

A C C E S S

Victims' rights before the International Criminal Court

Victims' Rights Working Group Bulletin • Issue 20 • Spring 2012

In this bulletin:

| | |
|---|-----|
| The ICC's first verdict, a half-hearted victory for victims | 1-2 |
| Victim testifies publicly in the Bemba trial: "I lost my dignity" | 1-2 |
| ICC Victim's Legal Aid under Threat | 3 |
| Increased use of Intermediaries: Increased discontent | 4-5 |
| The ICC under scrutiny after first guilty verdict: "How can we ensure meaningful reparation?" | 5 |
| Reparations for Lubanga victims: the submissions made so far | 6-7 |
| Challenges for victims' engagement with the ICC in Kenya | 8 |
| VRWG co-organises Victims' Forum in Banjul | 9 |
| Collective victims' applications before the ICC: a note of caution | 10 |
| Interview with Silke Sudzinsky, Counsel for Civil Parties before the ECCC | 11 |
| Prosecution of Libyan atrocities: what scope for the ICC | 12 |

The ICC's first verdict, a half-hearted victory for victims

Nicholas Damski

On 14 March 2012 the ICC made history by delivering its first verdict and finding Thomas Lubanga, 51, guilty of the charges of enlisting and conscripting children under the age of 15 and using them to actively participate in hostilities in Ituri district, eastern Democratic Republic of Congo (DRC) from 1 September 2002 to 13 August 2003.¹ Lubanga was the first person charged by the ICC and was transferred to the Court on 17 March 2006. The long-awaited judgment is the culmination of years of legal proceedings that have been stayed on more than one occasion.

The case has set a number of precedents in international criminal law, none perhaps as significant as the extent of victims' contribution. The ICC's revolutionary emphasis on victims' participation marks the first time that victims have been allowed to voice their views and concerns directly in legal



Thomas Lubanga Dyilo awaits verdict at the ICC, on charges of conscripting and enlisting children under the age of 15 and using them to participate in hostilities. © ICC-CPI/ Evert-Jan Daniel/ANP

...continued on page 2

Victim testifies publicly in the Bemba trial: "I lost my dignity"

On 1 May 2012, victims participating in the proceedings began to testify in person in the *Bemba* case. Taking Pulchérie Makian-dakama, the first victim appearing before the Chamber, testified without the usual protection measures, such as face and voice distortion. Pulchérie was 20 years old at the time of the events. She recalled how soldiers believed to be from Bemba's private army, overran her village and "grabbed my pants and undressed me...before two of them began to rape me".

Asked why she had refused Court measures to protect her identity, she replied: "I cannot ask for my voice or image to be distorted. I want it to be natural, be myself and say before the Judges and before the whole world what I suffered". When her counsel asked her what she was expecting from the ICC, she replied: "I am a human being. Judges need to pay attention to my situation. Judges have to rule on this case and give me justice. This is all I want from the ICC."

Pulcherie is one of only five victims to have been allowed to participate in person before the Court in this case. Three victims were granted the right to express their views and concerns and two victims the right to present evidence.

The Chamber recalled that victims, not being parties to the proceedings, have no automatic right to testify.¹ The judges explained that victims authorised to express their views and concerns can submit *observations* that may eventually assist the Chamber, but that these *observations* will not be considered as evidence. Indeed, when victims present *evidence*, their testimony will have a greater weight and will be considered by the judges in their determination of the guilt or innocence of the accused. As a consequence, the criteria applied to grant a victim's request to present evidence will be stricter than for authorising

...continued on page 2

The ICC's first verdict, a half-hearted victory for victims ... continued from page 1

proceedings, rather than only as witnesses for the prosecution. A total of 129 victims were represented at trial, each authorised, via their lawyer, to examine witnesses and evidence when their personal interests were affected. This is also the very first time that an international criminal court or tribunal will have the power to make reparations orders for victims.

Very early on, the Chamber noted the importance of guaranteeing the safety of victims and applicants, especially those living in areas of ongoing conflict. The Chamber recognised that potential victim-participants may require protection, even before they formally contribute to legal proceedings.² The Court also decided to address inadequate protection measures for witnesses, for instance, by restricting numbers in the courtroom to a bare minimum and limiting direct confrontation with the accused. These measures have now been established as standard practice for all child testimonies before the ICC.

In the absence of specific mention of gender crimes in the prosecution's charges, victims participating in the trial requested that the original charges be re-characterised to take into account sexual slavery and cruel and inhuman treatment, to reflect information concerning sexual violence against girl child soldiers which came out in the course of the trial.³ However, this ultimately was not allowed.⁴ As a result, despite the bench recognising that there was substantial evidence of sexual violence, only the evidence of child recruitment was considered in the judgment of 14 March 2012.

The judgment criticised the prosecution's use of intermediaries - non-court local actors tasked with such responsibilities as locating and communicating with potential victims. The controversial role they were alleged to have played led to specific hearings to address allegations made by the Defence that they might have influenced witnesses. The judges agreed

that the Prosecutor had failed to monitor the work of intermediaries, three of whom were eventually found to have potentially manipulated witnesses into giving false evidence. As a result, evidence derived from the testimonies of ten witnesses and three victims was completely disregarded by the Chamber and these particular victims appearing as witnesses were stripped of their right to participate in proceedings.

The Lubanga trial has exposed a number of teething problems for the ICC and the Court has lessons to learn to ensure that victims can participate meaningfully and that a greater scope of crimes can be considered in future judgments. Despite these shortcomings, the Lubanga verdict is a symbolic victory for all child victims forced to fight in DRC, even if most of them have not had the opportunity to contribute to the trial. It remains to be seen how former child soldiers, most of whom have become adults since the events in question, will react to the Court's approach to sentencing and reparations. What is certain however is that for all victims, the guilty verdict marks the closing of one chapter and the beginning of another, on the long road to achieving justice. ●

¹ Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842.

² Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-11198.

³ *Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour*, 22 May 2009, ICC-01/04-01/06-18918.

⁴ Judgment on the appeals against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205.

Victim testifies publicly in the Bemba trial ... continued from page 1

victims to present views and concerns. The criteria applied in the *Bemba* case included determining whether the evidence would "make a genuine contribution to the ascertainment of the truth" or "bring to light substantial new information which is relevant to issues which the Chamber must consider in the assessment of the charges".²

Judge Steiner dissented and held that the above criteria imposed an "unreasonable restriction" on victims' participation.³ She indicated that the criteria adopted by the majority had no legal basis and that the Chamber's fixation on the need to avoid hypothetical undue delays prejudicing the defence's rights was not founded on the facts, particularly considering that only a handful of victims had applied to be heard despite the total number of victims admitted to participate in the case reaching almost 3,000.

In the end, Pulchérie is one of only two victims who were granted the right to present evidence in the *Bemba* case. Like many victims participating in ICC proceedings, recognition by a Court of her humanity and suffering is a key step towards some form of rehabilitation. Her testimony acts as a reminder of how important it is for victims to have their voice heard, and for the ICC to understand the long lasting consequences the crimes in its mandate have on victims. As Pulchérie put it, "[i]n my community I'm no longer considered a human person. [...] I was a human being, but I was treated like an animal. [...] Before these events I was a woman with dignity." ●



Victims testifying before the ICC will have the chance to speak for countless others, such as these displaced persons in Nana Bakassa, CAR. © Humanitarian and Development Partnership Team/flickr

¹ Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138, <http://www.icc-cpi.int/iccdocs/doc/doc1341474.pdf>

² These arguments were largely established in the *Katanga* case. Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, ICC-01/04-01/07-2288, <http://www.icc-cpi.int/iccdocs/doc/doc909021.pdf>

³ Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision ICC-01/05-01/08-2138, 23 February 2011, ICC-01/05-01/08-2140.

ICC Victims Legal Aid under Threat?

Paulina Vega, *International Federation for Human Rights (FIDH)*, Carla Ferstman, *REDRESS*, Elizabeth M. Evenson, *Human Rights Watch*

In December 2011, the ICC Assembly of States Parties (ASP) requested savings in the budget of the Court as a measure to cope with the international financial crisis. It specifically identified legal aid for both victims and defence as a "cost driver". The original request from the Court for legal aid was 7.9 million euros (including 3.9 million euros to cover legal aid for victims). The Registry underscored that this would only cover what was strictly necessary to ensure adequate, quality and meaningful representation.

States nevertheless called for 1.5 million euros to be cut from the legal aid envelope. These reductions will potentially affect counsels' ability to travel to inform and take instructions from victims about ongoing proceedings and may make it difficult for counsel to commit to represent victims in a context where their remuneration is under threat.

Following the ASP session, the ICC Registry proposed reforms to the legal aid scheme in order to meet the budget reductions set by the ASP. Civil society and lawyers expressed concerns about some aspects of the Registry's proposal, such as travel for counsel and team composition, which could deprive victims of effective legal representation and participation in proceedings.¹ They also objected to the way the consultation about the reform had been organised, specifically the limited time for consideration of the serious changes proposed. While some decisions were already taken by states parties in March 2012, the consultation process on the reforms has been extended to June 2012.

It is crucial to reiterate the need for independent legal representation of victims before the Court. Any review should primarily be motivated by improving the effectiveness of the legal aid system, not just cost savings.

Concerns

Several recent developments already give rise to concerns regarding the state of victims' representation. On 29 February 2012, the victims' legal representative in the *Ruto and Sang* (Kenya) case complained about insufficient funds to undertake a mission to inform victims about the case and the outcome of the decision confirming the charges. Furthermore, on 9 March, Single Judge Ekaterina Trendafilova contended that the role of counsel appointed to represent victims in the confirmation of charges proceedings does not involve subsequently informing victims of the outcome despite Rule 92(6), which states that victims have a right to be notified of decisions in relation to proceedings in which they have participated.

On 19 and 23 March 2012, the victims' legal representatives in both cases in the Kenya situation (*Ruto and Sang*, *Muthaura and Kenyatta*) filed applications revealing that their mandate had been terminated by the Court. While their mandate was limited in duration, this abrupt and unprecedented

termination of appointment did not take into account the need for representation in pending appellate proceedings, protection and sustained legal assistance to victims. The Appeals Chamber ruled that there should be no gap in victims' legal representation, but indicated that the Registry may decide not to pay legal aid during this phase.² The decision denies victims the ability to raise protection or any other legal issues with the Court, pending the commencement of trial. Victims have effectively been left uninformed and by the wayside until

a new decision establishes a new legal aid mandate. It is critical that the Trial Chamber takes a decision on legal representation of victims and renews legal aid in the Kenya cases without further delay.

In addition, in the *Katanga and Ngudjolo* case, two victims' filings revealed certain Registry decisions which ignored basic rights associated to participation in the proceedings.³ The Registry determined that the relevant stage of the proceeding did not justify a proposed mission and that a field legal assistant was sufficiently qualified to undertake the proposed tasks. It

thus found that it was not necessary for counsel to travel, undermining counsel's independence, enshrined in the Code of Conduct for counsel.⁴ The Registry's approach was later upheld by the Trial Chamber who went further by stating that participating victims did not have an unqualified right to meet their legal representative in person at the expense of the Court. This decision strikingly contravenes basic practice regarding client-counsel relationships and the duty for counsel to take instructions from his/her clients. It is difficult to see how it will be possible for counsel to ensure adequate, quality and meaningful representation of victims without meeting with them in person.

While recognising the challenges of making do with limited resources, there is a need to conduct adequate consultations with counsel currently participating in proceedings and to genuinely involve the legal profession in the discussions around the reform of the legal aid scheme, to ensure it remains effective. Legal aid for victims should not be reduced prior to a review of the entire system and an appreciation of the consequences on victims' rights before the Court. ●



An effective system of legal representation is essential if victim participation is to be meaningful. © Julien Harnois/Flickr

¹ CICC discussion paper on the review of the ICC legal aid system: recommendations and comments - January 2012

² Decision on the "Application of the Victims' Representative pursuant to Article 83 of the Regulations", 23 April 2012, ICC-01/09-01/11-409; Decision on the "Notification regarding the Legal Representation of Participating Victims in the Appeal Proceedings", 23 April 2012, ICC-01/09-02/11-416.

³ "Demande d'examen d'une décision du Greffier relative à une demande de mission du représentant légal", 6 April 2012, ICC-01/04-01/07-3268 and Demande complémentaire à la demande d'examen d'une décision du Greffier relative à une demande de mission du représentant légal (no. ICC-01/04-01/07-3268), 13 April 2012, ICC-01/04-01/07-3269.

⁴ Article 6 of the Code of Professional Conduct for counsel.

Increased use of intermediaries : increased discontent

Gaëlle Carayon, *REDRESS*

The *Lubanga* verdict openly criticised the Office of the Prosecutor for its over-reliance on “intermediaries” and lack of supervision of their activities. The testimonies of 10 witnesses and three victims were discarded because of their perceived lack of credibility. The Bench devoted over 100 pages of its judgment to the issue of intermediaries.

While at the policy level the need to clarify the role, obligations and rights of so-called “intermediaries” had long been on the agenda, the *Lubanga* trial brought the issue to centre stage.



Despite the Court's outreach efforts, intermediaries still play a crucial role bridging the gap between the Court and victims. Outreach session in Mahagi, Ituri. 24 September 2010. © ICC-CPI

Local human rights activists, NGOs, and others have since the start of the Court's activities, acted as a link between the Court and victims or witnesses. The practice is thus not new. Without field actors, the Court would be unlikely to fulfil its function and implement its mandate. Faced with security issues and an unfamiliar local context, Court staff are unable to reach witnesses and victims without the assistance of local actors who provide introductions, orientation, access, advice, translation, and countless other types of support. However, the lack of clear guidelines on how the Court manages its interactions and relationships with intermediaries has had a negative impact on both the intermediaries' ability to carry out their assistance role and the Court's ability to oversee the work it entrusts to intermediaries. At the time of writing, the Court's *Guidelines* on intermediaries, a major undertaking that aims to address past shortcomings, remain in draft form.

The practice of using intermediaries in the field has grown and is likely to continue to grow, given the resource and other constraints faced by the Court. Intermediaries have also expressed their discontent with the functioning and practicalities of their relationships with various Court organs. Working in difficult conditions, facing threats to themselves and their families, intermediaries have called on the Court to recognise their role, and provide the necessary protection that should come with it.

They also called for reimbursement of expenses and remuneration for the activities undertaken on behalf of the Court.

In many cases, intermediaries will undertake tasks with no pay, no compensation for their time and no protection in case something goes wrong, all in the hope of seeing some justice done.

Emphasis has been placed on the need to “manage” intermediaries, and much attention has been paid to some “rogue” individuals. But, the other side of the story is the countless individuals and grassroots groups providing invaluable support.

We asked intermediaries who worked with the Court about their views on why they think issues arose in the *Lubanga* case and what they think should be done to remedy some of the shortcomings in relation to how the Court interacts with intermediaries.

An intermediary from Ituri, explained that, given the tense climate in situation countries, the Court faces difficulties in accessing places and was unfamiliar with the socio-political context. It did not understand the complicated war-time alliances, and did not grasp the subtleties of “who was close to who” in a toxic environment nor “who could do what”, etc. He added that most people on the ground were reluctant to engage with the Court directly and so the Court used local actors to bridge the gap, as they were already part of the community and able to move around without drawing attention.

Pressure from communities

When asked what he thought were the reasons behind the controversial role played by intermediaries in the *Lubanga* case, he indicated that the Court and the Prosecution in particular, may have underestimated the influence that supporters of the accused could have on those willing to testify. He suggested that “this may be what happened in the *Lubanga* case”, adding that many former child soldiers came from the same communities as the accused, along with NGOs on which the OTP relied on to contact witnesses. He also suggested there might have been a lack of due diligence by the Court, who placed its trust in persons from civil society “without assessing first who was who, who is close to whom, who is doing what and who supports which cause”. Another intermediary in DRC echoed this position, adding that when the Court arrived in DRC, “it did not know how to distinguish between reliable and non-reliable information”. In the context of post-conflict countries, members of the local communities are often both victims and perpetrators, a fact that needs to be considered when gathering evidence.

Training and guidance are needed

Intermediaries have stressed that they often lacked the necessary information on the work of the Court and the standards they were expected to abide by. An intermediary who also assisted victims in Ituri, gave us an example: “We would be

Increased use of intermediaries : increased discontentcontinued from page 4

asked to travel with victims to meet with Court officials. Victims would often arrive with no food and only the clothes they were wearing and then be asked to stay for more than a day.[...] Intermediaries would sometimes help the victim to buy food or a change of clothes, to provide more humane conditions." She feels that this was used to suggest they were "buying witnesses" and regrets the lack of guidance from the Court as to what was appropriate in the context of the ICC's legal proceedings.

In terms of guidance and training, intermediaries have indicated that it is often the intermediaries who approach victims, travel with them and explain the Court's mission and how to fill in a request for participation and reparation. Despite good intentions however, many intermediaries are not confident about the functioning of the Court and its processes.

"The Court did not care about our protection"

The other sticking point is protection. One intermediary interviewed stated that he engaged with the Court and accepted the risks because he wanted to do "noble work". However, his overall impression was that the Court did not care about his security. "It was not their problem", he added. Asked if the Court gave him guidelines on how to protect himself, he replied that "they only gave general guidelines, such as to contact the local authorities, the local police". In a country where the police have been partly blamed for some of the abuses committed and criticised for its lack of efficiency and corruption, he won-

dered how these people were supposed to protect him. Since he started work with the ICC, his house has been broken into and while the individuals responsible were arrested, they have since escaped. He calls for intermediaries to be given clearer guidelines on what to do in case of risks or threats.

Can Guidelines help?

Since 2009, Draft Guidelines have been elaborated by the Court to clarify how it works with intermediaries, and the role, obligations and rights of both the Court and intermediaries. These will likely play a positive role in the future though it is worrying and unfortunate that intermediaries we consulted indicated they had not been involved in the drafting process. Nevertheless, they called for the Court and States to be proactive in adopting the Guidelines. While acknowledging the difficult financial situation State Parties to the ICC face at home, they underlined that this is a crucial issue that merits their attention: "These are human lives we are talking about!"

As the Guidelines are now awaiting adoption by State Parties, it remains to be seen whether they will have a real impact in practice. It is unlikely that the Guidelines will be effective if they are not matched with the resources to ensure their implementation. Considering the risks that this lack of clarity poses to the fairness of trial proceedings, one could argue this would be a timely investment in the future of the Court. ●

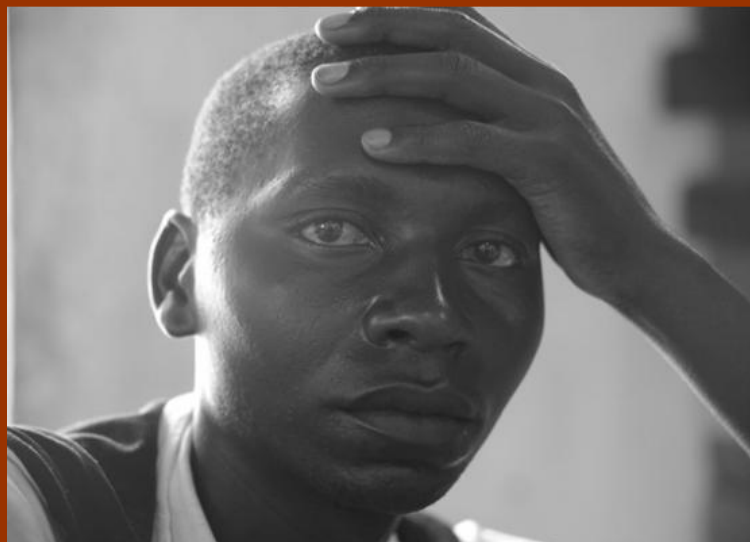
The ICC under scrutiny after first guilty verdict: "How can we ensure meaningful reparation?"

Jean Marc Lombaku, SYCOVI

Following the first guilty verdict, the ICC Rome Statute now faces its first major evaluation - an evaluation that will be as much about its ongoing fight against the commission of crimes against humanity, war crimes and genocide, as its ability to implement measures that will provide meaningful reparation to affected communities.

The Rome Statute provides that reparations awarded by the ICC may take the form of restitution, compensation and rehabilitation though this is not an exhaustive list. The real question however will be whether the ICC can establish effective mechanisms that meet the requirements of responsible victimology, whilst examining the very real socio economic problem of re-establishing social order in the lives of victims and affected communities thus providing satisfaction to them.

The various organs responsible for providing reparation to victims must ensure that awards proportionally reflect the huge diversity of harms, be it individually or collectively. Indeed, one needs look no further than the murders, rapes and assaults committed individually and collectively against women and girls, sexual slavery, debilitating injuries, massive displacement and endemic diseases affecting whole communities, to get a sense of the scale of the atrocities. Infrastructures that form the very underpinnings of the socio-economic fabric have been completely destroyed through the looting and burning of houses, whole villages, schools, hospitals, churches, monuments, national parks and other buildings that play a fundamental role in the lives of a popu-



A victim and now adult, of forcible child recruitment in DRC. © Guy Oliver/IRIN

lation. Together with the long-term effects of trauma and the repercussions that plague the lives of survivors, one begins to get an idea of what victims and their loved ones must live with for the rest of their lives.

Against this horrific backdrop, it is clear that whatever form the ICC's reparations take, nothing can ever compensate the material and human cost of the conflict in Ituri. Given the limited scope of charges brought against the accused in the ICC's very first guilty verdict, it is unlikely that the Court's first foray into granting reparations will even come close. ●

Reparations for Lubanga victims : The submissions made so far

Gaëlle Carayon

The *Lubanga* judgment, pronounced on 14 March 2012, paves the way for the ICC's first ever reparation process. While numerous suggestions have been made as to what the "reparation phase" will - or should - entail and lead to, many questions still remain unanswered. What principles will the Chamber apply? What form will reparations take? At the time of writing, the Chamber has yet to indicate the approach it will take but has already received numerous submissions on what process and principles should be applied. This article tries to summarise some of the submissions made so far.¹

While the Court is to establish reparation principles according to its Statute², the judges have decided that these should be established on a case-to-case basis by each Chamber. Trial Chamber I has specifically called for observations on the principles to be applied in the *Lubanga* case. In light of this, the Trust Fund for Victims (TFV), submitted that while the principles should encompass how to conduct reparation proceedings, they should also address underlying questions related to the right of victims of international crimes to reparation.³ The TFV identified the need for principles to ensure, *inter alia*, accessible, effective and meaningful reparations proceedings through a consultative process, allowing for victim involvement at all stages of the procedure and to include principles on non-discrimination, non-stigmatisation and effective access for women and girl victims. The Fund also suggested that principles on eligibility of victims and standard of proof, the material and symbolic nature of awards and the operational dimension of implementing a reparation award, be established.

The Chamber will also have to determine who is a victim for the purpose of reparation. The Prosecutor has suggested that "the class of persons entitled to participate in reparation proceedings and seek reparations may exceed the smaller class of persons directly or indirectly victimised by the specific crimes covered by the conviction".⁴ According to the Prosecutor, all victims of the attacks perpetrated by the UPC could apply as victims in the reparations phase.⁵ Such an interpretation is also envisaged by the Registry, which suggests that the part of the reparation awards drawn from the Trust Fund, as opposed to the convicted person, could be used to benefit a broader group of victims than those fulfilling the criteria for participation in the case.⁶ The Trust Fund also argued in favour of a flexible approach in that regard.⁷

With regard to assessing the harm resulting from child conscription, the Registry, Prosecutor and Trust Fund for Victims all agreed that an expert or a team of experts should be appointed.

Next, the Chamber will need to decide whether and how to identify victims entitled to reparations. While the Registry suggested that a scoping assessment of potentially eligible beneficiaries be undertaken⁸, the possibility for the Chamber to award reparations to victims who have not sent an application was also recognised. Indeed, as stressed by the Trust Fund, only a few victims have engaged with the Court so far, despite estimates that up to 2,900 children may have been associated with the UPC.⁹ The Fund added that, while possible, identification of individual victims would be very resource-intensive and may not be practically viable, particularly in light of the challenges raised by the lack of credible data available and



The ICC must consider the most appropriate reparations to help victims and be particularly sensitive to the issue of re-stigmatisation. © ICRC/W. Lembryk/cd-e-00562

other factors, such as the fact that not all children went through demobilisation centres.¹⁰

A relaxed standard of proof was also called for, with the Prosecutor suggesting a standard of "balance of probabilities" and the OPCV a "prima facie" standard based on presumptions and circumstantial evidence. Such an approach was also supported by the Registry with the caveat that a more rigorous verification may be required for victims seeking to benefit from more resource-intensive forms of reparation. The overall need to reduce the burden placed on victims was underlined.¹¹

Turning to the forms of reparation that the Chamber may wish to award, all submissions highlighted that while the Statute only refers to restitution, compensation and rehabilitation, this list was not exhaustive and other forms of reparations may be envisaged, such as satisfaction and guarantees of non-repetition.¹²

The Registry considered the various forms of reparation in turn, according to their resource implications. On the one hand, it considered that moral reparations (also known as forms of 'satisfaction') such as an apology, civil education initiatives, memorials, commemoration and public recognition could be made and that the judgment could be used as a form of reparation accompanied with public information initiatives. On the other hand, it indicated that compensation may not be the most appropriate form of reparation in the present case as

money may not reach victims and women in particular may not have control on how the money will be used.¹³ Stressing that rehabilitation may potentially alleviate the harm suffered by child soldiers, the Registry expressed concerns at cost implications and suggested educational and vocational training scholarships or the provision of teaching and training personnel as other possible options. The TFV found that restitution was unlikely to be an effective remedy for victims in this case and that compensation may not be the most appropriate form of reparations, and may in fact impede reintegration.¹⁴ Rehabilitation, satisfaction and guarantees of non-repetition were thus proposed as more suitable alternatives, though other means of enabling former child soldiers access to funds could still be employed, such as access to microcredit.

While Lubanga's indigence has been acknowledged, submissions nevertheless highlighted that some form of symbolic reparations may still be ordered against him.¹⁵ This position was supported by the TFV who stressed the importance of reparations being ordered *against the accused*, even if in practice, the funds will be advanced by the TFV.¹⁶

According to Rule 97 of the Rules of Procedure and Evidence, the Chamber may order individual or collective reparations, or both. Submissions from participating victims suggested that collective reparations may be awarded but primarily *in addition* to individual awards, given that most consulted victims had expressed a wish to receive monetary compensation (though victims were also largely in favour of reparation taking the form of outreach campaigns to counter the stigmatisation faced by former child soldiers, including girls). In contrast, the Trust Fund warned that individual awards may actually reinforce stigma against victims.¹⁷ The Fund therefore advised against an individual approach towards reparations and suggested instead that collective or community reparations may assist in reconciliation efforts, while maximising the use of the limited resources available to fund reparations.¹⁸



Child soldiers often suffer physical and psychological harm for the rest of their lives. © ICRC/W.Lembryk/cd-e-00387

Aside from the considerations above, and as indicated by the TFV, the Chamber will need to bear in mind additional factors when deciding on reparations, including the risk of stigmatisation of victims and the potential for further conflict, resulting from the narrow scope of charges in the case and the ethnic dimension of the conflict in Ituri. Ensuring that the reparation process is truly reparative will require not only consultation but

also involvement of victims in the design and process leading to reparation. This aspect was recognised by both the Registry and the TFV, which stressed the need to include other members of affected communities in the reparation process and to empower victims throughout, to ensure that reparations respond to the harm suffered, are meaningful, locally relevant and culturally appropriate.¹⁹ This aspect will be important in ensuring that reparations respond to the particularities of women's vulnerability and roles within their communities.²⁰

Another consequence of Lubanga's indigence is that the Trust Fund is likely to play a role, not only as implementer of reparation awards but also as a contributor in complementing reparation awards. In this regard, the views of the Registry and the Trust Fund differ as to whether the Chamber could *order* the Fund to draw on its other resources to complement reparation awards (Registry's view), as opposed to it being a discretionary decision of the Fund's Board (TFV's view).

A remaining issue will be whether the execution of any reparation awards made by the Chamber should be suspended until after the conviction becomes final. Indeed, conviction would only become final following appellate proceedings, which may take months, if not years, if the experience of other tribunals is anything to go by. While both the Registry and the TFV are in favour of suspending implementation until conviction is final²¹, OPCV has argued that this would not be appropriate in the current case, given that funds for reparation were unlikely to be provided by T.Lubanga.²²

Whether the Court will "get it right" remains to be seen. However, the need to balance repairing the harm suffered by victims with the limited resources available to do so has been a pervasive theme in all submissions. The possibility of *in situ* hearings has surfaced and may help to bring the process closer to the victims and to make it more relevant to them²³, and may thereby also have a reparative value. With such high expectations on the ground, the pressure is on for the Court to deliver. ●

¹ This article does not purport to provide a comprehensive summary of all filings made in relation to reparation in the case but rather to focus on some of the main points raised as at 1 May 2012.

² Article 75 of the ICC Rome Statute.

³ Trust Fund for Victims' observations on reparations in response to the scheduling order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, paras 5-95.

⁴ Prosecution's submission on the principles and procedures to be applied in reparation, 18 April 2012, ICC-01/04-01/06-2867, paras 2 and 4-6.

⁵ *Ibid.*

⁶ Second Report of the Registry on Reparations of 1 September 2011, 19 March 2012, ICC-01/04-01/06, at para 158-159.

⁷ TFV's First Report on Reparation, 28 March 2012, ICC-01/04-01/06-2847, para 422.

⁸ Registrar's observations on reparations issues, 18 April 2012, ICC-01/04-01/06-2865, para 28.

⁹ *Supra Note 7*, para 371.

¹⁰ *Supra Note 2*, para 111-115.

¹¹ *Supra Note 7*, paras 49-51.

¹² *Ibid.*, paras 10-15.

¹³ *Supra Note 6*, paras 74-117.

¹⁴ *Supra Note 7*, para 303.

¹⁵ *Ibid.*, paras 112-115.

¹⁶ *Supra Note 2*, para 16.

¹⁷ *Supra Note 7*, para 18-19 and 289-291.

¹⁸ *Ibid.*, para 20-22; *Supra Note 2*, para 151-153.

¹⁹ *Supra Note 8*, para 21; *Supra Note 7*, para 185-188.

²⁰ *Supra Note 7*, paras 27-36 and para 169.

²¹ *Ibid.*, paras 407-409.

²² OPCV Observations on issues concerning reparations, 18 April 2012, ICC-01/04-01/06-2863, para 135.

²³ *Supra Note 7*, para 60.

Challenges for victims' engagement with the ICC in Kenya

Carole Theuri, *Kenyans for Peace, Truth and Justice (KPTJ)*¹

The Kenyan Government's failure to provide justice for crimes committed during the post-election violence has led victims to view the ICC as the only attainable means for justice and reparations.² This high expectation has led to misunderstandings amongst victims about issues such as victim participation and reparations. It has given rise to unrealistic expectations of, and sometimes open hostility towards, the ICC.

The six suspects charged by the ICC have used their positions within government and political influence to mobilize support against the ICC and have been known to conduct community meetings and declare that any person involved with the ICC will be seen as a traitor. Many victims continue to live within ethnic communities that are militantly supportive of the suspects. In some of these areas, the atmosphere of insecurity is so palpable that victims live in fear of persecution for having participated in the ICC process. Recent surveys suggest that over 50% of the Kenyan population's knowledge of the ICC comes through media outlets. With suspects increasingly using the media to discredit the ICC, it has become harder than ever to counter misrepresentation of the facts.

One of the unique features of the ICC system is the opportunity for victims to participate in the cases. Although the ICC has been engaged in the Kenyan situation since 2009, its interaction with Kenyans outside the capital Nairobi has been limited, due *inter alia* to the lack of a permanent presence in the country prior to mid 2011, security concerns limiting their movement and the limited number of field staff. Kenyan civil society has been very active in engaging with and registering victims wishing to participate. Unfortunately, there was little to no initial guidance prior to the decision of the Chamber in March 2011 on victim participation. The little time between the moment the decision was issued and the deadline by which applications for participation had to be filed meant that the Court received a very high number of applications just ahead of the deadline, many of which were incomplete. As a result, 80% of applications submitted to the ICC were not transmitted for a decision because the Registry could not process them and obtain missing information in time. With the opening of a field office mid last year with staff dedicated to outreach and victims' participation, the ICC has made commendable steps towards engaging in outreach to victims communities and we look forward to increased interaction between the ICC and victims around the country.

Two common legal representatives, one in each case, were appointed to represent the views of all 560 victims approved to participate. However, since December 2011, there have been recommendations by the Registrar to reduce the legal aid available to victims and in particular to reduce financial support for their field officers. Unlike counsel for the defence, the victims' legal representative, sometimes through their field



Internally displaced people at a church compound in Molo, Kenya. February 2008. © Allan Gichigi/IRIN

officers, must cultivate a relationship with each victim to represent their views. Consequently, the field operatives must make frequent travels to meet, access and communicate with individual victims. The very nature of the crime of forcible transfer of a population raises logistical challenges, as victims are now distributed widely over geographical areas that go beyond the scope of the case.³

On the understanding that assistance to victims of the post election violence is primarily the responsibility of the Kenyan Government, the absence of the Trust Fund for Victims has been strongly felt. Victims of the violence are in dire need of medical and psychosocial support and now that a Trial chamber has been constituted, we look forward to the Trust Fund's engagement in Kenya.

Victims are central to the ICC process. Properly informing them ensures they have a better understanding but it also manages expectations and helps them appreciate the limitations of this process. As its engagement with the Kenyan cases continues, there is a need for the Court to cultivate continuous interest and public awareness in the ICC process. Once trials progress, the need to manage expectations and propaganda linked to the beginning of the trial stage will be stronger than ever. ●

¹ Kenyans for Peace, Truth and Justice (KPTJ) is a coalition of over 30 organizations whose primary aims are the establishment of democratic governance and human rights in Kenya following the post-election crisis, ensuring accountability and the institution of credible transitional justice and genuine reconciliation in Kenya as a means to just, sustainable peace. It also comprises an ICC Working Group which consists of 10 human rights organizations.

² The Kenyan situation now involves the prosecution of four suspects in two cases for crimes against humanity – specifically, murder, forcible transfer of population, rape, other inhumane acts and persecution.

³ For instance, while the geographic areas covered by the charges in case one are quite specific, victims are spread out over 6,000 km within and surrounding these areas. Similarly, victims of displacement in case two were originally displaced from the towns of Nakuru and Naivasha, yet some of these victims have moved to and relocated to Nyanza and the Western provinces, which are approximately 148 km to the west.

VRWG co-organises Victims' Forum in Banjul, 13-14 April 2012

Jürgen Schurr, REDRESS

What are the key challenges for victims of systemic crimes in Africa in accessing justice at the national, (sub-) regional and international level? What role can civil society and advocates play? These were among the questions that were discussed at the 'Forum for victims of systemic crimes in Africa', organised by REDRESS under the auspices of the Victims Rights Working Group (VRWG) in collaboration with the Independent Medico-Legal Unit (IMLU), the Institute for Human Rights and Development in Africa (IHRDA) and the Cairo Institute for Human Rights Studies (CIHRS).¹

The Forum took place on 13-14 April 2012 in the Gambia, to coincide with the NGO Forum and the 51st Ordinary Session of the African Commission on Human and Peoples' Rights (ACHPR). It brought together lawyers, experts and activists from the different sub-regions of Africa, including Algeria, Burundi, Cote d'Ivoire, Chad, the DRC, Ethiopia, Kenya, Libya, Sierra Leone, South Africa, Sudan and Zimbabwe.

The experiences of victims and their advocates in these countries showed that while countries have employed different approaches in addressing systemic crimes, and the position of victims differs within the respective legal systems, common challenges exist throughout. These include: lack of meaningful reparation; prolonged proceedings; discrepancy between law and practice; lack of political willingness to apply existing legislation; absence of victims' voices and perspectives in the national discourse on justice; the prominence of ethnicity in some countries, in debates around issues of victimization and justice and how this undermines solidarity among victims, as well as the credibility of justice processes. Other challenges include the lack of resources to adequately implement victims' right to reparation, particularly in the aftermath of a conflict.

"The absence of victims' voices in national justice debates is a challenge throughout Africa"

Where domestic processes fail to provide victims with prospects for an effective remedy, sub-regional, regional and international mechanisms have been resorted to. However, as the experiences of victims and advocates who brought cases before the African Commission on Human and Peoples' Rights (ACHPR) against Sudan and Algeria demonstrate, the mechanism fails to meet victims' hopes and expectations for reparation. Severe delays, obstacles in communication with the Commission's secretariat, lack of transparency with regards to the decision-making process, as well as the broad and general nature of the Commission's decisions and the lack of their implementation by states severely hamper victims' access to justice at the ACHPR.

Sub-regional mechanisms, such as the East African Community Court of Justice (EACJ) or the Court of the Economic Community of West African States (ECOWAS) may provide alternatives to the ACHPR but are fragile. Their dependence on political support raise concerns. This was apparent in regards to the Tribunal of the Southern African Development Community (SADC), where Heads of State decided to suspend the Tribunal after it delivered a judgment in favour of complainants against the government of Zimbabwe.

At the international level, the work of the International Criminal Court in Libya, Kenya, the DRC, the Central African Re-

public as well as Ivory Coast was considered important, while a common criticism by victims and advocates in all of these countries is the continued failure of the ICC to live up to victims' expectations. This is partly due to statements made by the Office of the Prosecutor at the outset of investigations and the lack of follow up to promises made, lack of adequate outreach to victims outside the capitals and lack of training or guidance by the ICC to victims and NGOs on how to fill registration forms so as to participate in the ICC process. Combined with a poor understanding of the ICC processes, these shortcomings seriously undermine the credibility of the Court.



Participants at the Forum for Victims of Systemic Crimes in Africa, 13-14 April 2012 © REDRESS

There was common agreement among participants that these manifold challenges at all levels can be more effectively addressed when civil society organizations and human rights advocates work in synergy.

The work of the Khulumani Support Group² in South Africa was discussed as an example of the role of civil society groups in ensuring that victims' rights and perspectives form part of the national discourse on transitional justice. The NGO Forum, taking place over three days in advance of each Ordinary Session of the ACHPR, was identified as an important regional platform for civil society organizations to meet, exchange and strategize on how best to implement victims' rights.³ The organization of regular meetings of victims' rights NGOs and advocates, the publication of relevant material and a more frequent exchange of information were also proposed. Building on the successes of the Victims Rights Working Group in regards to victims' rights before the ICC, participants discussed the possibility of replicating such initiative at the Africa level or a possible broadening of the VRWG mandate to include victims' rights more generally. A report of the discussions will be published shortly on the VRWG website (www.vrwg.org). •

¹ See the agenda of the meeting at: http://www.vrwg.org/VRWG_DOC/Agenda_Forum%20for%20victims%20of%20systemic%20crimes%20in%20AfricaENG.pdf

² <http://www.khulumani.net/>.

³ The NGO Forum is organised by the African Centre for Democracy and Human Rights Studies, see <http://www.acdhrs.org/>.

Collective victims' applications before the ICC: a note of caution¹

Paolina Massidda, OPCV

The "Decision on issues related to the victims' application process,"² delivered by the Single Judge in the case *Laurent Gbagbo (Ivory Coast)*, opened a debate on the future approach to be adopted in the victims' application process. The Single Judge considered, *inter alia* that "[t]he system [...] should encourage a collective approach to victim's applications."³ A similar approach has been adopted by the Single Judge in the Uganda Situation, who asserted that the Registry "[s]hould encourage a collective approach to victims' applications for participation in the proceedings."⁴



Just some of thousands driven from their homes in Cote d'Ivoire following the violence in January 2011 © Sunset Parkerpix/Flickr

Practical measures aimed at improving and expediting the victims' application process are welcomed, particularly now that the participation of victims in the proceedings before the Court has shown that a potentially high number of victims could apply. Such measures must be in line with the key principles on victims' participation established in the legal framework of the Court. In particular, article 68(3) of the Rome Statute, read in conjunction with rules 89 to 91 of the Rules of Procedure and Evidence, promotes an effective and meaningful participation of victims envisaging a strictly personalised and/or individualised approach.

While the need to enhance the efficiency and the substantive value of victims' participation is of utmost importance in developing further an effective participation of victims, it seems premature to launch a collective approach which might cause unfavourable effects on said participation.

The proposed approach generates the risk of preventing a victim from the possibility to provide the Court with a clear and comprehensive application form containing detailed information on all relevant factors specific to him/her. More importantly, the collective approach does not seem to take into account the real impact of certain specific crimes on individual victims. Indeed, according to the practice of the OPCV, victims of gender crimes, for instance, cannot be part of a collective application since, in most of instances, the crime they have been suffering from is hidden from the community, and very often even from their own family. Encouraging the use of a collective form might therefore discourage the participation of victims of these crimes or put some of them in a very delicate and potentially (re)-traumatizing situation.

In addition to these practical consequences, this new approach will undoubtedly have several consequences on the effectiveness of victims' participation in the proceedings. First of all, the collective approach as envisaged is very likely to deprive a victim of the right to tell his/her personal story and to share his/her difficult experiences with the judges, as well as the well-established right to truth. Moreover, the information provided will clearly not be sufficient for them to efficiently participate in the proceedings since, if implemented, it would render it impossible

for the legal representative to be able to represent the distinct interests of each member of the group as required by rule 90(4) of the Rules.

With regard to the expeditiousness of the management of victims' applications, this goal might not be achieved through the proposed approach. Indeed, omitting to request important information at the very beginning of the application process might artificially open the door to future delays in dealing with victims' applications since supplementary information from victims would be needed at a later stage. More importantly, the Registry has already emphasised that additional time and resources would be needed to assist groups willing to make a collective participation request.⁵ This conclusion is even more accurate since the collective approach

as envisaged does not seem to imply that intermediaries could be involved in completing the said form.

However this approach to victims' applications may not expedite the management of victims' applications for the purpose of the parties providing their observations pursuant to rule 89 of the Rules. Indeed, despite the fact that the information provided in the forms might be sufficient as far as the parties are concerned, it might not be sufficient for any other steps entailed by the proceedings. For example, the information provided will not be sufficient to assess the credibility of the applicant and more importantly, a doubt may be cast on every single individual member of the group as to whether their application is the result of a free decision, when collective applications are put forward, for example, by a leader of the community, be it the "*chef de village*" or any other authority exercising an important influence on the community itself.

Given the major challenges that the implementation of the collective approach entail and the detrimental impacts on victims' participation and on the expeditiousness of the proceedings, OPCV considers that the system of common legal representation, thoroughly established by the Registry and implemented by the Chambers in all the situations and cases pending before the Court to date, constitutes a valid option in itself, answering the concerns and values hidden behind the concept of collective participation of victims as currently proposed. ●

¹ The article is a summary of the Office of Public Counsel for Victims (the OPCV or the Office) submission filed in the case of the *Prosecutor v. Laurent Gbagbo* on the issue of collective approach to victim's application; as such it explains only the position of the Office in the matter. See No. ICC-02/11-01/11-86.

² See No. ICC-02/11-01/11-33, available on the website of the Court.

³ *Idem*, para. 7.

⁴ See No. ICC-02/04-191, available on the website of the Court.

⁵ See No. ICC-02/11-01/11-45, available on the website of the Court.

REDRESS intervenes on the issue of collective participation

On 16 March 2012, REDRESS submitted observations on collective participation of victims of mass crimes in the *Gbagbo* case before the ICC. REDRESS' submission focused on the practice and procedures of relevant regional and international courts and administrative bodies as well as relevant domestic practice which considers approaches to the collective participation of victims of mass crimes. The submissions also considered the challenges faced by victims of mass crimes in various jurisdictions in applying to participate in court proceedings. Read the submission at: http://www.redress.org/downloads/2012_03_16_AMICUSsubmission.pdf

Challenges of representing large groups of victims in the Cambodia Extraordinary Chambers

Interview with Counsel for Civil Parties, Silke Studzinsky

Can you tell us how victims participate as a "group" before the ECCC?

The framework depends on the case, as the internal rules were amended for the second case being heard. In case 001, the 90 Civil Parties formed four groups, each represented by a team of national and international counsel. Proceedings were limited to crimes taking place at just two locations and under the leadership of one accused. Since most civil parties were indirect victims who had lost relatives, there were not many criteria for grouping. NGOs played a key role in selecting counsel for each group and although Civil Parties had no real choice in the matter, they mostly followed the advice of their NGO.

Each group's participation was different, depending on the NGO. For example, some NGOs set up monthly meetings for their 'clients', from mid-2008 onwards, to inform them of developments and to involve them more directly. These meetings were conducted for the respective group, NGOs considering them as a single group regardless of which counsel represented them. As I was the only international lawyer based in Phnom Penh, my Cambodian colleagues and I prepared and conducted these meetings. Civil Parties were invited to attend hearings, on a rotating basis, with all attending at least the opening and closing statements. 22 Civil Parties were allowed to testify, having established that they would be doing so voluntarily, as a representative of a specific harm (for example, a father, husband or children lost) and be deemed fit to appear before the Chamber. Civil Party groups made submissions during the investigative phase and trial on a variety of matters. Although Civil Parties were generally not involved in discussions on legal matters, CP were instead given explanations on the specific legal issues which arose, in a manner which they understood.

In case 002, the 3864 Civil Parties are represented by 11 Civil Party Lawyer (CPL) teams. It was mainly NGOs who arranged legal representation and most civil parties from one NGO (with over 1800 clients) were given a choice of lawyers, who attended outreach sessions. Civil Parties were advised to pick lawyers

according to their own province, specialising in the relevant crimes or who they personally liked. They also elected representatives to communicate with lawyers/NGOs at meetings held every three months. The 122 representatives then hold regular district meetings with Civil Parties where they inform them about the developments.

Civil Parties attend hearings on a rotating basis (invited by the Victims Support Section) but most do not receive sufficient information to under-

stand the hearings. Those invited by the NGOs are less in number but usually attend an entire hearing week and get a briefing and debriefing from lawyers, facilitated by the NGOs. Despite extremely limited resources, this representative scheme, though far from perfect, has seen an amazing improvement since its induction in January 2010.

What are the challenges you face in representing your clients under this approach?

Lack of resources is a constant issue. The consequence is that we are losing out on professional translation/interpretation services as well as appropriate working space and facilities that other parties have. Although we have remote access to the case file, other relevant software and drives are inaccessible, making it impossible to carry out meaningful work outside the court.

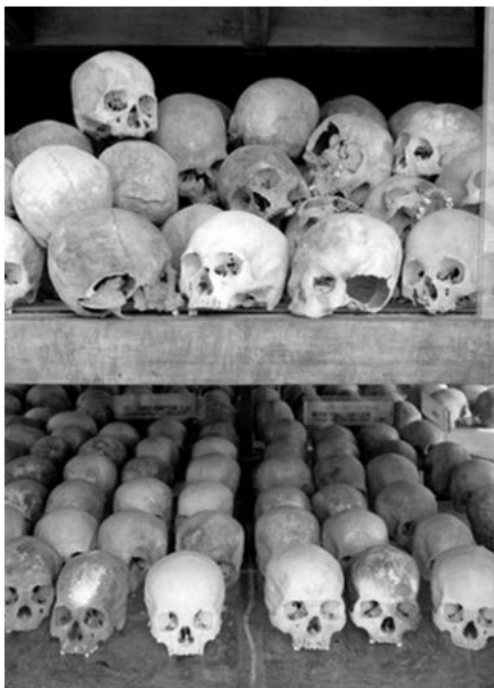
Furthermore, an amendment to the rules in case 002 has introduced a Civil Party Lead Co-Lawyer Section at the ECCC, whereby when a case reaches trial, the two Lead Co-Lawyers (LCL) from the Section, who are paid as consultants by the Court, take over the representation of civil parties to represent the 'common interests' of the "consolidated group" which comprises all 3864 civil parties. They have no power of attorney and rely on the work of the mostly (pro-bono) working Civil Party Lawyers. Thus, civil party lawyers now have no say before the Trial Chamber and require the Lead Co-Lawyers' approval for every submission, written or oral. The only exception is if the Lead Co-Lawyers delegate their powers. My experience has been that the Lead Co-Lawyers have often rejected suggested submissions by CPL and sometimes failed to share their own with Civil Party Lawyers or submitted them despite objections. There is no body to complain to if the CPL disagree with the approach of the Lead. This ultimately results in the voices of both Civil Parties and their legitimate Counsel being partly silenced.

How have you addressed the challenges of representing a large group of victims?

Being deprived of standing makes it extremely difficult, if not impossible, for me to represent my clients appropriately. I sometimes use the media to express my clients' views and have tried to develop other outlets. For example, we took the opportunity of a women's hearing, organized by an NGO, to give some of our clients an opportunity to submit their stories before a panel of experts, giving them some kind of justice, as these crimes were not included in the charges.

Finally, I have assisted some of my clients wishing to do so, to submit their views to the Court outside of the regular procedures, through open letters. These are unofficial submissions but given the circumstances, they provide them with some form of channel through which to express their views.

To conclude, collective participation of a large number of victims risks individual views or sub-group interests falling by the wayside. The reasons are multiple: informing the victims regularly and getting their particular views is only possible if sufficient financial resources are available. The introduction of Lead Co-Lawyers who have the ultimate decision-making power without any control exclude a number of voices. It is not realistic to believe that thousands of victims with different experiences can form one "consolidated group", speaking with one voice. The development of a common strategy from the very beginning could have alleviated the unsatisfactory situation. ●



The "Killing Fields" memorial near Phnom Penh is a testament to Cambodia's brutal Democratic Kampuchea regime © UN Photo/John Isaac

Prosecution of Libyan Atrocities : What Scope for the ICC?

On 26 February 2011, the United Nations Security Council referred the situation in Libya to the International Criminal Court covering the period from 15 February 2011 until now with an ongoing mandate. In its resolution, it referred specifically to the gross and systematic violations of human rights, including the repression of peaceful demonstrators. It considered that the widespread and systematic attacks taking place in Libya against the civilian population may amount to crimes against humanity. Ever since, the Office of the Prosecutor of the ICC has been carrying out investigations which have led to warrants of arrest being issued against Muammar Gaddafi (terminated following his death), Saif Al-Islam Gaddafi (currently detained in Libya) and Abdullah Al-Senussi (currently detained in Mauritania). They are charged with the crimes against humanity of murder and persecution.

Muammar Gaddafi was killed on 20 October 2011 signalling the fall of the Gaddafi regime after more than 40 years of brutal dictatorship. Prior to the fall of the regime, there was little debate about the prospects of justice in Libya: there were no such prospects. Now that there has been a change in regime, have the prospects for justice in Libya improved? And if so, how should this impact on the outstanding warrants of arrest and the role of the ICC?

Requests for Gaddafi's and Senussi's arrest and surrender to the ICC were transmitted to the relevant officials in Libya and Mauritania respectfully. While neither state is party to the Rome Statute, both have an obligation to cooperate with the ICC by virtue of Security Council Resolution 1970. So far, there have been no surrenders. Indeed, Libya has sought to challenge the ICC's jurisdiction in the case against Gaddafi, and Mauritania has been relatively silent.

On 1 May 2012, Libya challenged the admissibility of the case against Saif Al-Islam Gaddafi. Libya's main argument is that it is willing and able to investigate and prosecute Gaddafi, and indeed that investigations are ongoing for the same and addi-



Wael Najem, Libya's Deputy Minister of Justice, has told the international community that Libya must take responsibility for trying those responsible for serious human rights violations. © UN Photo/Jean Marc-Ferré

tional crimes as those pursued by the Office of the Prosecutor. Thus, under the principle of complementarity in the Rome Statute, Libya contends that the ICC has no jurisdiction to continue the case. The ICC is currently receiving submissions on the issue of admissibility. The ICC's Office of the Public Counsel for the Defence has argued that there is little prospect of fair trial rights being guaranteed; they have also alluded to mistreatment of Gaddafi in detention, a contention strenuously rejected by Libya.

A more interesting and perhaps more complex question is the way in which the ICC will consider the evolving transitional context in Libya. There has been an absence of the rule of law, particularly in relation to cases involving abuses by state officials, for decades. Indeed, it is this absence of the rule of law which fuelled the crimes currently under consideration. To what extent, if at all, should the ICC consider the 'intentions' of the new Libya to afford fair and equitable justice, when there is little if any track record of Libya having afforded such fair and equitable justice, in the past?

Under the admissibility rules at the ICC, what is most important is the 'genuineness' and 'effectiveness' of the national investigations and/or prosecutions. Libya will need to demonstrate not only that it has good intentions, but that it is fully capable of carrying these intentions out. Interestingly, the Libyan Transitional National Council recently passed an Amnesty Law by which an amnesty will be granted for any "acts made necessary by the 17 February revolution" and for the revolution's "success or protection". The Amnesty Law has no bearing on Libya's willingness to try Gaddafi and Senussi – however it does not bode well for its commitment to equality in the application of the rule of law, which is certainly an underlying consideration ICC judges may well feel compelled to take into account. ●



As Libyans celebrate the end 40 years of authoritarian rule, there is debate as to who is best placed to investigate and try those responsible for serious human rights © UN Photo/Iason Foonten

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 • FIDH • FOCDP • 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 • UCICC • UVF • LIPADHO • SYCOVI



87 VAUXHALL WALK, LONDON SE11 5HJ
TEL: +44 (0)207 793 1777 FAX: +44 (0)207 793 1719
www.vrwg.org / www.redress.org

We are grateful for the support of the John D. and Catherine T. MacArthur Foundation