

Victims' Rights Working Group



Children at the ZamZam camp, Sudan © UN

“The dead cannot cry out for justice; it is a duty of the living to do so for them”

Lois McMaster Bujold,
Diplomatic Immunity, 2002

Bulletin

Six Congolese victims are authorised to participate in proceedings before the International Criminal Court (ICC) during the investigation stage

Karine Bonneau,

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In a historic decision handed down on 17 January 2006 (the “decision”), Pre-Trial Chamber I of the ICC accorded ‘victim status’ to six claimants, and entitled them to participate in proceedings relating to the situation in DRC. The decision enables the victims to participate in the early investigative phase, even before any indictment had been preferred in the case.

In rejecting the Prosecution and Defence arguments, the Pre-Trial Chamber held that Article 68(3) of the ICC Statute (which deals with the participation of victims) is applicable as early as at the *investigation stage* and that, in this particular case, the “personal interests” of the victims/applicants were indeed affected. The decision recognises that victims may participate when the matter is still referred to as a ‘situation’ as opposed to at a later stage when the matter has been narrowed further to focus on particular accused persons - ‘a case’.

The Chamber decision allows the six claimants to: 1) present their views and concerns; 2) tender evidence; and 3) ask the Pre-Trial Chamber to order specific measures.

Transmission of requests for participation and protection

In May 2005, the International Federation of Human Rights (FIDH), duly empowered, transmitted six requests for participation by Congolese victims to the ICC Registry, which in turn submitted them to Pre-Trial Chamber I. The Pre-Trial Chamber 1 requested supplementary information from the representatives of the victims and the FIDH, and then held a hearing on 12 July 2005 in their presence.

On 22 July 2005, the Pre-Trial Chamber ordered that the requests for participation be provided to the Prosecutor and the Defence, to allow them to respond in accordance with Rule 89 of the Rules of Procedure and Evidence (RPE). However, the Chamber accepted the request put forward by the victims’ legal representative (and also recommended by the Victims and Witnesses Unit within the Registry), which called for protective measures. In particular, the Pre-Trial Chamber ordered that only a redacted version of the requests be provided to the Defence, in order to protect the identity of the applicants. The Pre-Trial Chamber considered that the redaction complied with the rights of the defence and noted that no specific suspect had been identified at this stage. Since the Prosecutor is bound by an internal

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obligation of confidentiality and an obligation to protect victims, the Pre-Trial Chamber considered that it was not necessary to provide the Prosecutor with a redacted version of the requests.

Establishing an important precedent, the Chamber ordered two protective measures in favour of the victims requesting participation: providing a pseudonym (provided for in RPE Rule 87) and prohibiting the organs of the Court to contact the victims directly, but only through their legal representatives, thus recognising their fundamental role.

In its decision on 17 January, the Pre-Trial Chamber clarified the conditions and criteria for the participation of victims at the investigative phase. It rejected the arguments put forward by the Prosecutor to the effect that: a) there was not yet any “procedure” as such within the meaning of Article 68(3), since the word “procedure” does not cover the investigation of a ‘situation’; b) the participation of victims at the investigative phase would be inappropriate; and c) those seeking to participate had not demonstrated that their personal interests were affected at this phase. The Court also rejected Defence arguments on lack of standing of the FIDH to transmit the requests, and for victims to participate.

The application of Article 68(3) during the Investigative phase

Article 68(3) of the Statute provides that:

“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

The Pre-Trial Chamber noted as follows:

a) The term “procedure” applies to the investigative phase

After an analysis of the terminology (the use of the terms “procedure” and “investigation” in the Statute and the RPE), and taking into consideration the position of Article 68(3) within the Statute, the Chamber rejected the Prosecutor’s first argument. It also relied on the evolution of the role of victims under International Law:

“the interpretation of article 68(3) as being applicable to the investigation stage is also consistent with the object and purpose of the victims participation regime established by the drafters of the Statute, which ensued from a debate that took place in the context of the growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law (...) the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can

present their interests. As the European Court has affirmed on numerous occasions, victims participating in criminal proceedings cannot be regarded as “either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different”. (par. 50-51). The Court also concluded that *“article 68(3) of the Statute also gives victims the right to participate in the fight against impunity”* (par. 53).

b) The appropriateness of participation at the investigative phase

The Chamber insisted that it is *“the extent of the victim’s participation and not his or her participation as such”* that will allow it to determine *“the adverse impact on the investigation alleged by the Office of the Prosecutor”* (par. 58). At the investigative phase, the extent of victim participation would be limited to generally making their views and concerns known concerning the investigation into a particular situation and tendering evidence. It does not include access to the “investigation file”. The Chamber considered that this form of participation would neither have a negative impact on the investigation, nor affect the capacity of the Prosecutor to conduct the investigation in accordance with the need for efficiency and security.

c) The definition of “personal interest” under Article 68(3)

The Pre-Trial Chamber laid down a double test for determining whether the “personal interests” of victims were affected. First, it held that *“the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.”* It adds that the personal interests of victims are clearly affected, *“because it is at this stage that the persons allegedly responsible for the crimes from which they suffered must be identified as a first step towards their indictment. The close link between the personal interests of the victims and the investigation is even more important (...) given the effect that such an investigation can have on future orders for reparations.”* (par. 63 & 72). Then, it envisaged a specific analysis of the personal interests of victims as regards the claims and requests they submit (par. 64). Thus, the appropriateness of their participation will also be studied on a case-by-case basis at the investigative phase.

d) The methods of participating during the investigation of a situation

At the investigative phase, victim status must be granted to all persons making requests who correspond to the definition of victims under Rule 85 of the RPE. At the case stage, victim status will be granted to persons who correspond to the definition in Rule 85, but only in connection with the specific case (par. 66).

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The Chamber held that victims' right to be heard under Article 68(3) places it under a dual obligation: to allow victims to present their views and concerns and to question them (par. 71).

The Chamber then distinguishes three hypotheses concerning the methods of victim participation:

- 1) The Chamber will decide whether victims may participate at the time it takes the initiative to launch specific proceedings under Articles 56(3) and 57(3)(c) of the Statute;
- 2) The Chamber will authorize the participation of victims in proceedings launched by the Office of the Prosecutor or the Defence, where they are of a public nature, unless the Chamber decides otherwise. Similarly, in exceptional cases, it may also authorize their participation in confidential proceedings where it considers that they may have an effect on the victims' personal interests;
- 3) The Chamber will decide whether to give effect to victims' requests to participate in specific proceedings on a case-by-case basis, taking into account the effect on their personal interests.

The Pre-Trial Chamber also confirmed, in accordance with the applicable texts, that it will ensure that victims participate in a manner that is neither prejudicial nor contrary to the rights of the defence.

The authorization of victim participation in this particular case

The Chamber accepted each request for participation after examining them in accordance with the criteria laid down in Rule 85(a).

- a) Each request is by a natural person.
- b) Each has suffered harm. As the concept of harm is not defined in the Statute, the Chamber interprets it on a case-by-case basis, under the international law applicable by virtue of Article 21(3) of the Statute, i.e. international human rights instruments and international case-law. It recalls that it is for the Trial Chamber to conclusively establish the harm in the later context of a specific case (par. 81-82).

c) The alleged crimes come within the jurisdiction of the Court.

At the situation stage, crimes come within the jurisdiction of the Court when they effectively satisfy the ICC Statute's conditions on subject matter (e.g., genocide, crimes against humanity, war crimes), geography (does it relate to a location within the scope of the Court's jurisdiction – e.g., on the territory of a state party or relating to a national of a state party)

and temporal jurisdiction (did the acts in question take place after the coming into force of the statute in 2002).

d) Causation between the alleged crimes and the harm suffered.

In the absence of an express criterion in the texts, the Chamber decided to set a relatively low threshold for examination, identical to that applied to procedural rights in the Statute at the same stage of proceedings, i.e. "*reasons to believe*". The Chamber is also required to analyse each request having regard to the objections of the Defence and the Prosecution, and may refer to other sources such as official UN reports. At this stage it does not seek to evaluate the credibility of the declaration, but to verify whether the account is compatible with such official reports (par. 101). The Chamber may also request the assistance of the Registry in respect of the information contained in declarations made by victims.

The role of nongovernmental organizations (NGO)

The 17 July decision is also important in that it confirms the role of NGOs in the transmission of requests for participation. Rejecting the Defence argument, the Chamber interpreted the use of the term "person" in Rule 89(3) of the RPE as relating specifically to "legal" persons or entities, thus including NGOs (par. 104). NGOs may thus introduce requests for participation by victims, as was the case for the FIDH here.

After the transmission of the requests, FIDH was required to present supplementary observations on issues such as the conditions in which the requests were obtained. Given the current lack of information for victims on their right to participation, their protection requires the establishment of a variety of filters between them and the Court (the traditional role of NGOs for victims); this principle will guarantee greater effectiveness of proceedings before the ICC.

The Chamber also confirms that victims may ask to participate without having filled in the form established by the Victims Participation and Reparation Section, to the extent that they mention the information required by Regulation 86(2) of the Regulations of the Court.

The Prosecutor has sought leave to appeal against the Pre-Trial Chamber's decision. This was followed by an exchange of observations with the representative of the victims who opposed the request. While awaiting any appeal, the six victims from the DRC will continue to exercise the rights that have been accorded to them under the Rome Statute of the International Criminal Court. □

Q.1 Fiona Mc Kay, you are the Head of the Victims Participation and Reparation Section of the International Criminal Court. Victims may not automatically participate to the proceedings before the ICC, but should first fill in an application form, through your Section. Have many victims applied so far?

To date, the Court has received several applications for participation from victims in the Democratic Republic of the Congo. These are the only applications that have been sent to the Section to date from any of the situations currently before the Court.

Q.2 What are the challenges the ICC meets on the issue of the participation of victims?

The challenges that the ICC faces in relation to participation of victims in ICC proceedings are very similar in the DRC, Uganda and Sudan.

First, there are a great many challenges that the ICC faces in the field. One of the most difficult issues we face is providing victims who are already living in very difficult situations with the tools to make an informed decision about whether to apply for participation. In each of the situations before the Court, many victims live in locations that are not easy to access and in insecure conditions. Moreover, there is as yet little awareness about the ICC and, in particular, the potential role of victims.

Second, we have encountered many challenges in establishing an application process for participation that is accessible to victims while at the same time being manageable for the Court. For instance, it has not been easy to design application forms that are sufficiently user-friendly and do not place excessive burdens on applicants, while at the same time soliciting the information that the Chambers need to take decisions in relation to applications. It is important to bear in mind that the Registry does not have any role in deciding whether an applicant is a victim of a crime falling under the jurisdiction of the ICC or whether they are entitled to participate in the proceedings. Our role is to facilitate the process which allows the judges to make that determination.

Third, it is a major challenge to give life to a mandate that is so innovative. For instance, since the provisions in the Rome Statute and Rules of Procedure and Evidence that relate to participation of victims are as yet untested, we must operate for the present without the jurisprudence that will guide our work in the future. This makes it difficult to answer questions we are frequently asked, such as which victims might be accepted to participate at different phases of ICC proceedings.

Q.3 How do you face these specific challenges, and what is your strategy to facilitate victims' participation?

The Registry has steadily developed strategies to meet the challenges that face the Court with respect to the participation of victims.

In confronting the particular challenges involved in reaching out to victims in the field and facilitating their access to the Court, we have developed strategies that rely upon partnerships with civil society institutions that already have relationships with victim populations, drawing upon their prior experience and strong understanding of local customs and norms. We work to identify and develop links with actors on the ground that may be able to serve as intermediaries between the Court and victims wishing to apply to participate in ICC proceedings, either to explain to victims their potential role before the Court or to actually assist victims, for instance by helping them to fill in application forms. These actors may range from legal or human rights NGOs or other civil society institutions to local authorities or other community leaders. International organizations can also provide valuable cooperation in some of these activities.

In tackling challenges involved in establishing an appropriate application process for victims, one strategy we have adopted is to seek the advice of people living in the countries where the Court is active, as well as other experts, to help us to develop standard forms and procedures that are appropriate to each situation. □

**Interview with Salih Mahmoud Osman
Sudanese human rights lawyer, Member of Parliament**

Interview conducted by Lutz Oette, REDRESS

Q.1. In its Resolution 1593 (2005) of March 2005, the Security Council of the United Nations decided to refer the situation in Darfur, Sudan, to the Prosecutor of the International Criminal Court. What is the current situation in Darfur?

The ethnic cleansing in Darfur has succeeded. According to a recent report by the UN Secretary General, more than 3.4 million people are directly affected by the conflict. Over two million people live in camps for refugees and internally displaced persons and are unable to return home. They have lost their property that has been looted, stolen or destroyed. Violations are ongoing, even inside the camps. The Janjaweed that are now considered and recognised as members of the regular government forces continue to rape and kill civilians throughout the region. This is taking place in front of the eyes of the African Union forces that are present but powerless to prevent violations taking place on a daily basis since the worsening of the situation in September 2005.

One of the reasons for this development is that perpetrators feel that the international community has forgotten about Darfur. Talk about accountability has faded away and the perpetrators feel at liberty to commit violations. The Special Court set up by the Sudanese Government to deal with crimes committed during the present conflict in Darfur has not succeeded in holding perpetrators accountable. There have only been a few cases against low-ranking officials and others before the Special Court. This is further evidenced by the report of the Prosecutor of the International Criminal Court to the UN Security Council in December 2005, which implies that the Special Court has failed to date to demonstrate that Sudan is willing and able to prosecute those responsible for international crimes.

The protection of victims and witnesses is a serious problem. In criminal cases where the perpetrators belong to Government forces, unidentified persons

have frequently intimidated and threatened to kill victims and witnesses if they speak out. The Special Court and the Government of Sudan have stated that investigations are hampered by the difficulty of victims and witness protection, but this is an attempt to find excuses as to why prosecutions are not feasible. The Government of Sudan controls the Janjaweed and has the power to stop violations, including threats against victims and witnesses, by being serious about disarming these groups.

Q.2. To what extent do human rights organizations have access to victims in Darfur?

Initially, lawyers were not allowed to see victims. In 2003 and 2004 there were a number of incidents of detention and harassment of lawyers. I myself was detained without charge for seven months and four days from February to September 2004 for my work of representing victims and taking cases as well as speaking out against the Government policy of arming the Janjaweed. The situation has somewhat improved since late 2004, the time around which the Amal Centre, which is treating and representing victims of torture, was established in Nyala. However, unlike the UN, Sudanese lawyers still have no access to detainees held in the detention centres run by the security forces.

Moreover, the Government of Sudan still restricts the access of international human rights organisations to Darfur. International human rights organisations are frequently denied the required permit to travel to Darfur. In early 2005, two members of the Dutch branch of *Medecins sans frontieres* were arrested and detained for their report on rape in Darfur. In November 2005, Darfurian human rights lawyers were questioned by security

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forces about the work of an international human rights delegation in Darfur whose visit to the region they had facilitated. Furthermore, security forces continue to disrupt meetings having a bearing on the situation in Darfur and harass both local and international participants. This happened in September 2005, when the Security Forces entered a workshop organised by the national NGO SUDO and the UNHCR on land issues, the situation of IDPs and compensation for rape in Darfur, and arrested six lawyers for questioning. It also happened on 22 January 2006 when the Security Forces detained members of a group of national and international human rights delegations and others who had gathered in a forum on the occasion of the African Union Summit in Khartoum to discuss issues of justice in Africa, including the situation in Darfur, in particular relating to the ongoing investigations by the ICC.

Q.3. Regarding the situation in Darfur, what are the main challenges faced by victims in order to access justice?

In reaching out to victims in Darfur, the role of lawyers is essential due to the intense mistrust between victims and local authorities in the region. In addition, as the ICC presence in the region continues to be delayed, mistrust of the national judicial system has spread to the international system of justice. Given this state of affairs, lawyers who provide the much needed legal aid to victims in Darfur can play an important role in educating victims on their rights and in identifying victims. To this end, the lawyers themselves need further training on international legal standards on evidence and international crimes.

Many victims are becoming frustrated about having to repeat their stories again and again. It is therefore essential for lawyers to build a relationship of trust and explain to victims the importance of giving statements for the purpose of justice.

Lawyers continue to be under intense pressure for playing this role, facing repeated accusations by the Government of Sudan and those close to it that they are cooperating with the enemies of Sudan to hand over perpetrators to international justice even though the national system is good enough. □

Interview with Claudia Perdomo Head of the Public Information Unit, International Criminal Court

Interview conducted by Clémentine Olivier, REDRESS

Q1. Claudia Perdomo, you are the Head of the Public Information Unit and Outreach Coordinator of the International Criminal Court. What does your role involve, in particular with regard to liaising with victims?

This Unit is under the Public Information and Documentation Section within the Registry but works in coordination with all the organs of the Court. One of the functions of the Unit is to conduct outreach activities to promote understanding of the ICC and to invite people from the situations under investigation to present their views and opinions with regards to the Court. Sensitising and raising awareness about the ICC are two of the main objectives of the outreach programme. The Unit also provides

assistance to the Victims Participation and Reparation Section, the Victims and Witness Unit, and the recently established Office of Public Counsel for Victims that have clear roles and mandates to help victims to understand their rights to participate in the proceedings and apply for reparations.

Q2. In November 2005, you visited Uganda. What was the purpose of this visit?

Our objective was to ensure that members of the national justice system and lawyers, paralegals and journalists had a better knowledge and understanding of the ICC in general and of the role of victims before the Court and defence counsel issues in particular. In addition we discussed with the participants best practices with regard to outreach.

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We invited them to provide us with feedback on our information materials and activities and explore possibilities of cooperation. This information is very important to refine and adjust the ICC strategy for outreach in Uganda. We regularly conduct such visits in the field.

Q3. In your opinion on the issues of outreach towards victims, what are the issues and challenges specific to the Democratic Republic of Congo, Uganda and Sudan?

There are some difficulties that are similar to the three situations with regards to the many challenges that the ICC faces when reaching out to victims:

- ◆ It is often logistically difficult to access victim populations;
- ◆ It is hard to gain the trust of people that have experienced very traumatic events, and who live in fear and distrust;
- ◆ In many cases, victims will have never heard about the ICC and may not be aware of concepts of international justice;
- ◆ There is a need to manage pre-existing expectations of the ICC;
- ◆ Women and children constitute the majority of this affected population and are the most vulnerable;
- ◆ Illiteracy is high among the victim populations;
- ◆ Cultural specificities include diverse languages, beliefs, traditions and social structures.

In Uganda the Court has carried out outreach activities with the Acholi leaders, religious leaders, local authorities in the Northern part of the country, journalists, lawyers, members of the judiciary and representatives of some humanitarian organisations. The Court has also used some radio stations and some newspapers to provide information on the ICC.

In the Democratic Republic of Congo the large size of the country is in itself a challenge. The Court has yet to reach out to the public at the national level. Up to the present, the efforts of the ICC with regard to public education have been directed towards the general public using radio; informational meetings have been held with lawyers, representatives of non governmental organisations and universities.

With regard to the outreach in Darfur the Court is still in a preparatory phase. We have had some bilateral meetings with NGO representatives that have been very useful. Before starting outreach activities we are assessing the situation. We are consulting with experts on the region to develop a strategy. This includes consultation on information materials and channels of communication.

Q4. What is the strategy of the International Criminal Court to answer to these challenges and interact with victims?

There are some strategic steps that we have identified to cope with the challenges and interact with victims. These strategic measures have been decided within the institutional inter and intra-organism mechanism that is referred to as the External Communication Group. This Group serves as a consultation mechanism, where we evaluate needs, share information, and discuss strategies and initiatives to conduct outreach activities. The Court has also acknowledged the need to respect the different roles and mandates of the organs and is conscious that sometimes activities will be carried out to convey specific messages to meet particular needs of each of the organs and/or Divisions within the same organ.

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The following are some of the strategies that we have considered to face the identified challenges:

- ◆ We will work with intermediary organisations on the ground, that have established relationships with victim populations and understand local customs and traditions. Regular meetings with our partners in the field will help us to obtain feedback and allow us to adjust the strategies whenever necessary;

- ◆ We are developing outreach tools tailored to victims in diverse circumstances including radio programs, videos and theater pieces;
- ◆ We will emphasize a realistic role that the ICC may play in bringing justice to a particular situation, and the fact that it is only one component of a larger picture;
- ◆ Finally, the Court will follow strict guidelines that will ensure that any contact between the ICC and victims is undertaken with the greatest care. □

THE REGULATIONS OF THE TRUST FUND FOR VICTIMS ARE FINALLY ADOPTED

By Karine Bonneau and Carla Ferstman

“A judicial process concentrating only on perpetrators has not usually been able to make the crucial contribution to reconciliation and peace. This aspect of the Rome Statute is saying ‘we want to recognize those who over the several years have been the faceless, ones, the anonymous ones, the ones who have been side-passed, and so in that process, help to heal trauma, help to heal wounded communities, help to make hole what was broken.’ ...

What compensation could you ever give that would be adequate for the loss of a loved one. You couldn’t possibly ever replace the one who is no longer there. But frequently symbols can be powerful. And when a country, a nation, the int’l community says, symbolically ‘we cannot compensate you but we want to show that we care, we want to show that we hope that this small thing that we do for you will somehow pour balm on your wounds and help those wounds to heal.’

It is an instrument that I am sure you want to see succeed. ... I am certain we want and we will succeed with the establishment of this Fund. ... so that we will be able to wipe the tears from the mother whose son was tortured to death, that we will be able to help someone who cannot walk so that they are given the capacity to do so, to help bring together families that have been split apart. I am certain you all will want to say that this was one of the most glorious achievements of the International Community.”¹

After much debate over the past two years, the 4th session of the Assembly of States Parties (ASP) finally adopted the regulations of the Victims Trust Fund (VTF). The full text of the regulations is available on the website of the Court, http://www.icc-cpi.int/library/asp/PartIII_-_Resolutions.pdf).

The adoption process

There were very length and difficult negotiations on the text of the regulations which lasted right until the evening of the final day of the session. Civil society groups and in particular, members of the Victims Rights Working Group (VRWG) played a central role in making recommendations to states parties and expressing concerns over some of the proposals that had been tabled during and immediately preceding the session. The ultimate text adopted by the ASP was the product of the concerted efforts of a number of key delegations, the active lobbying of NGOs that formed a specialized VTF team to concentrate their efforts, as well as the important involvement of key personalities, especially the Chair of the VTF Board, Madame Simone Veil.

1. Statement by His Eminence Archbishop Desmond Tutu, on behalf of the Board of Directors of the Trust Fund for Victims at the ceremony marking their first meeting. The ceremony was held in The Hague on the 22nd of April 2004.

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Mme. Simone Veil addressed the plenary of the ASP in its opening session on 28 November, and made a further address at the first meeting of the States Parties Working Group on 29 November, which took place under the new and very effective chairmanship of Ambassador Robledo of Mexico. Mme. Veil emphasized the principal importance of having the draft regulations adopted at the session, to provide the VTF with a clear mandate to take forward its work in earnest. She called on States Parties to ensure that the regulations to be adopted preserve the independence of the VTF and allow it to reach out to the range and breadth of victims of crimes coming within the jurisdiction of the ICC. She also participated in a panel session organized jointly by the Dutch NGO Platform for the ICC and the VRWG, in which she gave precisions on her views on the VTF and the results she was hoping the ASP would deliver. Her strong presence throughout the session and her continued dialogue with States during the State Party Working Group session, were essential to the positive outcome achieved with the adoption of the regulations.

The Regulations

The adopted regulations set out a framework for the management and operation of the VTF, including the methods for receipt of



Children at a camp for Internally Displaced People (IDP) in Southern Sudan © UN

funds, the modalities for the Board's decisions on the use of funds (including the types of beneficiaries and at what point during the process the VTF may begin its activities) and the relationship between the VTF and the Court.

Some of the key areas covered in the regulations are set out below:

a) When is the VTF able to intervene to benefit victims?

When the VTF is implementing the reparations orders of the Court

pursuant to an order emanating from the Court, this will occur at the very end of the trial and appeal process, after the reparations phase is completed.

The Regulations recognize, however, that in certain circumstances, the Board will have the ability to act much sooner. The Regulations stipulate that the Board of the VTF has the ability to use its voluntary contributions to benefit victims from the initial announcement of the opening of a formal investigation into a particular situation. The Regulations provide that when the VTF decides that it wishes to use its resources in this way, it must consult with the appropriate when it is considered to be seized and after a consultation process with the Court.

The Board is considered to be 'seized' when the following criteria are met:

- a) The Board considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families;
- and
- b) The Board formally notified the Court of its conclusion to undertake specified activities and the relevant Chamber of the Court has not, within a period of 45 days of receiving such notification, informed the Board that a specific activity would be in contradiction with issues of jurisdiction, admissibility, presumption of innocence or the rights of the accused and a fair and impartial trial.
 - c) Should there be no response from the Chamber or should additional time be needed by the Chamber, consultations may be held with the Board to agree on an extension. In the absence of such an agreement, the extension shall be 30 days.

In other words, the relevant chamber of the Court has the possibility to stall or stop the Trust Fund's decision to use its resources at an early stage of proceedings, if it believes that the Board's activity might negatively impact upon the Court's ongoing work. This might occur, for example, if the relevant chamber determines that for some specific reason, the Board's intended activity would negatively impact upon the ongoing investigation or prejudice the trial process.

b) What is the scope of victims? - Will the VTF be limited to those victims who are directly affected by the actions of the individuals that are to be prosecuted by the Court or can the VTF also directly assist the broader communities of victims impacted by the Court's proceedings?

When the VTF is implementing the Court's reparations orders, it will be limited to assisting the individuals and groups of victims that are set out in the Court's orders, which will generally be restricted to those victims that have suffered as a result of the crimes prosecuted by the Court.

However, as mentioned earlier, there will be circumstances when the VTF may intervene at a very early stage, from the initial announcement of the opening of a formal investigation into a particular situation.

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TRUST FUND FOR VICTIMS ...

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c) Are donors to the VTF allowed to specify how their contributions are to be used?

The Regulations recognize that contributions to the VTF should not lead to undue imbalances or discrimination between the funds available for different classes of vic-

tims. At the same time, there is some recognition that certain donors have limited mandates and would only be in a position to contribute funds for specific types of activity, and one would not want such types of limitations to lessen the incentives for donations to the VTF.

Consequently, Regulation 27 prohibits the earmarking of voluntary contributions from States, but allows non-State contributors to earmark a maximum of 1/3 of the amount of their voluntary contribution, in a manner that does not discriminate between classes of victims. □

Khmer Rouge Trials: the Impact of the International Criminal Court on the Place of Victims

by David Boyle, Solicitor (Australia), PhD in International Law, Coordinator of an FIDH mission in Cambodia, Member of the CARIECJ

Background

The trials before the Cambodian “Extraordinary Chambers” (“CEC”) set up to try former Khmer Rouge leaders will be conducted in accordance with Cambodian criminal procedure. However, the judges may also “seek guidance in procedural rules established at the international level” where there is any gap, uncertainty or incompatibility in Cambodian procedure compared with international rules.

Since these trials will be held in a country of French or civil law tradition, the place of the victims will inevitably be an issue. Indeed, beyond the role of witness, Cambodian criminal procedure grants victims the rights to file complaints and be joined as “civil parties” to criminal prosecutions. The active participation of victims in the Khmer Rouge trials could make a decisive contribution, beyond reparation of their loss, by allowing them to contribute to repression of the crimes themselves. Yet the victims are hardly mentioned in the amended law adopted in 2004 to establish the Extraordinary Chambers.¹

This uncertainty regarding victims’ rights is preventing them from preparing to participate in the trials. Accordingly, the question of the role of victims before the CEC was raised during a conference organized by the FIDH and its Cambodian partner leagues in Phnom Penh in February 2005.² Later, a group of Cambodian NGOs included a call for the respect of victims’ rights in their recommendations on the internal rules of the CECs.

For its part, the Cambodian Government Task Force³ responsible for setting up the CEC has acknowledged the right of victims to be joined as civil parties, in principle, while expressing fear that too many civil parties could reduce the effectiveness of the trials. A member of the Task Force has also confirmed that the draft “internal rules” for the CEC concerning victims were largely inspired by the Statute and Rules of the International Criminal Court (ICC).

Encouraged by this recognition, yet preoccupied by the danger that any block importation of international rules may weaken the rights of Khmer Rouge victims, the CVIC-KR, a Collective of NGOs in support of Khmer Rouge victims (the “Collective”), has submitted a set of draft articles to the Cambodian government on respect for victims rights before the CECs.

Variable impact

The Collective identified two guidelines that should dictate the approach of the CEC: the obligation to ensure full respect for the rights of victims under Cambodian law; and the need to adapt the exercise of these rights to the specific context of the CEC. The impact of the ICC on the role of victims before the CEC will vary in accordance with these two guidelines.

On the one hand, as regards the definition of victims’ rights, Cambodian criminal procedure precedes the current trend in international law to take greater account of victims. Thus, it cannot be said that there is any “gap” in Cambodian procedure in this regard, which might authorize reference to international rules. However, the Collective did note that the ICC precedent confirms the compatibility with international law of active participation by the victims of massive human rights violations in prosecution of the perpetrators⁶. The ICC gives practical effect to this evolution by allowing victims to expose their views and concerns when their personal interests are affected, “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” [ICC Statute, Art. 68(3)].

1. For a link to the constitutive documents of the CEC, see: <http://www.riddi.org/boyle>.
2. FIDH, *Articulation between the International Criminal Court and the Khmer Rouge Tribunal: The Place of Victims*; Report available at: http://www.fidh.org/articles/2005/02/20050229_article2642.
3. Recommendations of Non-Governmental Organizations for the Internal Regulations for the Extraordinary Chambers; for more information, contact the Cambodian Human Rights Action Committee: ghrac@frum.org.kh.
4. See: <http://www.cambodia.gov.kh/krt/english/index.htm>.
5. For more details on the CVIC-KR proposal, see the web-site of one of its members, CARIECJ: <http://www.cariecj.org>.
6. Cf. Clémentine Olivier & Carla Ferstman, *Ensuring the Effective Participation of Victims Before the International Criminal Court*, The Redress Trust, May 2005, p. 1, <http://www.vwg.org/Publications/2.html>.

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In other words, victim participation does not breach international rules relating to defence rights as long as it does not disrupt the equality of arms between the accusation and the defence. In Cambodia, as in France, the obligation of the investigating magistrate to take account of both prosecution and defence evidence ensures this balance. Thus, the full participation of victims in the Khmer Rouge trials is perfectly compatible with international rules in this area.

As regards adaptation of the exercise of victim rights to the specific context of the CEC, on the other hand, the Collective makes concrete proposals for the effective implementation of victims' rights to testify, file a complaint and be joined as civil parties before the CEC. Although priority is given to solutions close to Cambodian procedure⁷, the ICC model has inspired several proposals concerning victims' participation, representation, protection and reparation.

Participation

The most obvious role for victims in trials for international crimes is to bear witness to the acts making up the crimes they have suffered, as long as they are able to testify in safety. However, since simple witness status leaves the victim in a situation of dependence on the judicial authorities, it is laudable that the ICC allows victims to participate actively in criminal proceedings. Indeed, the right to file a complaint is of great importance in the context of international crimes, because the prosecutor alone cannot cover all the crimes in question.

Thus, the Collective referred to the Rome Statute to confirm the right of victims to file complaints before an international criminal court. In particular, the Collective insisted on the need for an effective avenue of appeal against any decision not to investigate their complaint, preferably before the Pre-Trial Chamber of the CEC, as is the case before the equivalent Chamber of the ICC.

When joined as "civil parties", victims participate as full parties to the criminal proceedings, equivalent to the prosecutor and the accused, in order to ensure that the court takes account of their concerns. Although civil parties cannot be called as witnesses, they enjoy increased independence as compared with witnesses. Nevertheless, too great a number of civil parties would create important administrative problems, while encumbering the appellate bodies with repetitive appeals.

The Collective analysed several potential solutions to this problem, especially supporting action in the name of society as a whole by human rights organizations, a solution close to the Cambodian legal system⁸. However, the Collective also recommended *collective* action by organised groups of Khmer Rouge victims, a solution recognised in French law and globally comparable with the common law concept of class actions. The Collective also recommended two aspects of the assistance provided to victims before the ICC, based on common *legal representation*.

Legal representation

There is no reference to the legal representation of victims in the legal framework for the CEC. On the contrary, as a result of mal-adjusted importation of the terminology of the *ad hoc* Tribunal for Rwanda, counsel for victims is omitted from the provisions relating to defence counsel. Yet when victims intervene as plaintiffs or civil parties in trials for international crimes, access to legal representation is a "key means by which [their] rights may be realised". Indeed, the ICC Statute provides that the views and concerns of victims "... may be presented by the legal representatives of the victims..." [ICC Statute, Art. 68(3)].

Accordingly, the Collective recommended that complainants and civil parties should have a general right to legal representation before the CEC, equivalent to that of the accused. This right would cover both individual and collective action. In addition, given the complexity of this sort of proceedings, the representative should be authorised to intervene during the filing of complaints and with respect to any appellate proceedings before the CEC.

The Collective also referred to the ICC to propose two complementary means of adapting victims' rights to the context of mass crimes. The first solution was the possibility for a lawyer from the Office of Public Counsel for Victims to accompany the civil parties in their action before the ICC. This may seem difficult to transpose to Cambodia, since the CEC budget does not specifically provide for such aid. However, if legal action is allowed by the, often-poor victims of the Khmer Rouge, sooner or later the issue of legal aid to victims will arise. In this context, the recourse to a "public defender" would undoubtedly prove less expensive.

Secondly, the Collective recommended, to the extent that individual civil party actions continue to be recognized, that the CEC should be authorized to organize their representation by a single lawyer, possibly chosen from a list drawn up by the Registry. Victims who accepted such a solution should be able to request legal aid.

Protection

Given the mitigated experience of *ad hoc* tribunals for the former Yugoslavia and Rwanda, the Collective's proposal also refers to the ICC precedent in order to defend the victims' right to protection against reprisals and further trauma, including respect for their privacy. Indeed, the experience of international courts shows the absolute importance, in trials for international crimes, of the court's ability to reassure victims who testify, file a complaint, become civil parties, or are simply identified in the course of the proceedings. In the absence of effective protection measures before, during and after their participation, it is understandable that victims hesitate to support the trials.

7. In particular, the Cambodian draft Code of criminal procedure recurrently refers to the Council of Ministers.
8. It is practised in France and partially recognised in the draft Cambodian Code of criminal procedure.
9. Olivier & Ferstman, *Ensuring the Effective Participation of Victims...*, op.cit.

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Since this sort of measure is only partially provided for under Cambodian law, the Collective proposed a common set of measures aimed at reassuring the victims who participate, based on the ICC Statute and Rules. Specific reference is made to recent decisions of the ICC Pre-trial Chamber allowing the protection of the identity of complainants.

Nevertheless, it is clear that the CEC will only be able to fully ensure such protection during the proceedings themselves. In this respect, the Collective observed that the *collective* exercise of victims' rights may also help to reassure victims, especially by creating a "screen" allowing them to act without being individually exposed. The Collective also recommended that measures for victim protection be extended to their legal representatives and the personnel of NGOs acting in their name.

Reparation

The last point broached by the Collective, but not the least, is implementation of victims' right to effective and adequate reparation before the CEC. Although obtaining reparation is the main reason for becoming a civil party under Cambodian law, some useful references were made to the ICC Statute. In particular, the proposal refers to the "Joint principles" drafted for the UN Commission on Human Rights, and the ICC Statute, in support for its recommendation that the *"Extraordinary Chambers should be explicitly authorised to grant forms of reparation, including symbolic forms, covering all the loss suffered by victims, as recognized at the international level: restoration, compensation, rehabilitation, satisfaction, and guarantees of non repetition"*.

In addition, the organization of collective and individual reparation for thousands of victims by way of a vic-

tims' trust fund captured the attention of the Collective. Following the ICC model, it recommended that the CEC be authorised to establish a fund in order to receive both confiscated property and external contributions.

Conclusion

Active participation by Khmer Rouge victims will constitute one of the essential conditions for impartial and independent trials before the CEC. Their presence will add a human dimension to the trials that should strengthen their exemplary force. It will thus contribute to national reconciliation and better operation of the Cambodian legal system in future.

This implies full respect, before the CEC, of all the rights of victims under Cambodian law: participation, representation, protection and reparation. At the same time, intelligent reference to the ICC precedent should help to adapt the exercise of these rights to the context of the Khmer Rouge trials.

Since civil society organisations will play an essential role in the effective implementation of victims' rights before the CEC, they should also be protected. Given the limited resources of the CEC, close collaboration with associations which support victims would seem necessary. □

10. See Carla Ferstman, "Commencement of the Judicial Phase of Proceedings - What Impact for Victims?", *VRWG Bulletin*, n° 4, October 2005.

Organisations that have affiliated themselves to the VRWG include:

Amnesty International • Avocats Sans Frontières • Centre for Justice and Reconciliation • Coalition for the International Criminal Court • European Law Student Association • Fédération Internationale des Droits de l'Homme • Human Rights First • Human Rights Watch • International Centre for Transitional Justice • International Society for Traumatic Stress Studies • Justitia et Pax • Medical Foundation for the Care of Victims of Torture • Parliamentarians for Global Action • REDRESS • Women's Initiatives for Gender Justice

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