The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice System adopted a broad definition of legal aid: the term “legal aid” includes “legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at

as a right in itself under international law, a necessary precondition for the exercise of other rights and an important safeguard to ensure fairness in judicial proceedings and trust in the administration of justice.<sup>42</sup>

One of the problems of the ICC legal aid system for victims is that it copied what was envisaged for the defence, without taking into account the particularities of representing victims of international crimes. The work of the counsel for victims requires constant communication with and in the field, the understanding of local realities and the building of a particular relationship of empathy with the clients' views and concerns.

Unfortunately, there have been significant costs to legal aid funding provided to victims under strong pressure from State Parties to find savings. In fact, in previous years, both the ASP (including the Committee on Budget and Finance) and the Court have labelled victims' right to representation as a 'cost-driver'.<sup>43</sup>

During 2012, the Court implemented a much criticised reform in remuneration and expenses for external counsels. FIDH, and many other civil society organisations have called the Court to refrain to implement these changes, without a prior comprehensive review of the legal aid system.<sup>44</sup> However, since 2012 the changes were adopted, and so far there is no information to the extent to which the financial cuts have affected the capacity of legal representatives to consult with victims.

Concern and disappointment was expressed among participants about the tendency to label victims' participation and representation as 'expensive'. Participants familiar with the issue of victims' representation said that decisions on resources have had an enormous impact on the implementation of victims' representation. There was a common rejection to the idea of allowing "accounting" considerations to outweigh respect for victims' rights under the Rome Statute.

#### *a) Selection of a Legal Representative*

The ICC legal texts and case law have based some principles and rules for victims' legal representation on interpretations and practices from other jurisdictions and institutions. One of the key elements of legal representation is the freedom to choose a counsel.<sup>45</sup> At the ICC however, if a large number of victims apply to participate in a case, they may be requested to choose a common

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no cost for those without sufficient means or when the interests of justice so require. Furthermore, "legal aid" is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes". See: ECOSOC, Commission on Crime Prevention and Criminal Justice, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

<sup>42</sup> United Nations, Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/23/43*, 15 March 2013, para 20 onwards.

<sup>43</sup> ASP, Report of the Bureau on legal aid for victims' legal representation, 28 October 2008, para 3; Report of the Committee on Budget and Finance on the work of its eighteenth session, 9 August 2012, ICC-ASP/11/5 para 36, First report of the Bureau on Legal Aid (ICC-ASP/11/2/Add.1), para. 8

<sup>44</sup> See: FIDH Comments on the Proposed Changes to Legal Aid at the ICC, 20 September 2012, and FIDH, Comments and Recommendations on the Discussion Paper on the Review of the ICC Legal Aid System, 3 February 2012. See also Civil Society Quotes and Statements on Legal Representation in: [www.iccnw.org/?mod=legalrep](http://www.iccnw.org/?mod=legalrep)

<sup>45</sup> Rules of Procedure and Evidence, Rule 90 and FIDH, Victims' Rights Before the International Criminal Court. A guide for Victims, their Legal Representatives and NGO's. Chapter 5, page, 5.

legal representative for victims (CLRV).<sup>46</sup> If victims are unable to choose a common legal representative, the judges may request the Registrar to appoint one, taking into consideration the victims' views.<sup>47</sup>

The freedom to choose a counsel is a necessary pre-condition for credibility and confidence in the client-lawyer relationship. This is stressed as a key element for victims. Without a lawyer that is trusted and perceived as their real representative, victims would develop little sense of 'ownership' of ICC proceedings.

For victims, as stated during the discussions, being recognised as "having a lawyer" and being able to say "this is my lawyer" is an essential part to developing 'ownership' in relation to ICC proceedings.

In the selection of the common legal representative, the judges and the Registry should ensure that the distinct interests of victims are properly represented, and that conflicts of interest are avoided.<sup>48</sup> The designation of a common legal representative should also take into consideration local traditions.<sup>49</sup> The Registrar has proposed some general criteria that common legal representatives should meet<sup>50</sup> and that have been supported by the jurisprudence of the Court. These criteria may be adapted specific situations and cases but overall include trust with victims, commitment to victims, familiarity with the situation, relevant experience, availability to maintain communication with victims and information technology skills.

During the meeting, a good victims' lawyer was defined as a counsel that, by representing victims, is the spokesperson of their reasoning and their lives. ***"[As a victim's representative] you should feel their passion, pain and anger. If you are representing them and they are not happy with the proceedings and with the questions asked, you should say so"***.

Participants in the meeting have stressed the importance of selecting a counsel from situation countries who may be able to understand the local context, traditions and expectations of victims. In this sense, there is a general concern about the appropriateness for the OPCV to directly represent victims. The main concern in this regard is the possibility of conflicts of interest among groups of victims. This does not mean that they oppose the existence of the Office. To the contrary, its work in providing assistance to the external counsel was considered important. However, the participants considered that it should not take the leading role in representing victims.

More importantly, it is necessary to consult victims about the criteria for their own lawyer in a particular situation. For instance, in Kenya some victims would have preferred the appointment of a foreign lawyer, and some felt that the work of a legal representative in the field could pose security risks. Unfortunately, the judges did not listen to these concerns.

#### *b) The Importance of Consultation with Victims*

To build trust and generate the victims must assimilate the proceedings and partake in consultations. This may be the main difference between the work of their counsels and that of other counsels in

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<sup>46</sup> Rules of Procedure and Evidence, Rule 90.2

<sup>47</sup> Regulations of the Court, Regulation 79.2.

<sup>48</sup> Rules of Procedure and Evidence, Rule 90. See also, ICC-01/04-374, par. 40.

<sup>49</sup> Regulations of the Court, Regulation 79.2

<sup>50</sup> ICC-01/09-02/11-214- Anx3, 5 August 2011.

the courtroom. This is particularly important with regard to reforms and policies on financial aid for victims.

Local NGOs shared their concerns on the budgetary constraints that prevent legal representation teams from proper consultations with victims. "If it is not possible to consult, there is no meaning for victims". In the Kenya cases, the legal representatives are based in the country, but this does not overcome the limitations imposed by financial constraints. One participant regretted that one of the legal representatives in Kenya had not gotten paid for three months ***"If they don't get paid, how are they supposed to do their job?"***

Despite the recognised importance of consultation, a former legal representative said that it is sometimes difficult to convince the Registrar about the need to conduct some missions to deal with unforeseen developments in the proceedings. A participant complained that the Court required justifications for missions that demonstrate a lack of knowledge about the realities of the field. ***"The current structure has taken away the humanity of the Court [...] They are not dealing with people, but with faceless numbers"***. Another stated: ***"there is a de-naturalization of the mission of the ICC: Victims have become a number in a form. Victims, as a global entity, are described with anaesthetic terms"***.

The main idea of consultation with victims is to equip them to present their views and concerns in the courtroom. However, the judges themselves do not consult with victims on essential issues pertaining to the exercise of their own rights in the courtroom. The most relevant and recent example of this was the decision on the proposed mode of representation of victims in Kenya,<sup>51</sup> with a legal representative on the ground, with a shared role of OPCV. taking instructions from the victims' lawyer and conveying their views in the courtroom. This regime was qualified by participants as 'chaotic'. One of the main problems is that some victims consider that the narrative retained in the courtroom does not necessarily reflect their story, and that their interaction and dialogue with their lawyer was lost in the way the message was conveyed.

There are situations, it was alleged, where victims feel abandoned because they never see their lawyers. At the very least, victims should be consulted about the appointment of the counsel, before any substantial filing and when key decisions are taken so that they can understand the consequences of the decisions for their interests. But most importantly, victims should be able to reach their lawyers at any time. To do all this, field assistants are essential.

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<sup>51</sup> See: FIDH and KHRC call upon the ICC to ensure a meaningful participation and legal representation for Kenyan victims, 9 October 2012, in: <http://www.fidh.org/en/africa/Kenya,260/Kenya-ICC/FIDH-and-KHRC-call-the-ICC-to-12266>

### UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

On 25 April 2012, the Commission on Crime Prevention and Criminal Justice presented the UN Economic and Social Council its principles and guidelines on legal aid. These may be helpful in addressing some of the challenges on legal aid for victims at the ICC. The following is a summary of those that may be relevant for the ICC system of victim's representation.

**Principle 1.** Recognition of legal aid as a right that should be guaranteed in the legal texts.

**Principle 2.** Legal aid should be accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources, without intervening with the counsel's independence. Knowledge of the people about their rights and obligations, about their justice system and conducts criminalized, must be enhanced.

**Principle 4.** States should provide legal aid to victims of crime without prejudice to or inconsistency with the rights of the accused.

**Principle 5.** States should also provide legal aid to witnesses of crime, without prejudice or inconsistency with the rights of the accused.

**Principle 6.** Non-discrimination: "States should ensure the provision of legal aid to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status."

**Principle 7.** The provision of legal aid should be prompt at all stages of the criminal justice process.

**Principle 8.** Right to be informed: information on rights during the criminal justice process and on legal aid service should be made freely available and is accessible to the public.

**Principle 9.** Remedies and safeguards should be established if access to legal aid is undermined, delayed or denied, or if persons have not been adequately informed of their right to legal aid.

**Principle 10.** "Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs". This includes persons living with mental illness, those living with HIV, indigenous and aboriginal people, asylum-seeker, foreign citizens migrants, refugees and internally displaced persons. Such measures should include gender-sensitive and age-appropriate measures.

**Principle 11.** In decisions on legal aid affecting children, the best interests of the child should be the primary consideration.

**Principle 12.** Legal aid providers -counselors and their teams- must be able to carry out their work effectively, freely and independently, without intimidation, hindrance, harassment or improper interference, and be able to travel to consult and meet with their clients freely and in full confidentiality, and to freely access prosecution and other relevant files; and to freely access prosecution and other relevant files, without suffering or be threatened with administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.

**Principle 13.** There should be mechanisms in place to ensure that legal aid providers possess education, training skills and experience commensurate with the nature of their work, the gravity of the offences they deal with, and the needs of women, children and groups with special needs. There should be an efficient mechanism to address disciplinary complaints.

**Principle 14.** The contribution of lawyers' associations, universities, civil society and other groups and institutions in providing legal aid should be recognised and encouraged. Partnerships should be established to extend the reach of legal aid.

*Source: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 25 April 2012, E/CN.15/2012/L.14/Rev.1*

### 3. Reparations

At the ICC, victims have the right to claim reparation for the harm suffered, contrary to previous international criminal tribunals. Incorporating important developments in international law, the ICC established a reparation regime that is not connected to the victims' participation in proceedings, victims not being obliged to participate in preliminary or trial phases in order to be eligible for reparation awards. This regime is set out in Article 75 of the Rome Statute and in Rules 94 to 98 of the RPE. It also created a TFV that is meant to implement projects of assistance to victims (its assistance mandate), as well as reparation orders for the benefits of victims of crimes under the ICC jurisdiction and their families (its reparations mandate).

#### *a) Modalities of Reparation*

The ICC follows the general principle of international law according to which "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".<sup>52</sup> However, under the Rome Statute the individual found guilty of international crimes is the one to provide for reparations. If he is indigent, the Chamber may order the TFV of the ICC to provide said reparations.

The various forms of reparation defined under international law include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>53</sup> Reparation thus goes far beyond financial compensation, which forms only one possible reparation measure. Under the Rome Statute, restitution, compensation and rehabilitation are specifically expressed as other forms of reparation. Nevertheless, the ICC with its limited jurisprudence in the field of Reparations<sup>54</sup> has considered, not only the Rome Statute, but also universal and regional human rights treaties and other international instruments and standards on reparations. By doing so, it established that the mention of specific modalities of reparations in the Statute was not exclusive and thus did not prevent the Court from granting other forms of reparation.

#### *b) Decision on Reparations and Next Steps*

On 7 August 2012, Pre-Trial Chamber I, in the case against Thomas Lubanga Dyilo (DRC) issued a first decision on reparations, which established the basic principles to be followed in awarding reparations. The decision was ground breaking, as it was the very first decision on reparations in an international criminal tribunal. In their decision, the Judges stated that reparations, at the International Criminal Court, served a twofold purpose: "they oblige those responsible for serious crimes to repair the harm they caused to the victims, and they enable the Chamber to ensure that offenders account for their crimes".<sup>55</sup>

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<sup>52</sup> See Permanent Court of International Justice, *Chorzow Factory*. Case Merits 1928, P.C.I.J., Sr A, N°17 (September 13) at 47 or available at:

[http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie\\_A/A\\_17/54\\_Usine\\_de\\_Chorzow\\_Fond\\_Arret.pdf](http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf).

<sup>53</sup> See in particular the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian law (Van Boven / Bassiouni Principles).

<sup>54</sup> ICC-01/04-01/06-2904, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision Establishing the Principles and Procedure to be applied in Reparations" 7 August 2012, para. 222,

<sup>55</sup> ICC-01/04-01/06-2904, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision Establishing the

### Principles on Reparations

On 7 August 2012, the Trial Chamber I issued the “Decision establishing the principles and procedures to be applied to reparations” in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. This is a summary of those principles:

- Victims are to be treated fairly and equally, irrespective of whether they participated in trial proceedings. While the needs of all the victims need to be taken into account, priority may be given to victims in a ‘vulnerable situation’. Victims shall be treated with humanity and with respect to their dignity and human rights. Reparations shall be granted without discrimination and should avoid further stigmatisation of victims.
- Reparations may be granted to direct and indirect victims, including family members of direct victims; anyone who attempted to prevent the commission of the crimes under consideration; and those who suffered personal harm as a result of offences.
- Reparations should have a gender-inclusive approach; victims, families and communities should be able to participate throughout the reparations process with adequate support; recipients of reparations shall provide informed consent prior to their participation in reparations proceedings; outreach activities are an essential feature to render reparations significant. Victims should be consulted on reparations issues.
- Appropriate awards should be provided to victims of sexual and gender-based violence; measures shall be implemented to ensure that women and girls are enabled to participate in a significant and equal way in the design and implementation of reparations orders.
- The age-related harm of victims as well as any differential impact of crimes on boys and girls shall be taken into account; all reparations decisions concerning children should be guided by the Convention on the Rights of the Child and should reflect a gender-inclusive perspective; special measures should be taken for the development, rehabilitation and reintegration of child soldiers; comprehensible information about reparations proceedings shall be provided to child victims and those acting on their behalf; and child victims shall be consulted.
- Reparation may be awarded to individuals or groups; a collective approach should be utilized to ensure that reparations reach unidentified victims; individual and collective reparations may be awarded concurrently; individual reparations should avoid creating tensions within communities; collective reparations should address harm suffered by victims on an individual and collective basis.
- Restitution, compensation, and rehabilitation are not an exclusive list. Other types of reparations may be appropriate, including those with symbolic, preventive or transformative value.
- Victims should receive adequate, appropriate and prompt reparations; reparations should be proportionate to the harm, injury, loss and damage they suffered. Reparations should aim at reconciling victims with their families and communities, reflect local cultural and customary practices without being discriminatory or unequal; and should support self-sustaining programmes.
- The causal link between the crime and the relevant harm shall not be limited to ‘direct’ harm. The crime must be the ‘proximate cause’ of the harm for which reparations are sought.
- A standard of proof of ‘a balance of probabilities’ is sufficient and proportionate to establish the facts relevant for a reparations order.
- Nothing in the above-listed principles will prejudice or be inconsistent with the rights of a convicted person to a fair and impartial trial.
- States Parties are obliged to cooperate fully and not prevent the enforcement or implementation of reparations orders and awards.
- All necessary measures should be taken to publicize reparations principles and proceedings; reparations proceedings shall be transparent; and measures should be adopted to ensure that all victims have detailed and timely notice of reparations proceedings and access to any awards.

Source: ASP, *Report of the Court on Principles Relating to Victims' Reparations*, 8 October 2013, ICC-ASP/12/39, para 12 and ICC-01/04-01/06-2904, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision Establishing the Principles and Procedure to be applied in Reparations” 7 August 2012

As Thomas Lubanga Dyilo was declared indigent, the Chamber decided that he was only able to contribute to non-monetary reparations, and such participation, in case of 'symbolic' reparations such as a public apology, could only be voluntary.<sup>56</sup> The decision established that the TFV "shall complement the funding of a reparations award, albeit within the limitations of its available resources and without prejudice to its assistance mandate".<sup>57</sup> As the Trust Fund has limited resources for reparations, it argued that the reparations it would be able to provide for were going to be of a 'collective' nature. This was accepted by the Chamber.

The Judges established principles (see text), but did not decide on specific reparations awards, or on the specific harm suffered by specific victims. The decision on principles for reparations is, at present, subject to an appeal, by both the convicted person and victims. These appeals are, at the same time, dependent on the decision of another appeal on the conviction of Thomas Lubanga Dyilo.

The grounds of appeal include, *inter alia*, the participation, at the reparations stage, of potential groups of victims, the dismissal of individual applications for reparations, the delegation of powers to the Trust Fund, and the issue of collective reparations. So nothing is set in stone yet.

### *c) Victims' Views and Expectations*

For reparations to be meaningful for victims, consultations must be held with them and their affected communities. This is essential to identifying the most meaningful and useful form of reparation for victims, in particular, as participants in the meeting observed, considering the financial constraints of the TFV.

Participants insisted on the need to consult community leaders and experts on local culture when working out reparation measures, so to avoid an overly western vision of what reparation really means and to take into account local social and cultural specificities (ex: monuments are often not appropriate to meet victims' expectations). ***"What is a fair reparation? Who defines what is fair? The Court? The TFV? The victims?"*** asked the participants.

Since the Trial Chamber issued its decision on principles without deciding on specific victims' harm and awards, the participants said that victims regretted that there were no judicial hearings on reparations during the Lubanga trial, and that they, the victims, sometimes felt that they could not present their views and expectations on reparations measures.

Participants valued a wide vision of reparations that may go beyond the scope of the charges. ***"Victims do not experience suffering that is walled by the terms of an indictment"*** said a participant in the FIDH meetings. In the Lubanga case for example, reparation should not be limited to the issue of child soldiers, which is only the tip of the iceberg, but should reflect the wide range of crimes that represent reality.

The possibility of receiving reparations created great expectations among the victims. However, these expectations will turn into disappointment if the scope of reparations is not properly explained to victims. This is a major challenge, since in many countries collective reparations have never been granted. However, when presenting the victims' rights to reparation, it seems likely that the relevant

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<sup>56</sup> ICC-01/04-01/06-2904, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision Establishing the Principles and Procedure to be applied in Reparations" 7 August 2012, para. 179.

<sup>57</sup> ICC-01/04-01/06-2904, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision Establishing the Principles and Procedure to be applied in Reparations" 7 August 2012, para. 273.

sections of the ICC (VPRS), in certain cases such as CAR, will prioritize collective reparations. As the damage to participating victims is individual, victims do not understand collective reparations and feel that individual reparations would better fulfil their expectations. On 'symbolic reparations', one participant said, "symbolism is an act of acknowledgment, but does not repair harm". Symbolic reparations, as for example the gesture of the USA after the US embassy bombing in Kenya in 1998 to inaugurate a park with the names of the victims, do not always give victims the feeling that they were given any reparation.

Participants acknowledged the financial constraints of the TFV to fund reparations. At the same time they considered the importance of emphasizing that, under international law, the State where the crimes were committed have an obligation to provide reparations for victims of international crimes. Of course, the realities of national institutions impose a limitation that needs further study. National political will is decisive, and some nationally ordered reparation measures are lacking effective implementation because of corruption. A case in Ituri was offered as an example; around 300 houses were to be constructed for the victims, but the houses were never finished.

#### 4. Victims' Relationship with the Office of the Prosecutor

The opening of an ICC investigation is news that arouses high expectations in the victims. Such expectations usually go beyond the mandate of the ICC but have sometimes been reinforced by open promises from the OTP stating that there will be no impunity.<sup>58</sup> While it is important to maintain a good image, lending credibility to future uncertain deliveries may be counterproductive.

Some victims in situation countries have lost their faith in national judicial proceedings, if they ever had any. Even in truth and reconciliation efforts, victims are the ones called up to forego their right to justice in the name of peace. So, the promise for justice, without limits, is likely to resonate on them.

When meeting with victims the OTP must provide information on their rights to participate in proceedings and to have access to reparation.<sup>59</sup> In doing so, careful attention must be paid not to raise victims' expectations. Information must be truthful and complete and must be provided in a manner understandable by the victims. In this vein, it is essential to ensure close cooperation with outreach efforts made by the Registry.<sup>60</sup> The Registry should be permitted to conduct outreach activities as early as the preliminary examination stage.

Many victims decide to engage with the OTP by providing information, accepting to be witnesses and most important, providing the OTP with a certain legitimacy that only they can provide.<sup>61</sup>

Unfortunately, victims and affected communities, through the local NGOs and experts, are

<sup>58</sup> See for instance: ICC-OTP-20090716-PR438, "ICC Prosecutor receives materials on post-election violence in Kenya", press release of 16 July 2009: "There will be no impunity for the crimes that have been committed" [Moreno-Ocampo] said. *Statement of the Prosecutor on the Opening of the investigation into the situation in Libya*, 3 March 2011: "We have a mandate to do justice. We will do it. There will be no impunity in Libya". ICC Prosecutor Statement on the occasion of the 28 September 2013 elections in Guinea, 27 September 2013, "There will be no impunity for international crimes committed in Guinea".

<sup>59</sup> OTP *Regulations of the Office of the Prosecutor*, ICC-BD/05-01-09, 23 April 2009, Regulation 37.

<sup>60</sup> OTP, *Regulations of the Office of the Prosecutor*, ICC-BD/05-01-09, 23 April 2009, Regulation 15.

<sup>61</sup> Cfr. Dixon and Tenove, *International Criminal Justice as a Transnational Field: Rules, Authority and Victims*, *The International Journal of Transitional Justice*, 1 October 2013, in: <http://ijtj.oxfordjournals.org/content/early/2013/10/01/ijtj.ijt015.full?keytype=ref&ijkey=ZtavCqFaSpha7r7>

conveying a sense of disappointment and growing mistrust towards the ICC, and including the OTP. Victims do not make a distinction between organs. But there are some serious criticisms as to how the OTP manages its relationship with victims and affected communities during its investigations.

According to the OTP's *Policy Paper on Victims' Participation*, "As the organ conducting investigations and prosecutions, the Office interacts with victims to address, to the extent possible, the full range of criminality".<sup>62</sup> According to the Regulations of the OTP, it will seek the views of victims to take into account their interests at all stages of its work.<sup>63</sup>

Despite this approach, some victims and affected communities do not feel that the charges brought by the OTP represent the extent of their suffering, and there is little feedback on the results of the investigation that can help explain what happened. Whilst the independence of the Prosecutor and the appropriateness of the investigation and the charges are well acknowledged, the main concern is the lack of information and accountability from the OTP to victims and affected communities, who thus cannot always understand the reasons for the selection of cases, and the charges laid by the Prosecution.

Since the drafting of the Rome Statute there was recognition of an impending impunity gap between what the ICC could do and the number of alleged senior offenders in massive crimes. This gap explains the disparity between the vast suffering of victims and affected communities and the charges laid by the Prosecution. Dealing with the impunity gap is essential and the OTP can play a valuable role in doing so.

#### *a) The Need to Build Genuine Relationships*

Some of the criticisms from victims relate to the lack of communication from and with the OTP after meetings with victims and/or affected communities and lack of information on the meaning, implications and possible results of providing testimony. Some local organisations claim that victims felt used and never knew what was done with the information they provided to investigators.

As most victims of serious crimes, ICC victims will only participate in investigations and proceedings if they have a sense of purpose.<sup>64</sup> They put their pain and suffering in the Prosecutor's hands not willingly and they expect justice in return, as a way to rebuild their dignity. This entails a sort of unwritten and ethical contract between the victim-cum-witness and the Prosecutor. The latter, to the very least, must address such relationship with an honest sense of accountability.

Victims expect an answer, and some feedback of what was done with their stories and their suffering, particularly, when what they have told or suffered is not comprised in the charges laid by the Prosecution. Otherwise, they will probably feel disappointed. As a participant in the meeting said "***when they tell me there is no evidence, ...what more do these women need to tell to convey***

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<sup>62</sup> Office of the Prosecutor, *Policy Paper on Victim's Participation*, April 2010, page 4.

<sup>63</sup> Office of the Prosecutor, *Regulations of the Office of the Prosecutor*, ICC-BD/05-01-09, 23 April 2009, Regulation 16.

<sup>64</sup> In comparative terms, the meeting drew some conclusions that were similar to those of experts and survivors in other areas. For instance see: DPLF, *Después de Procesos de Justicia Transicional ¿Cuál es la situación de las víctimas*, Wahsington D.C., 2008.

*their suffering? what else do they need to have these crimes recognised?"* Up to now, these victims have not received any answers and they feel deceived.

For victims who engage with the OTP, the price is high. They probably put their own security and that of those around them at risk, they may be required to leave their communities or stay at the risk of being stigmatized. Some of them have to skip a day's work and even pay their own expenses to leave their communities and meet with OTP staff in a safer place. If those efforts are not recognised and taken into account, the victims may become disappointed and completely disengage. OTP investigators are essential to the image of the ICC, and their good and respectful relationship with victims and affected communities is essential for the legitimacy of their work and that of the whole Court.

The OTP has adopted some regulations on how to conduct interviews, in particular, seeking to protect the wellbeing of those being questioned, mainly children and victims of gender-based and sexual crimes<sup>65</sup>. Unfortunately, some local organisations witnessed interactions that were perceived as disrespectful according to local customs and the specific situation of victims who were called to meet with investigators. The lack of simple signs of respect and empathy, such as providing a glass of water or an aspirin, were cited as examples of treatment that is perceived as lacking in interest in the wellbeing of victims. Some OTP staff apparently disregarded the victims' more serious security concerns and their risk of being stigmatized. There seemed to be a perception that bureaucratic considerations superseded victims' views, interests and wellbeing.

The OTP has argued that its practices have improved, and the present Prosecutor, Fatou Bensouda, has included the protection of the wellbeing, security, dignity and privacy of victims as part of the Mission statement of the OTP.<sup>66</sup> Respect and consideration for victims is one of the key factors of the new OTP Code of Conduct. These efforts of the OTP are important, but they need to be perceived as a reality in the field. Communication and dialogue with victims, affected communities and grassroots NGOs still need to be improved.

The OTP needs to increase its efforts to make victims feel a sense of ownership of investigations. The OTP may find it useful to consider the experiences of other jurisdictions and investigations that have introduced psychosocial approaches that go beyond the moment of the interview and the gathering of testimony. These approaches seek to provide the investigation with a reparative meaning for victims and affected communities (see text box), which may be essential in the situations handled by the ICC.

#### *b) Complementarity Efforts After the Opening of an Investigation*

Local civil society, in the face of the problems and limitations of the ICC and its mandate, have recognised the importance of national proceedings, in particular for those victims of crimes that are not comprised in the Prosecution's case.

There may a need for the OTP to continue working on complementarity issues after the opening of an investigation in situation cases.

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<sup>65</sup> Office of the Prosecutor, *Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2009, Regulation 36*

<sup>66</sup> See: OTP Strategic Plan June 2012-2015, 11 October 2013.

### **Bringing Victims' Interests to the Heart of Investigations and Proceedings**

Criminal investigations and proceedings for international crimes, in particular but not limited to those of a sexual nature, must avoid re-victimization and, ideally, have a reparative nature. This may be achieved through a psychosocial approach that would allow victims to take ownership of the investigations and proceedings. There have been experiences in this field on establishing, a series of principles and standards. The following are drawn from the ethical principles set out in the *International Consensus on Principles and Minimum Standards for Psychosocial Work in Search Processes and Forensic Investigations in Cases of Enforced Disappearances, Arbitrary or Extrajudicial Executions* with reference to discussions promoted by FIDH.

- Work according to international human rights standards.
- Recognise victims as right holders. They must be properly informed so they are able to provide an informed consent to participate in criminal investigations – proceedings – and they need to continue to be informed of any relevant information at all stages of the proceedings. They must not be considered as mere repositories of evidence. Victims must be provided with truthful and complete information.
- Investigations and proceedings may have a reparatory nature. They may “promote mechanisms of resistance and coping that respect the emotions, thoughts and experiences”.
- Investigations and proceedings must take into consideration the particularities, expectations and needs of people involved, including their cultural differences and their local customs.
- Investigations and proceedings must protect the physical and mental integrity of victims, their families and their communities
- Investigation and proceedings must not discriminate and should, to the extent possible, prevent the dredging up of social divisions based on ideology, gender, race, or national or ethnic origin.
- All efforts must be made to prevent further physical or psychological harm to the victims or their social exclusion.
- Investigations must seek to take the victims' views into account, and to the extent possible, have consideration for their expectations and address any misunderstandings.

(See also: Inter-American Institute of Human Rights, *Comprehensive Attention to Victims of Torture in Cases under Litigation: psychosocial contribution*, San José Costa Rica, 2009)

## CONCLUSIONS

All organs and services of the ICC must pay due attention to victims' rights and concerns and recognise their importance within the Rome Statute system. Victims are critical to the ICC's functioning and legitimacy. They can contribute bridge the gap between what the Judges' decide in The Hague and situation countries and affected communities.

Victims deserve to be treated as active rights holders and not as passive beneficiaries of the work and activities of the Court. Their rights must be respected, protected and fulfilled by the organs of the ICC and the ASP. They should be granted meaningful participation in the proceedings, representation that allows them to have some sense of ownership of ICC proceedings, and reparations that ensure them some redress. While the timely transmission of information to victims is critical, they must also be given access to engage in a dialogue with the Court through enhanced outreach activities. Such two-way communication would also enrich the Court, and enhance its relevance – and legitimacy – in situation countries.

Attention must be given to the growing disappointment of victims and affected communities in relation to ICC investigations and proceedings. All organs, offices and departments, and in particular the OTP, need to enhance their communications and their sense of accountability towards these groups at all stages of the investigations and the proceedings. For this, it is essential to reinforce support to intermediaries and recognise the value of their work.

The ICC and the ASP must prioritize the rights and interests of victims over bureaucratic and financial considerations. To do so should not be dismissed as unrealistic; it does, however, require wide consultation with all stakeholders, starting with victims and their representatives. Faced with implementation difficulties, it is this sort of consultation that can provide some answers to the looming challenges through creative solutions that do not endanger the fulfilment of victims' rights.

The Rome Statute seeks to create a deterrent effect. It is worrying that in some situation countries, crimes that could fall under the ICC jurisdiction reportedly continue to be committed. It is imperative for the work of the Court to have some meaning for victims and, through them, for affected communities, so that it may help build up social rejection of the atrocities committed, and as a result, help fulfil the mandate of the Rome Statute. If not, ICC investigations and proceedings will remain a foreign exercise.

The OTP must make sure that victims are treated as active right holders and ensure that victims are not left feeling treated as mere sources of information. The OTP must provide adequate information to affected communities so that they can understand the Prosecution's choices. At the same time, a wider effort must be made to make sure that the charges reflect the gravity and widespread criminality in the field. The impunity gap between the crimes committed and the choice of charges by the OTP has a strong impact on the legitimacy of the Office and must be addressed.

Discussions at the Court and among States Parties tend to focus on the delays allegedly caused by

victims' participation. The backlog in the processing of victims' applications is often presented as symptomatic of the time-consuming nature of victims' participation and as a reason to review the system. FIDH rejects this view, as it does not take into account other known reasons for the delays, such as problems with the evidence presented by the Prosecution or the Defence and issues of disclosure.

That is not to say that the application system cannot be improved. However, any potential review of the application system and thus the participation system for victims, must pay significant attention to the need for victims' participation to be meaningful and respectful of the letter and spirit of the system of the Rome Statute. Moreover, facilitating this participation may in fact expedite proceedings. Allowing victims to participate in appeals could actually simplify the proceedings, thereby alleviating the need for the judges to consult with them prior to authorising victims' participation in each interlocutory appeal.

Legal representation for victims is a key element in respecting, protecting and fulfilling victims' rights at the ICC. However, the adoption of policies and discussions on victims' representation particularly at the ASP, in its working groups and the Committee on Budget and Finance, have been addressed mainly from a financial perspective. Financial considerations should not override respect for victims' rights at the ICC. This is a major concern and a source of disappointment for victims.

For victims, it is essential to have a close relationship with their lawyers, and ensure their legitimacy as the victims' representatives. This is essential to the victims' assimilation of the ICC proceedings. Regular consultation between the legal representatives and the victims he/she represents is also essential.

Reparations are a source of enormous expectations and thus, heighten the risk of disappointment. The modalities and scope of reparations need to be understood. The way reparations are implemented may be as important as the awards themselves.

## **Recommendations**

### *To the International Criminal Court:*

Victims should be placed back at the centre of the Court's work, policies and messaging. All organs should acknowledge the central role of victims, the purpose of their participation and the importance, humanity and added value they bring to ICC proceedings.

### *To the Office of the Prosecutor*

The Office of the Prosecutor should make sure that the interests of victims, in particular those having suffered crimes of a sexual nature, are taken into account in its staff interactions with victims, its policies, and its case selection policies.

The OTP should ensure that victims are provided with clear information about the reasons for its decisions on the charges to be laid.

The OTP should bear in mind that its selection of charges has a major impact on the exercise of victims' rights under the Statute. The Office should conduct broad consultations with victims, intermediaries and local actors to establish and evaluate its investigation hypothesis and its selection of the charges.

#### *To the Registry*

Evaluations of the modalities of application, representation and participation of victims should address, mainly, the question of whether the system allows victims to fully exercise their right to present their views and concerns, to participate meaningfully and to build up a sense of ownership of proceedings. Financial and administrative decisions should have the fulfilment of those rights as their primary concern. Savings should never take precedence over the principles.

The Court's reports on legal aid should not only address the financial aspects of the system, but also whether the funding provided ensures that victims can fully exercise their rights. The evaluation on the reform to legal aid should take into account how it has impacted victims' representation, in particular, consultation with victims.

Outreach activities should start at the earliest possible moment, ideally during preliminary examinations and should include clear information on the extent of victims' rights, in particular, the nature of reparations to be provided by the TFV.

In the adoption of institutional policies that affect victims' rights, consultations with victims' legal representatives should become standard practice and not be perceived as an exceptional concession.

#### *To the Judiciary*

Judges should seek victims' views on decisions that may affect the implementation of their rights under the Statute, in particular, in relation to the conditions on the ground, security concerns, and cultural perspectives. Taking account of local customs to solve conflicts within affected communities may be useful in addressing the question of the implementation of victims' rights.

The application process should protect the victims' narrative of the crimes and respect the letter and the spirit of the Rome Statute, which adopts a system of criminal justice that combines a punitive and reparative purpose.

It is important to ensure some consistency in the jurisprudential lines on the modalities of victims' applications, participation and representation. Nevertheless, the Court and the judges should be careful in adopting 'collective approaches' as they may not be ideal for addressing the rights of victims in some contexts or in some forms of criminality, such as gender-based and sexual violence. Collective participation should not be established as the norm.

#### *To the Trust Fund for Victims*

The TFV should develop its communication with victims, intermediaries and local NGOs from the earliest possible stage. Information should be provided in a language understood in affected communities. At the very least, the website of the Trust Fund should be available in French.

Outreach activities and consultations with affected communities are necessary before taking any decision on the implementation of collective reparations.

As the time of implementation of the first ICC-ordered reparations might be approaching, it is essential for the TFV to lay the bases of credibility that may add to its legitimacy in the DRC. Transparency and the dissemination of information are essential. This could start with more transparency in the TFV's choices of assistance projects and situations to focus on, its policies regarding the funding of organisations that are supporting the participation of victims in ICC proceedings. Once the appeals decisions are published, the TFV will need to clarify its role and its policies in the design of reparation measures.

Building up synergy with local actors to promote national efforts on reparations for victims is essential to fulfilling the right to reparations of victims of international crimes. The Fund should explore ways to share its knowledge and capacities with local authorities, with an eye on the establishment of national reparations mechanisms and funds and the implementation of reparations at the national level according to international standards.

#### *To the Assembly of State Parties*

States should affirm the importance of victims' rights in the Rome Statute framework.

The Assembly should recognise the importance and benefits that victims' participation in the proceedings bring for victims' themselves and for their communities, but also for the legitimacy and the mandate of the Court.

Financial considerations should not override the principles. In fact, the fulfilment of victims' rights should be the primary consideration of any changes that may affect victims' participation, representation and reparations.

States should welcome the Draft Guidelines on Intermediaries, the Code of Conduct and the Model Contract for intermediaries.

States must recognise the importance of outreach activities for ensuring victims' rights and the legitimacy of the Court. They should provide the necessary funding for these activities.

States, during their complementarity discussions, should address the impunity gap between the crimes dealt with by the Court and the criminality base in a situation country. Support to national proceedings is essential.

Complementarity discussions should be pursued from the viewpoint of the victims' rights to justice, thus addressing the States' obligations in this respect under international law, for these are not voluntary policy choices.

States should consider making their legal texts explicit on the rights of the victims to participate in appeals.





## Establishing the facts

### investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

## Supporting civil society

### training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level

## Mobilising the international community

### permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

## Informing and reporting

### mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.

**FIDH**  
**represents 178**  
**human rights organisations**  
**on 5 continents**

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**FIDH - International Federation for Human Rights**

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inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

## 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 178 member organisations in more than 100 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 organisations, FIDH is not linked to any party or religion and is independent of all governments.

# fidh

Find information concerning FIDH's 178 member organisations on [www.fidh.org](http://www.fidh.org)