

# ACCESS

## Victims' rights before the International Criminal Court

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ICC REVIEW CONFERENCE - SPECIAL EDITION

### Kenyan victims consulted on opening of Prosecutor's investigation

Anne Perrot, REDRESS

On 31 March 2010, Pre-Trial Chamber II took a decision to allow the Prosecutor to commence an investigation into the situation in Kenya. The situation covers the alleged crimes against humanity committed in the context of the post-election violence, which caused about 350,000 people to flee, left at least 1,330 people dead, more than 900 acts of documented rapes and sexual violence and the country at the edge of a civil war.<sup>1</sup> The time-frame for the investigation relates to events that took place between 1st June 2005 (i.e., the date of the Statute's entry into

force for the Republic of Kenya) and 26 November 2009 (i.e., the date of the filing of the Prosecutor's Request).

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A woman tries to salvage her property in Mathare slums. Kenya, January 2008. © Julius Mwelu/IRIN

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### Admissibility: a final hurdle for the start of the Bemba Trial?

After much anticipation and delay, the start of the trial against Jean Pierre Bemba Gombo, accused of two counts of crimes against humanity and three counts of war crimes, including significant charges of gender violence, is now scheduled for 5<sup>th</sup> July 2010. Mr. Bemba is the alleged President and Commander in Chief of the *Movement de Libération du Congo*, and was the leader of the opposition in the Democratic Republic of Congo until his arrest. The allegations against him relate to crimes he is said to have committed in Central African Republic (CAR). While debates arose last year as to his interim release pending trial and the lack of willingness of third countries to accept

Bemba on their territory, it now seems that the only issue that could further delay the process, or possibly even put an end to it, is the outcome of proceedings on admissibility.

On 25 February 2010, Bemba's defence team submitted a request to contest the admissibility of the case, basing their arguments on the complementarity principle, the principle "*non bis in idem*" and on the absence of gravity.<sup>1</sup> The defence has alleged that, domestic investigations have been carried out on the same allegations, and that the authorities in CAR had already launched a prosecution, that they have shown their good-

will to prosecute him and that their courts have the capacity to do so.

The prosecutor opposed the arguments, as did victims' representatives, adding that the facts demonstrate that criminal proceedings that had been lodged in CAR against the accused were abandoned before a judgment was rendered on innocence or guilt. A status conference to discuss the admissibility challenges was held on 27 April 2010. All parties and participants, including representatives for the government of CAR, expect a decision on admissibility in the near future. •

<sup>1</sup> ICC-01/05-01/08-704-Red3

The Chamber found that the information made available provides a reasonable basis to believe that crimes against humanity victimising a large number of civilians have been committed on Kenyan territory, in particular murder, rape and other forms of sexual violence, forcible transfer of population and other inhumane acts.

The Chamber took the view that at least at this preliminary phase, there was no indication that the ICC would not have jurisdiction as a result of Kenyan investigations and prosecutions. It indicated that the domestic investigations and prosecutions that had taken place in Kenya concerning the post-election period related only to minor offences. Furthermore, it indicated that national investigations and prosecutions appeared to be directed against persons that fall outside the category of those who bear the greatest responsibility. Moreover, attempts to establish a special tribunal to prosecute those who are responsible for the post-election violence appeared to be frustrated, which serves as a further indication of inactivity on the part of the Kenyan authorities to address the potential responsibility of those who are likely to be the focus of the Court's investigation. Thus, the case would be admissible under article 17 of the Statute, subject to satisfaction of the gravity threshold.

The Chamber indicated that the gravity threshold was met, having regard to the scale of the post-election violence, considering the alleged number of deaths, documented rapes, displaced persons, and acts of injury, as well as the geographical location of these crimes, which appears widespread and taking into account the brutality of the acts, in which alleged perpetrators crudely cut off body parts, attacked civilians with a range of sharp objects, including machetes, poisonous arrows, and broken glass, and

even burnt victims alive, terrorized communities by installing checkpoints where they would select their victims based on ethnicity, and hack them to death, commonly committed gang rape, genital mutilation and forced circumcision, and often forced family members to watch. The Chamber also considered the devastating impacts of the acts.

### Importance of consulting victims about the authorization of the investigation

Prior to its authorization of the investigation, on 10 December 2009, shortly after the Prosecutor had made his application for the authorization of the investigation, Pre-Trial Chamber II ordered that the Victims Participation and Reparations Section of the Registry embark on a consultation process with Kenyan victims to:

***"(1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation); (2) receive victims' representations (collective and/or individual); (3) conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in rule 85 of the Rules have been met; and (4) summarize victims' representations into one consolidated report with the original representations annexed thereto."***<sup>2</sup>

This order constituted an important finding by the Pre-Trial Chamber, that it is necessary for victims to be provided with a real opportunity to provide their input. It is insufficient for the possibility of their input to be theoretically available, the Court must go further and take steps to ensure that victims can practically provide input. Because of security concerns, the Prosecutor had chosen to notify victims by "general means through a widely publicized notification", as he determined

that direct contact "would pose a danger to the integrity of a future investigation or to the life or well-being of victims and witnesses".

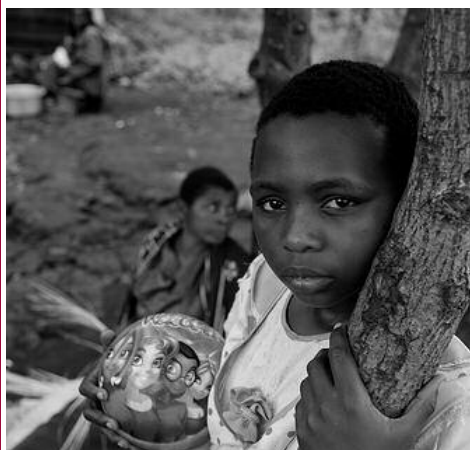
In accordance with this order, the Victim Participation and Reparations Section of the Registry carried out consultations in Kenya and the public version of their report was filed with the Chamber on 29 March 2010.<sup>3</sup> This Report indicated that, on the specific question of victims' representations under article 15(3), most of those met were not aware of victims' rights to make representations. Those who were aware of victims' rights in this regard were confused as to the nature of the information which should be included in victims' representations and also as to which part of the Court would receive the representations. The Report of the Registry also noted, among other things, that there exist serious and well-founded fears for the security of those who contact the ICC, or who are even thought to have had contact with the ICC. There was overwhelming agreement that persons with knowledge or evidence about serious crimes have been and will continue to be harassed, intimidated, and even killed.

The Prosecutor of the ICC made his first visit to Kenya in mid-May 2010, to carry out investigations and meet with the victims' communities. ●

<sup>1</sup> On 31 March 2010, Pre-Trial Chamber II granted the Prosecution's request to commence an investigation. See, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>

<sup>2</sup> Press release, 4 May 2010, <http://www.icc-cpi.int/NR/exeres/F39C6639-AA8D-4F1C-BBA9-083D1DD46FB2.htm>

<sup>3</sup> Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, 10 December 2009, ICC-01/09-4, <http://www.icc-cpi.int/iccdocs/doc/doc791568.pdf>



Emanie and her mother Veronica have both been brutally raped by soldiers and are awaiting treatment. © Endre Vestvik (flickr)

## Final ruling excludes sexual slavery in Lubanga Case

After months of uncertainty, on 8 January 2010, the Trial Chamber in the Lubanga case followed a significant Appeals Chamber ruling handed down a month earlier in relation to the possibility of modifying the legal characterisation of the facts in the case.

It stated that in order to re-characterise the facts in the case so as to include sexual slavery and inhuman treatment, there would need to be factual evidence of

sexual slavery and inhuman treatment in the confirmation of charges decision.

While evidence of such treatment may have come to light during oral testimony in the trial, the Chamber found that there was no factual evidence of such treatment particularised in the confirmation of charges decision, which forms the basis of the case against Mr. Lubanga. ●

# Clear policies on intermediaries needed as anonymity is raised in trials

Gaëlle Carayon, REDRESS

Since the outset of the ICC's first investigations, the role of intermediaries has been a recurring challenge. The Court relies on local organisations and individuals to help carry out its mandate on the ground. Local actors are instrumental in notifying victims of proceedings as required by the judicial process, organising outreach events, assisting to gather evidence or as point of contact for investigators, contacting potential witnesses or assisting victims in applying to participate in proceedings or to claim reparation. They play a crucial role in facilitating access to remote regions and can also provide the most discreet way of maintaining contact with victims and witnesses without attracting attention.

From the outset of the Court's operations on the ground, local organisations and individuals have been calling for clear policies on intermediaries, in particular on their protection from reprisals, remuneration and entitlement to training. To date, despite the efforts of the Registry last year to collect views from the different organs of the Court and from intermediaries themselves, there is still no coherent Court policy.

Recently, intermediaries' roles have been scrutinised in both the Lubanga and Katanga/Ngudjolo cases. Defence have raised arguments to suggest that intermediaries might have coached witnesses or fabricated evidence. They have sought disclosure of the identities of intermediaries which, until now, had always remained confidential. The Defence question the rationale for protecting the identity of an individual whose integrity is challenged and is directly impacting the credibility of the evidence.

The Office of the Prosecutor (OTP) has strongly argued against disclosing intermediaries' identities for security reasons, arguing that some intermediaries were involved in more than one case and that disclosure would impede further investigations.

## Anonymity as "innocent third parties"

Earlier in the proceedings, the names of intermediaries were concealed from the defence, following the argument that they were "innocent third parties."<sup>1</sup> This category of "person" was referred to by the Appeals Chamber in the Katanga case, when observing whether the Stat-

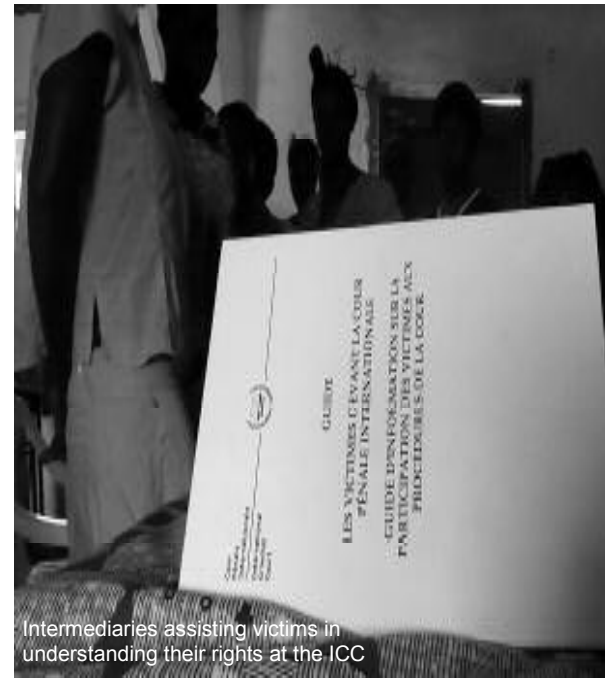
ute provided for the protection of "third parties". In the Lubanga case, recalling the Appeals Chamber judgment, Trial Chamber I recognised the possibility of protecting the identity of some third parties when the information itself was not relevant to the facts and when the redactions did not make the document illegible.<sup>2</sup>

However, in light of the accusations made that some intermediaries might have deliberately contributed to the presentation of false evidence to the Chamber, the Court is now compelled to take another look at the balance between its obligations to protect "others who are at risk on account of testimony given by [...] witnesses" and the rights of the accused and due process. Indeed, defence witnesses in the Lubanga case have claimed that former witnesses "stole their identity", that intermediaries bribed witnesses to concoct incriminating evidence, and that prosecution witnesses were coached to lie to the Chamber.

## A piecemeal solution to the disclosure issue

Following indications from the Chamber that it might order the Prosecution to disclose identities of some intermediaries<sup>3</sup>, the OTP recalled that "the environment in which intermediaries operate [was] dangerous and [the] risk of harm [was] high both to them and to witnesses who may have interacted with them."<sup>4</sup> The OTP also argued that intermediaries are not participant witnesses and it had no reason to suspect misconduct. The OTP explained that it had made a "considerable effort to identify and evaluate intermediaries' reliability, knowledge, integrity and ability to perform tasks discretely" and that the evaluation is an ongoing process whereby the OTP "continues to monitor and evaluate [intermediaries'] productivity, loyalty, accuracy, security, reliability and honesty."

Opposing the disclosure, the OTP suggested that other options could be preferred such as calling an appropriate OTP representative to give evidence on the use of intermediaries or for the intermediaries whom the Chamber has



Intermediaries assisting victims in understanding their rights at the ICC

deemed are sufficiently tainted by specific allegations to appear before the Chamber as court witnesses, *ex parte*, without disclosing their identities to the defence. In doing so, the OTP stressed that revealing their identities could chill the willingness of persons to offer assistance in the future. Finally, the OTP added that revealing their identity could potentially require the Victims and Witnesses Unit to include them in the Court Protection Programme.

## The need for a comprehensive, court-wide policy

The ICC should apply the highest standards in ensuring the rights of the accused, nevertheless, ensuring protection of those who assist the Court is also mandatory. Many organisations in the field have called repeatedly for clarity as to their role and status. Allegations of misconduct over a few individuals should not overshadow the fact that many committed individuals devote much time, energy and scarce resources to assist the Court to fulfil its mandate.

It is crucial that clear policies are adopted, across all organs of the Court, covering issues such as protection, safety training, training and vetting. •

<sup>1</sup> ICC-01/04-01/07-475, para 43; ICC-01/04-01/07-475, Dissenting opinion Judge Pikis, para 15

<sup>2</sup> ICC-01/04-01/06-1835, para 11

<sup>3</sup> 19 March 2010, ICC-01/04-01/06-2362

<sup>4</sup> 25 February 2010, ICC-01/04-01/06-2310-Red

# The modalities of victims' participation evolve in the Katanga / Ngudjolo trial

Dadimos Haile, Avocats Sans Frontières (ASF)



Germain Katanga Initial appearance 22/10/07 © ICC-CPI / Robert Vos



Mathieu Ngudjolo Chui Initial Appearance - 11/02/08 - © ICC-CPI /

The participation of victims has been the subject of numerous decisions that have sought to define the criteria, modalities and contours of victims' participation ever since the first Pre-Trial Chamber ruling on the subject dated 17 January 2006.<sup>1</sup> The most comprehensive of the decisions concerning the participation of victims in trial proceedings are the decisions of 18 January 2008 and 11 July 2008 by Trial Chamber I and of the Appeals Chamber, respectively in the Lubanga case,<sup>2</sup> and Trial Chamber II's recent decision in the Katanga / Ngudjolo case.<sup>3</sup>

In determining the criteria for the participation of victims, the January 18 decision of Trial Chamber I construed the notion of harm suffered by a victim to include direct as well as indirect harm, except where the victim is a legal person.<sup>4</sup> The Trial Chamber further held that victims are not required to establish the link between the harm suffered and the crimes included in the charges against the accused. Accordingly, victims of any crime falling within the jurisdiction of the Court can participate provided that: a) there is a link between the victims and the evidence that will be considered at trial or b) the victim's personal interest is affected by issues that are at stake during the trial. The decision, however, made the participation of victims contingent upon a showing of personal interest in respect of every procedural action or intervention by victims' legal representatives.

Another important aspect of the January 18 decision was that it granted victims the possibility to lead and challenge evidence pertaining to the guilt or innocence of the accused where their personal interests are engaged. The Chamber, however, did not attempt to define the notion of personal interest in relation to the participation of victims in the trial stating that victims' interests may be multiple and diverse.<sup>5</sup>

On appeal lodged both by the Prosecutor and Counsel for the Defence, the Appeals Chamber upheld the Trial Chamber's interpretation of the notion of harm under rule 85 (a) to include direct or indirect harm with the additional qualification that such harm should always be personal.<sup>6</sup> The Appeals Chamber also confirmed the decision granting victims the possibility to lead and challenge evidence.<sup>7</sup> Most crucially,

however, the Chamber held that "the harm alleged by Victim and the concept of personal interests under article 68 (3) of the Statute must be linked with the charges confirmed against the accused" thereby reversing the decision of the Trial Chamber.<sup>8</sup>

As shall be seen below, some of the above elements have been examined by Trial Chamber II in the Katanga/Ngudjolo case in the light of the specific facts of that case, while also adopting a slightly different approach in certain respects.

## Relevant aspects of Trial Chamber II's Decision in the Katanga/Ngudjolo case

While recognizing the fact that the different chambers of the Court had the opportunity to rule on various aspects of victims' participation, the Chamber held that it was up to each chamber to determine the timing and modalities for the exercise of victims' participation in light of the specifics of each case.<sup>9</sup> One area that the Chamber deemed to require further elaboration concerned the notion of personal interest, which, as noted above, was not defined by Trial Chamber I in the Lubanga case. Accordingly, Trial Chamber II held that although victims may have multiple and diverse interests, "the only legitimate interest the victims may invoke when seeking to establish the facts which are the subject of the proceedings is *that of contributing to the determination of the truth by helping the Chamber to establish what exactly happened.*"<sup>10</sup>

The Chamber further stated that the personal interest of each victim can be demonstrated through elements such as the temporal and geographical proximity between the charges and the events described by the victims in their application.<sup>11</sup> Based on the above understanding, it ruled that, once these elements were shown in the application for participation and the application is accepted, the victims should not be required to establish their personal interest in relation to every procedural action they wish to undertake.<sup>12</sup> The Trial Chamber, however, reserved the right to seek explanation from the victim's legal representatives, where the link between their intervention and the personal interest of victims is not apparent.

The decision circumscribes the situations in which the Chamber may require additional clarification or explanation. Accordingly, in situations where a legal representative represents more than one victim, the latter will not be required to demonstrate the existence of the personal interest of each of the victims but only whether he is acting on behalf of all or a group of the victims.<sup>13</sup> Similarly, the representatives will not be required to reveal the identity of the particular victim or victims on whose behalf the intervention is sought.<sup>14</sup>

In relation to the possibility for victims to lead and challenge evidence, Trial Chamber II seems to have expanded on the jurisprudence in the Lubanga case by way of a specific reference to the possibility that witnesses called by victims' legal representatives may "give evidence about the crimes with which the accused have been charged, and about any part played therein by the accused".<sup>15</sup> One of the attendant issues that had arisen in relation to the above was whether the possibility to present evidence, including testimonial evidence, pertaining to the guilt or innocence of the accused entailed the duty

of disclosure akin to the obligation imposed on the Prosecutor. The Chamber ruled out the existence of a general obligation of disclosure of evidence, whether exculpatory or incriminating, on the part of victims since the latter do not have the right to present evidence.<sup>16</sup> The possibility for victims to present evidence is subject to a specific request and an authorization by the Chamber, which would provide an occasion to rule on the disclosure and set appropriate guarantees for fairness.<sup>17</sup>

On 19 April 2010, the Trial Chamber granted the Defence of German Katanga leave to appeal three of the five issues it had raised. The three grounds of appeal relate to the Chamber's ruling on the possibility for victims legal representatives to present evidence and the implication in terms of a possible obligation to communicate such evidence to the parties. A resolution of these issues by the Appeals Chamber by the completion of the Prosecution's case would provide useful guidance for the subsequent phase of the proceedings and help avoid delays.

Over all, Trial Chamber II's decision did not depart significantly from the jurisprudence of the Court in the Lubanga Case with the exception that the ruling sets aside the requirement for victims to establish their personal interest with respect to every procedural action. The latter ruling, which is partly inspired by the larger number of victims participating in the Katanga/Ngudjolo case,<sup>18</sup> would significantly contribute to judicial economy. It would also ease the burden on legal representatives as well as the Defence and the Prosecutor, who would normally have to react to every application by the former. Incidentally, the Appeals Chamber has not had the opportunity to rule on this issue in the Lubanga Case and it is not one of the grounds of appeal confirmed against the present decision. It is, therefore, interesting to note that Trial Chamber I and II will be applying different approaches on the criteria for and timing of the establishment of personal interest. ●

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MONUC Peacekeepers Disarm FRPI Militia Members of the Patriotic Force of Resistance (FRPI). 28/Nov/2006. Ituri, Democratic Republic of the Congo. Flickr/UN Photo/Martine Perret

<sup>1</sup> Situation in the Democratic Republic of Congo, Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, Pre-Trial Chamber 1, 17 January 2006, ICC-OI/04-IOI-TEN-Corr

<sup>2</sup> Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *Decision on victims' participation*, 18 January 2008, ICC-01/04-01/06-1119, Appeals Chamber, *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, 11 July 2008, ICC-01/04-01/06-1432

<sup>3</sup> Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, *Decision on the Modalities of Victim Participation at Trial*, Trial Chamber II, 22 January 2010, ICC-01/04-01/07

<sup>4</sup> The Chamber reasoned that the requirement of direct harm is limited to legal persons under 85(b) since no similar qualification is provided for under Rule 85(a) concerning natural persons. See *Decision on Victims' Participation* supra, Para. 91

<sup>5</sup> Id., Para. 97

<sup>6</sup> Appeals Chamber, supra, Paras. 32-39

<sup>7</sup> Id., Para. 105

<sup>8</sup> Id., Para. 65

<sup>9</sup> Trial Chamber II, *Decision on the Modalities of Victims Participation*, supra, Para. 53

<sup>10</sup> Id. Para 60

<sup>11</sup> Id. Para. 61

<sup>12</sup> According to the Chamber, "once the Chamber has established that an individual victim may participate in the proceedings under rule 89 of the Rules, this means that the Chamber has thereby recognised that this individual has a personal interest in the trial proceedings." Ibid

<sup>13</sup> Id., Para. 63

<sup>14</sup> Id., Para. 64

<sup>15</sup> Id. Para. 86

<sup>16</sup> Id. Paras. 105-106

<sup>17</sup> Id., Para. 107

<sup>18</sup> As of November 2009, 359 victims were granted leave to participate through their legal representatives in the Katanga Case. See, *Dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure*, 31 July 2009, ICC-01/04-01/07-1347; *Corrigendum du dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure*, 5 August 2009, ICC-01/04-01/07-1347-Corr. and *Dispositif de la deuxième décision relative aux demandes de participation de victimes à la procédure*, 23 November 2009, ICC-01/04-01/07-1669 .

# Preparing for the ICC's first reparations Proceedings

Mariana Goetz, REDRESS

The International Criminal Court's mandate moves beyond purely retributive justice, building on some hard learned lessons from the ad hoc Tribunals and Special Courts, which left victims feeling bitterly excluded and dispossessed of their right to access justice. The reparative justice mandate of the ICC enables victims' rights to both a remedy and reparation, where no able and willing national justice mechanisms are available.

In line with prevailing international human rights jurisprudence, victims of gross violations of human rights or humanitarian law have both procedural rights to seek justice and a substantive right to reparation.

## Reparation principles

While article 75 of the ICC Statute states that the Court shall establish principles relating to reparations, no set of principles have been established collegiately as such. Thus, it would appear that each Chamber will establish principles for the case before it, and that these will then develop jurisprudentially. There are however some guiding principles that might be applicable to all cases. For instance, the Truth and Reconciliation Commission in Sierra Leone recommended that reparations should be guided by principles of feasibility and sustainability. It also recommended that reparations should avoid new stigma or the reinforcement of existing stigma. This was a concern because providing reparations for specific categories of people might create new or reinforce existing stigma and alienation of already marginalised individuals or groups. Furthermore, increasing awareness and understanding of the specific needs of victims was considered integral to reducing stigma and also critical for victims' rehabilitation and reducing victims' suffering of its own right.

In addition to giving particular attention to principles that are gender sensitive,<sup>1</sup> specific principles might also guide reparations for children. The UN Guidelines on Justice in Matters involving child Victims and Witnesses<sup>2</sup>, emphasise the need to ensure dignity, non discrimination and the best interests of the child. Acting in the best interests of the child is sometimes more effectively achieved by



NGOs in East DRC exchanging on the issue of reparation during a workshop on the subject, Oct 2009, REDRESS

supporting the family or community that the child is dependent on. While every child should be treated as an individual with his or her individual needs, wishes and feelings (not, for instance, as a typical teenager or child of a certain age).

## Who should be eligible for reparation?

As the ICC approaches the end of its first Trial, much remains undetermined with regard to the reparations process. The scope of victims that will be considered eligible for reparation is a difficult question. As Mr. Thomas Lubanga is being prosecuted for enlisting, conscripting and actively using children under the age of fifteen in hostilities, it is in principle the former child soldiers who are the victims in the ICC's first case. Though, the Trial Chamber has found that those who suffered indirectly as a result of a child's recruitment, such as his or her parents, are also eligible victims.

However, the Prosecutor has limited his case to recruitment evidenced by training of children in specific camps and to their active participation in specific hostilities. As such, only the children who are subjects of the specific incidents being prosecuted are able to participate in the trial; not all children allegedly recruited or used by Mr. Lubanga's UPC

forces. However, of all the children who were actually trained in the specified camps or actively participated in the specified battles, only 103 are currently participating in the Trial. It would appear that all the children falling into this narrow class, whether they make a claim for reparation or not should be eligible for some form of reparation.

But what of the other children allegedly recruited and actively used by Mr. Lubanga's UPC forces? Might they be eligible for some form of reparation against Mr. Lubanga if convicted? Then there is the even larger class of victims of the hostilities, those who have suffered at the behest of the child soldiers. These "*victimtes d'attaque*" are generally felt to be the most obvious victims to those who lived through the conflict in Ituri.

## Reparations ordered by the Court

The Chamber can determine the scope and extent of damage, loss and injury to victims; and in so doing is to state the principles on which it is acting. In so doing, the Chamber must ask the Registrar to notify the persons against whom it is considering to make a determination, as well as the victims, interested persons or states.

It can either order reparations directly against a convicted person, specifying appropriate amounts or forms of reparation and the modalities of making these available to the victims. Alternatively, the Court can order reparation to be made through the Trust Fund for Victims established in accordance with Article 79 of the Statute. This might be done in particular where the number of victims, scope, form or modalities of reparation make a collective award more appropriate.

The modalities for notifying reparations awards can in and of themselves have a reparative effect. In the context of the Inter-American Court of Human Rights, the satisfaction element derived from the publicity of judicial remedies has been exploited so as to maximise the reparative effect. The Court has ordered judgments to be translated into local tribal languages and reproduced and provided individually to each victim.<sup>3</sup> In this respect the procedural aspects of how reparations proceedings and orders are able to recognise victims' dignity and humanity can play a significant role, particularly where the reparations awards are not substantively what victims might expect. This last point emphasises the critical importance of conducting sufficient outreach and of consulting with victims and affected communities in a participatory manner before any decisions or actions regarding their rights have commenced. Consultations will remain key throughout the reparations process in order to ensure that appropriate awards, as well as their delivery or implementation are ensured.

## Forms of reparation: individual and collective?

The Statute provides an open-ended list of forms of reparation, including restitution, compensation and rehabilitation. The UN Basic Principles provide a further two forms, namely satisfaction and guarantees of non-repetition. While the latter have not been included in the Statute because they are thought to address reparations awarded against a State, some forms of satisfaction may also be appropriate in the ICC context, such as the building of a memorial or other symbolic acts.

While collective awards may be a key component of mass reparations, international law recognises victims' individual right to reparation. The UN Basic Principles state that "in taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualised basis or, where it deems it appropriate, on a collective basis or both." Collective reparations may in some circumstances effectively address certain types of victimisation, for instance a particular group or community has been the target of specific harm. However, individual awards are still significant as they recognise individual harm to a degree that may not be possible with a collective award. In situations of vast humanitarian need, collective awards might also lose their specificity to individual victimisation, being subsumed into wider developmental projects. Project based services, can still be allocated on an individual basis providing access to medical treatment, training or income generating toolkits. While there are clear challenges to individual awards in cases of mass reparations,

there is also a range of international practice that can be drawn upon in working through the issues effectively.

## What if the convicted person has insufficient funds?

A major concern for victims is that reparations will be awarded but there will be insufficient funds for them to be implemented in practice. It is imperative that the Prosecutor undertake financial investigation into the assets of suspects and accused persons beyond routine requests for cooperation from states on search and seizure of assets. In order of such requests to be effective, they must be sufficiently detailed and supported to comply with national banking requirements.<sup>4</sup> While the Pre-Trial Chamber has a clear role to play in seeking protective measures for the purpose of forfeiture for the benefit of victims, it is less clear the extent to which the Trial Chamber takes over this role during the course of a trial in order to ensure initial requests for cooperation are followed through by the Prosecutor and States.

Even in the best of circumstances, where assets will have been identified, seized and transferred for safekeeping to the Trust Fund for Victims, there may still be insufficient funds to repair victims at all meaningfully. In order to address this concern, the Board of Directors of the Trust Fund for Victims is tasked to "make all reasonable endeavours to manage the fund taking into consideration the need to provide adequate resources to complement payments for awards [...] and taking particular account of ongoing legal proceedings that may give rise to such awards."<sup>5</sup> In such cases, the Trust Fund would need to consider how best to complement existing funds obtained through fines, forfeiture or awards for reparations against the convicted person, with funds from its "other resources", obtained through voluntary contributions. Thus the Court may only award reparation for monies it has collected from the convicted person through fines, forfeiture or a reparation award. Beyond these funds, which may be meagre, it is the voluntary, "other sources" of funding of the Trust Fund that would need to be relied upon. ●



Former child soldiers in DRC are at the centre of discussions on who will receive reparation should M. Lubanga be convicted. Picture: young militia outside their leader's house in Bunia, Ituri, DRC, 2006, © Tiggy Ridley/IRIN

<sup>1</sup>See, Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation: [www.womensrightscoalition.org/site/reparation/signature\\_en.php](http://www.womensrightscoalition.org/site/reparation/signature_en.php)

<sup>2</sup> ECOSOC Resolution 2005/20, 36<sup>th</sup> Plenary meeting, 22 July 2005.

<sup>3</sup> I/A Court H.R., *Case of the Plan de Sánchez Masacre v. Guatemala*. Merits. Judgment of April 29, 2004. Series C No. 105, para 125.4

<sup>4</sup> Art. 96 of the ICC Statute outlines the contents of requests for cooperation and assistance under Art. 93.

<sup>5</sup> Regulation 56 of the Regulations of the Trust Fund for Victims.

# Empowering Children to Engage with Transitional Justice Mechanisms

Alison Smith, *No Peace Without Justice*\*

The targeting of children during armed conflict is nothing new: children have been victims of crimes under international law for centuries and have also been used as vehicles through which adults commit crimes, particularly during recent conflicts. What is new is the increasing attention being paid to this issue. The world is beginning to say “enough”: enough destruction of young lives; enough unconscionable and unnecessary suffering; enough loss of childhood; enough political expediency that allows these things to continue. Underneath it all, enough impunity for all of these things, because with impunity comes more suffering, as violations are tacitly or explicitly approved and allowed to continue.

Children have been involved only recently in transitional justice processes and when they have been involved, their participation has been something of an “add-on”. Yet there is an emerging consensus that transitional justice is important for children: they are important members of society, and the children of today’s transitions are also the adults of tomorrow, inheriting the results of transition. Furthermore, children and young people often outnumber adults in many countries requiring transitional justice; excluding them may exclude the majority of the affected population, which is both counterintuitive and unproductive.

The question is not whether but how children’s perspectives should be woven into the fabric, design and operations of transitional justice mechanisms and processes. The answer to that question should be guided by several provisions in international legal instruments relating specifically to children, particularly the Convention on the Rights of the Child (CRC) and its Optional Protocols. These provisions set out the broad rights that children possess, guide how those rights might be exercised and lay out what can and cannot be done with regard to children, such as prohibiting the conscription, enlistment or use of children to take a direct part in hostilities. Article 3 of the CRC, for example, provides that the best interests of the child should be a primary consideration underpinning every action taken in relation to children, as well as in the implementation of the rights contained in the CRC itself. The CRC also specifically provides that children have the right to participate in decisions affecting their lives<sup>1</sup> and to redress for harms committed against them, by obligating States Parties to promote the “physical and psychological recovery and social reintegration of a child victim ... in an environment which fosters the health, self-respect and dignity of the child”.<sup>2</sup> The CRC also provides for the rights of children accused of having committed crimes and is complemented by other international instruments, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.<sup>3</sup>

To date, when international justice institutions do consider the experiences of children, they have focused on crimes committed against children, particularly the recruitment or use of children to take a direct part in hostilities, or as victims of crimes of sexual violence. This has been critical for raising awareness

about the experiences of children, and, for example, for contributing to a reduction in the rates of child recruitment. However, those experiences have often been presented through the filter of adult eyes, as adults have testified about crimes committed against children, rather than the children themselves. The time has now come to empower children to participate in the mechanisms and processes that aim to give them redress, by giving effect to their rights and engaging them through the development and implementation of policies that facilitate their participation, in a protective environment and in a manner consistent with their evolving capacities.

Both the States setting up transitional justice mechanisms and the mechanisms themselves, including the International Criminal Court, must ensure that children’s rights are respected and promoted, including facilitating children’s active involvement in rebuilding their shattered society. As the Sierra Leone Truth and Reconciliation Commission noted, “The reconciliation process in Sierra Leone demonstrates how children, as active partners in the process, can help break the cycle of violence and re-establish confidence in the rule of law.”<sup>4</sup>

Children are among those most affected by conflict and other types of transition, whether as direct victims of underage recruitment or use in hostilities, sexual violence or other crimes or because of displacement or indirect impacts. Because transitional justice processes will invariably affect the lives of children, they have a right to participate in those processes. This is both a matter of common sense and a legal right, as reflected in the Convention on the Rights of the Child.<sup>5</sup> •

\* *Alison Smith is the International Criminal Justice Coordinator for No Peace without Justice*

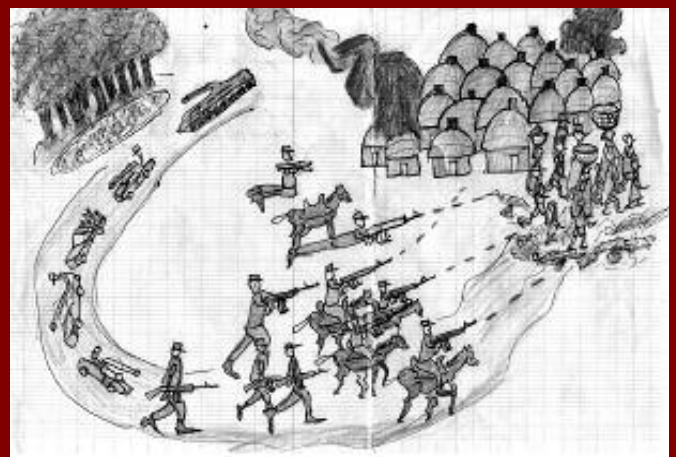
<sup>1</sup> CRC, Article 12(2)

<sup>2</sup> CRC, Article 39

<sup>3</sup> CRC Articles 37 and 40

<sup>4</sup> Preamble to the *Truth and Reconciliation Commission Report For the Children of Sierra Leone*, at page 7, available from [www.unicef.org/infobycountry/files/TRCCF9SeptFINAL.pdf](http://www.unicef.org/infobycountry/files/TRCCF9SeptFINAL.pdf).

<sup>5</sup> See article 12(2) of the Convention on the Rights of the Child



This boy was 8 when his village in Darfur was attacked in 2004. His drawing describes this attack, where Janjaweed forces (drawn on horse backs) and Sudanese forces (in vehicles and tanks) worked together to burn his village, kill many civilians (shown lying on the ground) and lead to the displacement of the survivors. (Waging Peace: [www.wagingpeace.info](http://www.wagingpeace.info))



# German investigation into FDLR atrocities

Dr. Ilona Auer-Frege, OENZ \*

In the years after the genocide against the Tutsi minority in Rwanda, the core group of the perpetrators called Interahamwe, who had fled into the Eastern part of the Democratic Republic of Congo (DRC), reorganized themselves into a new armed group, the Forces Démocratiques pour la Libération du Rwanda (FDLR). Since the late 1990's, the FDLR covered large parts of the Congolese provinces of North- and South Kivu, an area that contains large quantities of mineral resources like tin, gold, coltan or cassiterite.

In the first phase until 2001 the FDLR still intended to overthrow the new Rwandan government in Kigali by military means and launched numerous military attacks on Rwandan territory, which caused hundreds of deaths of Rwandese civilians and military, but could not destabilize the state.

In 2001, the FDLR changed their internal leadership and tried to establish a broader international network to organize financial and ideological support throughout sub-Saharan Africa, Europe, Canada and the United States. With Dr. Ignace Murwanashyaka from Mannheim / Germany, elected as the new president, the FDLR tried to establish a new image of a legitimate organization of Hutu politicians in exile who were fighting for their cause overseas, as the Rwandese government would not allow them to form a political movement in their home country.

Ignace Murwanashyaka was chosen as the new president, because he and his deputy Straton Musoni had both not been in Rwanda during the genocide, and they could influence a large network of Rwandese living in the Diaspora in Europe and North America. They would be able to convey the propaganda of the FDLR towards western governments, seeking international support and financial contributions from their networks.

At the same time the FDLR stepped up the military influence over the mining areas in the Kivu provinces. With approximately 6,000-10,000 armed and well trained and managed combatants, they were able to control the local markets, tax economic transactions and, most importantly, systematically organize the illegal export of mineral resources to global market. This business, often conducted in direct cooperation with parts of the Congolese national army, produced enough profit to finance the salaries and equipment of the militia and to substantially enrich their officers. Over the years, the political intentions became secondary to



Congo-Kivu, in a village exposed to FDLR exactions, Flickr / André Thiel

the financial interests of the FDLR leadership.

To enforce the compliance of the local population, the FDLR have always used extreme violence against civilians. They have looted, kidnapped, threatened and killed villagers who were not willing to cooperate. The systematic rape of thousands women and girls has also been used regularly to intimidate and destroy local communities, and has been documented by local human rights groups, such as Amnesty International, Human Rights Watch and the special rapporteurs to the UN Human Rights Council in Geneva.

The German Prosecution alleges that the FDLR leadership was responsible for crimes against humanity and war crimes, formulating the definition of the general political agenda and the military strategies of the FDLR on the ground. It also alleges that Ignace Murwanashyaka exerted considerable influence on the war in the region and could therefore have used that influence to stop the violence.

The International Criminal Court in the Hague, which has already initiated several trials against alleged perpetrators of war crimes from Central Africa like Thomas Lubanga, Jean Pierre Bemba or Joseph Kony, has never shown any intention to investigate the FDLR-leaders in Europe.

In 2008 and 2009, the German Federal General Attorney became aware of the growing international attention and pressure by the media, national and international human rights groups and chose the case against Murwanashyaka and Musoni

as first examples for the newly established national War Crimes Investigation Unit. Since then, the collection of intelligence has increased, and Murwanashyaka and Musoni were arrested in November 2009. They are now awaiting their trial in detention.

The arrest of the two leading FDLR figures has sent a clear signal to their troops in the DRC that their intention to be regarded as a legitimate political representation has failed, and that they have to expect international consequences for their repeated crimes against humanity. Since the arrest, the number of FDLR-fighters who were willing to demobilize has clearly increased.

Still, it has been difficult to find reliable evidence against the FDLR leadership in the DRC. A team of experts has researched over one year to establish a clearer picture of the international political, communication and finance structure of the militia. German investigators have questioned former FDLR-members who had been able to escape and demobilize. But any witness who was willing to share inside knowledge about the militia was immediately at risk for his personal safety. Former FDLR members, as well as victims of rape, attacks or assaults are very reluctant to talk about their experiences, given that the FDLR network and affiliates is still tight within the DRC and abroad.

Therefore the German investigators have had to establish new forms of witness protection to protect potential witnesses. Important information will only be shared, if the former combatant or the victim can be guaranteed to have full anonymity. Yet witnesses must not be influenced, receive gratifications or promises, i.e. the offer of political asylum in the country of the trial, so as not to diminish their credibility. The experience of the trials at the International Crime Tribunal for Rwanda in Arusha and at the ICC in the Hague have shown that finding and protecting witnesses without compromising them is one of the core challenges for any successful trial against suspected perpetrators or organizers of war crimes. ●

*\* Dr. Ilona Auer-Frege is the coordinator of the German Ecumenical Network for Central Africa OENZ, a network of Christian humanitarian agencies active in Rwanda, Burundi and the DRC. The OENZ is lobbying for peace and human rights in the Great Lakes Region and has played an active role in the investigation against the FDLR leadership. [www.oenz.de](http://www.oenz.de).*

# Could Kenya's Witness Protection Programme Work?

James Gondi and Judy Gitau\*

The issue of witness protection has become critical in Kenya following the majority decision taken by the International Criminal Court's Pre Trial Chamber II granting the Prosecutor's *proprio motu* request to commence investigations into crimes against humanity committed during the Kenya's post December 2007 election violence.<sup>1</sup> While the ICC has its own witness protection measures and programmes, the ICC Prosecutor's investigation in Kenya is likely to only prosecute those "most responsible," leaving further accountability to the national justice system.<sup>2</sup>

Fundamentally, the object of Kenyan witness protection law is to ensure that due administration of justice in criminal and related proceedings is not prejudiced by witnesses not being able to give evidence due to lack of protection from violent or other criminal recrimination.<sup>3</sup>

With the enactment of the Witness Protection Act Number 16 of 2006, Kenya made some headway in her fight against impunity. At the very least, in principle, witnesses to crimes of whatever nature would be able to give evidence in courts of law without fear of retribution. In practice however, this was not the case. This was because this fundamental legislation had numerous flaws.

Firstly the Witness Protection Act established the witness protection programme under the Attorney General's office. The independence of this programme was severely compromised as evidence against 'powerful' state officials was not assured. Witnesses could not hope to give evidence against state officials and be protected by the same officials. Worse still, the Attorney General was the sole determinant of whether or not an individual qualified to be granted security under the programme. There were no checks or balances to ensure persons deserving of the protection actually got it as opposed to the discretion of the Attorney General being the determining factor.

Another loophole in the said law was the lack of structural integrity in the proposed programme. Both the Multi Agency Task Team on the operationalization of the Act as well as the Advisory Board to the programme were so bloated that they

gave room for confidentiality breaches. Furthermore, these proposed teams included parties accused of gross human rights violations including crimes against humanity. For instance, these included the Police force and officials of the Ministry of Provincial Administration.

Funding of the very expensive programme was not well considered and thus was not to be drawn from the Nations' consolidated fund nor was it to benefit from donors. At a rudimentary level, the Act's definition of a Witness for the purposes of protection was so narrow that it would deny deserving persons security.

With political goodwill on one part, and pressure, criticism and provision of resources from the civil society, an attempt was made to remedy the legislation through the Witness Protection Amendment Bill 2010. The amended Witness Protection Act has expanded the meaning of 'Witness' to include a person who requires protection from a threat or risk that exists on account of being a crucial witness.

The amended Act creates a corporate entity, the Witness Protection Agency, to run the Witness protection programme and bestows on the director of this entity the responsibility/power to admit or include any person into the programme. The criteria for admission to the programme in the amendment becomes the prerogative of the Agency.

This Agency is granted power to control and supervise its staff, administer its funds and assets, receive any grants gifts donations or endowments and make legitimate disbursements, form associations, enter agreements, open bank accounts, collect analyze store and disseminate information. The programme also receives funding from the Country's consolidated fund.

Although the amendment Bill plugs most of the leaks in the original legislation, issues still arise with regard to the bloated advisory board, the unilateral decision making powers given to the Director on admission to the programme, the lack of structural measures to prevent interference with the programme's autonomy and a definition of 'witness' that does not envisage evidence against the state or in favour of accused persons.

With a sound law, and all things being equal, any Witness Protection Programme should not be reliant on political goodwill. Kenya's Witness Protection Agency as amended by the Bill though not perfect, stands in good stead in the fight against impunity. Indeed should the amendment bill become law, then witnesses, especially those of crimes related to the Post Election Violence 2007-2008 would breathe a sigh of relief. The true answer however to the question of whether or not Kenya's Witness Protection Programme will work can only be answered in time and with politics. ●

\* The writers work for the Kenyan Section of the International Commission of Jurists (ICJ-Kenya)

<sup>1</sup> The Situation in the Republic of Kenya, Pre Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in The Republic of Kenya, 31 March 2010. <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>

<sup>2</sup> ICC Prosecutor's Press Release, 30 September 2009, describing a three-pronged approach to justice in Kenya.

<sup>3</sup> UNDCP Witness protection Bill



This graffiti, found throughout the slum of Kibera, was put up during the post election violence in 2008. The artist, who calls himself solo7, while others were killing, looting, and rioting, risked his life to write these messages of peace, Kibera, Nairobi, Kenya, Flickr / Barbara Dziedzic

# Situation Under Analysis: Palestine

Raji Sourani, Palestinian Centre for Human Rights (PCHR)

More than 16 months after the end of the Israeli military offensive on the Gaza Strip that left over 1,400 Palestinians dead and over 5,300 injured, most of them civilians (at least 80% according to PCHR figures<sup>1</sup>), Palestinian victims are still waiting to see any justice done.

The complex political situation, terribly affected by the ongoing belligerent occupation of the Palestinian territory, appears to be an insurmountable obstacle on the way to justice: on the one hand, Palestinian courts do not have any jurisdiction over Israeli citizens; on the other hand, although Israel has a functioning legal system, when it comes to Palestinians the system is fundamentally biased, making the pursuit of justice impossible. The Israeli judicial system is clearly designed to make it *de facto* impossible for Palestinian victims, especially those from Gaza, to access the courts, and to shield Israelis suspected of committing crimes against Palestinians from any responsibility.<sup>2</sup>

The lack of judicial remedies unfortunately is not an isolated case regarding the victims of the last military offensive on the Gaza Strip: disregard for human rights and violations of international law have been a main feature of the 43 years occupation, as has been the related impunity granted to those responsible for the violations. Six years after the ICJ advisory opinion of July 2004,<sup>3</sup> which found that the construction of the Wall was in breach of, *inter alia*, of Articles 49 and 53 of the Geneva Convention and of Articles 46 and 52 of the Hague Regulations, international law has not been enforced and the continuous construction of the Wall is affecting tens of thousands, and potentially hundred of thousands of Palestinians residents in the West Bank.<sup>4</sup>

It is clear that if recourse to international justice is needed, the first option is the International Criminal Court (ICC) in The Hague. The Court indeed was created precisely for this purpose, to pursue accountability for the most serious crimes of international concern and to provide a forum to the victims deprived of an effective judicial remedy by the incapacity or unwillingness of the national States.

The high values that the international community wanted to be represented by the International Criminal Court are clearly stated in the Preamble of the Rome Statute. There it is affirmed that "such grave crimes threaten the peace, security and well-being of the world" and States declared themselves "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to their prevention" and "resolved to guarantee lasting respect for and the enforcement of international justice".

It is no surprise that the ICC was immediately regarded as the natural forum for the Palestinian victims, in particular to investigate the

allegations of serious violations of international human rights and humanitarian law, including grave breaches of the Geneva Conventions, committed by the Israeli forces during the military attack on the Gaza Strip.

On 22 January 2009, immediately after the end of the offensive, the Palestinian Authority submitted a declaration to the International Criminal Court under Article 12(3) or the Rome Statute recognizing the jurisdiction of the Court.

Hundreds of Palestinian victims, individually or by means of NGOs, have brought complaints and submitted information to the Office of the Prosecutor of the ICC. As of January 2010, the Office acknowledged receipt of



Displaced families, their homes were destroyed by Israeli forces during a three-week conflict that ended on 18 January 2009 © Erica Silverman/IRIN

388 "communications" in relation to alleged crimes committed in Gaza in December 2008 and January 2009.<sup>5</sup> A huge number of documents have been filed by several organizations and legal experts in order to provide the Office of the Prosecutor of the ICC with the necessary legal and factual information needed to make a decision on the opening of an investigation. Reports on the alleged crimes have been issued by a number of national and international NGOs and a 254-page-report was officially submitted by the independent fact finding mission established by the Arab League and presided over by Professor John Dugard.

In September 2009, the UN Fact Finding Mission on the Gaza Conflict, appointed by the Human Rights Council, submitted its final report (the 'Goldstone Report'), which was endorsed by the UN General Assembly, the Human Rights Council and the European Parliament. The report considered that what took place in Gaza during the period between 27 December 2008 and 18 January 2009 "was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population" (para. 1690). The Mission found evidence that war crimes and crimes against humanity have been committed by the Israeli military forces and noted that "whatever violations of interna-

tional humanitarian and human rights law may have been committed, the systematic and deliberate nature of the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations."

In the light of the gravity of the violations of international human rights and humanitarian law committed against the Palestinian civilian population, the recommendations of the Report stressed the need for accountability measures. In particular, the Mission recommended the involvement of the UN Security Council in order to monitor and report on any domestic proceedings undertaken by the State of Israel in relation to the investigations into the alleged crimes and that the report be formally submitted to the Prosecutor of the ICC.

It is worth recalling the words of the Goldstone Report: "With reference to the declaration under article 12(3) received by the Office of the Prosecutor of the ICC from the Government of Palestine, the mission considers that accountability for victims and the interests for peace and justice in the region require that the legal determination should be made by the Prosecutor as expeditiously as possible" (para. 1767).

Today, 8 years after the Rome Statute entered into force, we have an historical opportunity: the Review Conference which is taking place in Kampala provides the international community with the possibility of addressing the serious problems of ineffectiveness that international justice is still facing. It is necessary to return to the original idea, to the very foundation of the ICC: a court meant to fill in the gaps, the black holes of international justice.

A court designed as a complement to national authorities in the struggle to ensure accountability for the most serious crimes of concern of the international community as a whole, to seek justice for the victims of these crimes which, as the victims of Gaza today, are often deprived of any judicial remedy at the domestic level. ●

<sup>1</sup> See PCHR report '23 Days of War, 928 Days of Closure', December 2009, available at: [www.pchrgaza.org](http://www.pchrgaza.org).

<sup>2</sup> See PCHR report 'Genuinely unwilling', February 2010, available at: [www.pchrgaza.org](http://www.pchrgaza.org).

<sup>3</sup> See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion.

(International Court of Justice, 9 July 2004), available at: [www.icj-cij.org](http://www.icj-cij.org).

<sup>4</sup> See PCHR Report 'Implementation not impunity: International Humanitarian law still not being applied in the OPT, July 2005, available at: [www.pchrgaza.org](http://www.pchrgaza.org).

<sup>5</sup> See the Communication of the Office of the Prosecutor to the Deputy High Commissioner for Human Rights, dated 12 January 2010.

# The ICC's impact on Victims & Affected Communities

Gaëlle Carayon, REDRESS

Eight years after the entry into force of the Rome Statute, the Victims' Rights Working Group (VRWG) has undertaken a consultation amongst its membership to identify what the impact of the ICC has been on victims and affected communities.

It distributed a questionnaire to gather the views of victims and those working directly with them, compiling a report on the "impact of the Rome Statute system on victims and affected communities".

Victims have different views and perspectives, and a significant factor influencing these is the amount of information and contact they have had with the Court through its outreach work. To some, the ICC has had an important impact, or has the potential to; its creation and initiatives are welcome. However, overwhelmingly responses have indicated that more needs to be done in many areas. The following issues were highlighted by respondents:

## The importance of outreach for meaningful impact

Victims have recognised the efforts by the Court to explain its mandate, role and limitations. Indeed, victims' communities have acknowledged that where outreach has taken place, there has been increased knowledge about the Court. Nevertheless, they indicate that "the majority of the population is not informed about the ICC [and that] in urban areas there are informed persons but outreach in rural areas remains very weak." Thus victims call for outreach activities to be increased with specific emphasis on those who are most difficult to reach including women, children, elderly and disabled.

## The wider impact of the ICC on victims

For many, it is still felt that until a conviction is handed down, and inctees are arrested, the most significant impact of the ICC is yet to be seen. Indeed, victims have highlighted frustrations due to cumbersome procedures to participate in proceedings and a slow and remote process. Unexecuted warrants against suspects have reinforced the feeling that "the existence of the ICC [...] gave hope but it will need to become effective and manage to arrest those who commit the crimes" to have a real impact. Thus victims are call-

ing for States to ensure high level cooperation on executing arrest warrants, as well as for *in situ* hearings to take place whenever feasible.

## Direct impact of ICC on victims

The choice of where to investigate and who to prosecute is sometimes perceived as biased and the fact that the process takes time adds to frustrations. Victims' organisations have called for more clarity on the criteria applied in determining admissibility of situations and selecting cases and charges.

For victims who have been able to apply to participate in proceedings, the ICC has had a real and specific meaning in enabling direct access to justice. Despite application procedures that could be more accessible and effective, victims who participate have generally praised the fact that "the views and concerns of victims have been heard."

Direct beneficiaries of the Trust Fund for Victims have recognised that "the implementation of activities funded developed hope, trust, confidence and a sense of belonging by the victims." However, many who have not had the chance to benefit directly from the Trust Fund's projects have been dispirited, fearing that their chance might have been lost. It is suggested that in order to maximise the impact of the Fund, it should ensure more transparency and develop a good communications strategy.



VRWG report, "The impact of the Rome Statute system on victims and affected communities", April 2010, available at [www.redress.org/downloads/publications/Stocktakingreport2010.pdf](http://www.redress.org/downloads/publications/Stocktakingreport2010.pdf)

## The ICC's impact on peace

Peace and justice are generally pitted against each other during peace negotiations, trumping discussions about victims' rights to a remedy and reparation when they have suffered serious human rights abuses. However, victims also raise (particularly in northern Uganda and Ituri, DRC) the fact that indictments and arrests have a clear deterrent effect. In fact they emphasise the need to issue arrest warrants more systematically, and to galvanise support on arrests to maximise impact on peace.

## Impact on child recruitment and gender violence

The first trials have enabled child soldiering to be recognised as unlawful. While this recognition does not necessarily mean that the practice has stopped, it is less widespread and openly committed in some areas. The ICC's prosecution of gender crimes, has reportedly not reduced gender violence with any significance, though a more singular approach in Central African Republic may show more results. Gender specific outreach by the ICC has been praised but further efforts are called for as means of raising their profile and lowering their stigma within communities, thereby also maximising the potential deterrent effect. Child specific outreach should also be developed, including the development of child-friendly materials and tools that can engage children in a protective and enabling environment.

## Impact on victims' rights at national level

States parties to the Rome Statute are called upon to ensure they implement its provisions making genocide, war crimes and crimes against humanity punishable under national law. Some respondents have felt that the momentum surrounding the ICC, including through outreach initiatives, have helped shed light on victims' right to a remedy and reparation; and have helped raise the need for accountability and victim sensitive mechanisms at national level. In this light, States are urged to ensure that national implementing legislation gives effect to victims' right to a remedy and reparation in accordance with the 2005 UN Basic Principles and Guidelines. ●

### Working Group affiliated organisations 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  
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