

Access

Victims' rights before the International Criminal Court Victims' Rights Working Group Bulletin • Issue 23 • Winter 2013

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Kenya's Truth Commission: a victim-centred focus is needed

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Victims of the 2007-8 post-election violence (PEV) in Kenya have sought justice and reparation for almost six years. However this quest has been marred with disappointment and obstacles. While the process before the International Criminal Court (ICC) has attracted much attention, the responsibility to provide justice and reparation to victims primarily lies with the Kenyan authorities.



A barbershop burning in Nairobi's Mathare slum, 31 Dec 2007 © Julius Mwelu/IRIN

Understandably, the publication of the much anticipated report of the Truth, Justice and Reconciliation Commission (TJRC)¹ in May 2013, following numerous delays and controversies², has marked renewed hopes for victims.³ However, the fact it has yet to be debated in Parliament raises questions about Kenya's seriousness in actually addressing the needs of victims, if indeed they are of national concern at all.

While the TJRC's recommendations may not be binding and some parts of the report may be struck out⁴, the report offers opportunities for victims to obtain justice, particularly with regard to reparations. The report provides numerous recommendations on key transitional justice measures. These range from prosecution of alleged perpetrators; police reform to public apologies and memorials. However, there is a risk that in implementing those recommendations, officials "pick and choose" the least politically charged recommendations that best serve the interests of powerful and influential figures rather than focusing on the views, needs and rights of victims.

Numerous challenges will affect the implementation of the TJRC's recommendations, and these were debated at a workshop organised on 9-11 October 2013 in Kenya by ICTJ and GIZ, the German international cooperation agency.⁵ The TJRC report recommends the establishment of an

implementation mechanism. It will be essential to distinguish implementation from monitoring tasks as well as to ensure that the implementation mechanism does not function in isolation but in conjunction with official governance bodies if it is to be an effective mechanism.

The implementation of recommendations on reparation also raises whether and how victims can be associated with the process and the need to clearly separate implementation of the measures from development and humanitarian assistance.

In relation to reparation, the TJRC recommended the establishment of a *Reparation Fund* to compensate victims of gross violations of human rights and historical injustices. The fund would set out the categories of victims who would be eligible to access the fund and the modalities for such access. The TJRC report notes that "Victims can obtain reparation either through state administrative programmes, or through recourse to the courts" but that "[u]nfortunately, recommending a proportionate and tailored reparation measure for each individual victim would be impractical and impossible to implement." The TJRC also added that, "[i]t is against this background that priorities for reparations are set out and that the Commission recognizes that realistically implementable reparations measures cannot satisfy individual victims or respond adequately to individual suffering and harm."⁶ This wording may potentially be problematic, as ...continued on p. 2

reparation programmes should always complement reparation through judicial processes.

The TJRC importantly recalls the distinction between individual and collective as well as material and non-material reparation. It also outlines the five forms of reparation suggested in the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation. However, here is a risk that there will be an exclusive focus on collective forms of reparation based on the challenges highlighted by the TJRC. It is therefore very important at the implementation stage that the full range of potentially appropriate reparation measures is safeguarded.

The implementation phase will also require identifying victims and beneficiaries. The TJRC refers to criteria for eligibility including vulnerability, needs and harm suffered by victims based on the type of violations, the time of occurrence of the violation and the type of beneficiaries. As discussed during the October workshop, this raises numerous questions, such as who will be in charge of this identification process, how to identify communities as victims and what methodology will be used to assess victims' needs. It is fundamental that victims are involved in the design of the reparation framework.

More fundamentally, all actors involved must ensure that the establishment of a reparation programme in Kenya, while much needed, is not done to the detriment of other justice measures, such as the prosecution of alleged perpetrators as well as other measures to ensure non-recurrence of violations. Transitional justice processes are not isolated mechanisms. They must respect international human rights standards and victims' rights. Irrespective of the debate as to

whether the TJRC's recommendations are formally binding, most of them restate Kenya's existing legal obligations to provide effective remedies and reparation for crimes attributed to Kenya through its state agents (police) or for its failure to prevent or respond with due diligence to crimes committed by non-state actors. •

¹The TJRC was tasked with inquiring into gross violations of human rights and historical injustices that occurred in Kenya from 12 December 1963 when Kenya became independent to 28 February 2008 when the Coalition Agreement was signed. See, Abridged version of the TJRC Final Report, available at: <http://www.tjrkenya.org/images/documents/TJRC-supplementary-report.pdf>

²See for example comments from the Kenya National Commission on Human Rights (KNCHR), Wambui Ndonga, "KNCHR slams truth commission as a sham", 14 February 2013, available at: <http://www.capitalfm.co.ke/news/2013/02/knchr-slams-truth-commission-as-a-sham/>

³See, ICTJ, *ICTJ Welcomes Kenya TJRC's Report*, 24 May 2013, available at: <http://ictj.org/news/ictj-welcomes-kenyas-tjrc-report>

⁴On those questions, see the *amicus brief* filed by ICTJ before the High Court of Kenya, available at: <http://ictj.org/news/ictj-kenya-high-court-uphold-victims-rights-truth-justice>

⁵*Technical Implementation Workshop with Policy Makers and Stakeholders on the TJRC Report*, 9-11 October 2013, Kenya, facilitated by ICTJ and GlZ.

⁶TJRC Report, Volume IV, pp. 98 and ff.

Ivory Coast: complementarity should not mean impunity Civil parties in domestic proceedings analyse complementarity

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On 20 September 2013, the Ivory Coast government announced that it would not transfer Ms. Simone Gbagbo to the International Criminal Court (ICC), formally opening a debate on the ability and willingness of Ivory Coast to judge all alleged perpetrators involved in the Ivorian post-electoral crisis.¹ Is this refusal an act of defiance against the ICC or one of legitimate complementarity?

The FIDH and its member organizations have been engaged early on with victims of international crimes in countries under ICC investigation or preliminary examination: in DRC, since 2003, and in the Central African Republic from 2003-4. However, in Guinea², following the 28 September 2009 massacre,³ national justice proceedings have become a concrete option for victims as a complement to international justice, and above all as a means to build a national justice system capable of judging the most serious crimes.

FIDH, MIDH and LIDHO decided to accompany close to 100 victims of post-electoral violence from all sides, in proceedings before Ivorian tribunals.⁴ Their engagement logically followed the post-electoral crisis, the self-referrals of the Ivory Coast government to the ICC's jurisdiction in 2010 and 2011, and the initiation of judicial proceedings in the Ivorian justice system on 6 February 2012. FIDH, MIDH and LIDHO also joined the domestic proceedings as public interest litigants.⁵

Complementarity put to the test in Ivory Coast

Two years later, it is time for a first assessment. While Ivory Coast is waiting for the ICC's decision on whether or not charges against Laurent Gbagbo will be confirmed, the fight against impunity is at a crossroads. On one hand, judicial proceedings against alleged perpetrators who sided with the former Gbagbo regime (pro-Gbagbos) are moving forward. The first criminal trial against 83 pro-Gbagbos, accused of causing "a threat to national security" is awaiting a hearing. On the other hand, aside from the obvious bias in proceedings (only one member of the opposing pro-Ouattara camp has been indicted), the pursuit of domestic justice appears threatened by the announced closure of the Special Investigation Unit in December 2013. This unit had been tasked with carrying out investigations and judicial proceedings relating to the post-electoral crisis.⁶

The Unit originally consisted of three magistrates, half a dozen clerks, about twenty judicial police officers as well as sufficient resources to carry out over six different judicial proceedings, hear from over 3500 victims and witnesses, and charge close to 140 people. However, just two months after the arrest and indictment of Amadé Ouérémi (the only pro-Ouattara indicted to date), the future of the Special Investigation Unit is in jeopardy. The three originally appointed investigating judges have all been replaced. Due to lack of staff, the work of the Unit has become idle. In October

2013, the Minister of Justice stated that “*ordinary justice [could] now take over and the Special Investigation Unit [was] now obsolete*”.⁷ However, according to all the key players, investigations are far from being over and the important work already carried out by the Special Investigation Unit needs to be finished. “The Unit is the only place where we were heard by the official justice system,” was the response of a civil party victim. This statement accurately symbolizes the general perception: closing the Unit, is ending the fight against impunity and sending victims back to their solitude and perpetrators. This is a far cry from the President’s promises of justice and reconciliation for all.

The end of 2013 is a critical time for complementarity in Ivory Coast. Its success is now dependent on whether the Special investigation unit will come to an end or not. How can Simone Gbagbo – and probably Charles Blé Goudé – be tried by the local courts of Man, Duékoué, Korhogo or Bouaké? These cases involve thousands of pages of complex, incomplete, and politically explosive material requiring significant manpower and expertise to handle. The government itself highlighted, in its submission to the ICC in October 2013, that “[t]he information is made complex due to the scale and the diversity of the alleged crimes, as well as by the geographical scope of their commission”.⁸

The revival and continuation of the work of the Special Investigation Unit will be the first indicator of Ivory Coast’s willingness and ability to conduct the trials of those responsible in the post-electoral crisis. Paradoxically, this also seems to be the official position of the Ivorian government, as reflected in its application challenging the admissibility of the case against *Simone Gbagbo* before the ICC. In this application, the Ivorian government presents the Special Investigation Unit as concentrating “*exceptional means to accelerate the processing of offences committed during the post-electoral crisis period*” and having enabled “*the carrying out of investigations providing sufficient evidence for the Prosecutor of the Republic to the Trial Court (Tribunal de Première instance) of Abidjan-Plateau, to issue three indictments against Ms. Simone Gbagbo*”.⁹ The solution suggested by the Ivorian State’s statement is that the loss of the Special Investigation Unit would constitute a weakening of the ability of Ivory Coast to try alleged perpetrators of post-electoral violence. It may also demonstrate a lack of willingness to prosecute all those responsible, as investigations are getting closer to some pro-Ouattaras, allegedly implicated in the commission of crimes.

For FIDH, LIDHO and MIDH, Ivory Coast has a legitimate claim for wanting to organise the trial of Simone Gbagbo, as well as the trials of all other alleged perpetrators. Ivory Coast has this duty and it could strengthen its justice system. It goes to the heart of the very principle of complementarity, as provided for in Article 17 of the Rome Statute. However, the primacy of national justice must not serve as an instrument of vengeance, or guarantee impunity for perpetrators of serious human rights violations.

2013 has been a turning point in the application of complementarity. The Ivorian case was preceded by similar issues arising in Libya and Guinea. The decision in the *Al-Sénoussi case*¹⁰, where the Chamber ruled that the case should be sent back to Libya, and to a certain degree, the advancement of national judicial proceedings in Guinea, concerning the stadium massacre of 28 September 2009¹¹, are progressively building a practice of complementarity. This practice will determine the weight of the ICC in its capacity to encourage or even to force national justice systems to effectively fight against impunity. The future of complementarity between national and international justice

will also depend on the way in which States will comply with their duty to deliver justice in a fair and impartial manner. If Al-Sénoussi or Simone Gbagbo are tried in haste, the hope for a coherent justice in Tripoli or Abidjan will be permanently affected.



Post election violence in Cote d'Ivoire © United Nations Photo

At a time when ideological and political debates are being raised in an attempt to pit the ICC against Africa, the success of the relationship between national post-conflict justice and international justice can provide a strong and intelligent response. To fight against impunity is to help and reinforce the capacity of the State on whose territory the most serious crimes have been committed to judge those responsible. To do so, the support of all the States is needed. This responsibility falls on all of us but above all on States and the ICC to work towards ensuring that complementarity is a success, in the eyes of the victims. •

¹ See the communiqué of the extraordinary session of the Council of Ministers on September 20th 2013, http://www.gouv.ci/conseil_ministre_1.php?recordID=176

² A preliminary investigation was opened by the ICC Prosecutor on 14 October 2009.

³ This refers to an opposition gathering at the national stadium in Conakry which was violently suppressed by security forces, leading to alleged crimes against humanity of killings and disappearances, rape and sexual violence, arbitrary detention and torture as well as persecution, <http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPREportonPreliminaryExaminations13December2011.pdf>

⁴ Ivory Coast referred itself to the ICC in 2010 and 2011.

⁵ Ivory Coast under Laurent Gbagbo had acknowledged, since 18 April 2003, the jurisdiction of the ICC regarding crimes as a result of the rebellion which started in the North of the country on September 19th 2001; the president Alassane Ouattara has renewed this acknowledgement on 14 December 2010 and on 3 May 2011, for crimes committed during the post-electoral crisis. See “Q&A on the case of Laurent Gbagbo”, <http://www.fidh.org/fr/afrique/cote-d-ivoire/Q-A-sur-l-audience-de-confirmation-12903>

⁶ See the report of the FIDH, LIDHO, MIDH, October 2013, “The fight against impunity at a crossroads” in French <http://www.fidh.org/fr/afrique/cote-d-ivoire/14159-cote-d-ivoire-la-lutte-contre-l-impunite-a-la-croisee-des-chemins> and in English <http://www.fidh.org/en/africa/Cote-d-Ivoire.566/14160-ivory-coast-the-fight-against-impunity-at-a-crossroad>

⁷ Judicial missions of the FIDH, MIDH and LIDHO in the Ivory Coast on October 2013.

⁸ *Application of the Ivory Coast for a ruling on the admissibility of the case Prosecutor v. Simone Gbagbo and request for a stay of execution as per articles 17, 19 et 95 du Statut*, October 1st 2013, page 14, §31.

⁹ *Ibid*, page 16, §45.

¹⁰ *Decision on the admissibility on the case Prosecutor against Abdullah Al-Sénoussi* », October 11, 2013.

¹¹ See <http://www.fidh.org/fr/afrique/Guinee-Conakry.66/> and the report by the FIDH and OGDH, “*Guinea / Fight against impunity: notable advances and expected acts*”

New approaches to victims' applications to participate: a critical assessment

Mariana Pena and Jean Philippe Kot, ASF

Victims who wish to participate in proceedings at the International Criminal Court (ICC), must apply to do so. However, the application process, designed at a time when the Court was only dealing with a limited number of applicants, has proven burdensome. Reports have pointed out that the increasing number of applications has caused backlogs, which in turn has brought about delays, thus rendering the process unsustainable.¹ To address this challenge, the Court has considered amendment - and even elimination - of application forms, including the possibility of replacing individual forms with collective forms, and modifying the way forms are processed by the Registry and Chambers. Chambers themselves have come up with new approaches, which are critically reviewed below.

In April 2012, in the *Gbagbo* case, Pre-Trial Chamber I ruled that victims could come together to fill out a group application form to which individual declarations would be attached.² It has been reported that the partly collective approach resulted in the receipt of less information than the standard application form, reducing the amount of time needed to scan, analyse and redact documents, and enter information into the Court's database.³ However, the experience also highlighted the difficulties inherent to creating and bringing physically together groups of victims in the absence of pre-existing or self-identified groups. The Court has itself pointed out that victims may not be able to come together for security or logistical reasons; they may not feel comfortable speaking about the harm they suffered in front of a group or may lack trust in other members of the group.⁴ In addition, while victims' stories share similarities, merging information about the events and the harm suffered by victims into a single collective account is likely to result in loss of relevant and specific details about the experience of singular victims, which may be relevant for the treatment of the applications.

Moving in a different direction, Trial Chamber V in the *Ruto and Sang* case and the *Kenyatta* case decided, in October 2012, that only victims who wish to appear in person before the Court should submit a standard application form. Other victims can instead 'register' with the Registry.⁵ In practice, registration responsibilities have been outsourced to legal representatives.⁶ The information collected by legal representatives is then shared with the Registry, which administers the database in which the information is stored.⁷ Trial Chamber V may have hoped to reduce the amount of paperwork related to the process of admitting victims to participate in proceedings. However, the Registry together with the legal representatives have produced other types of forms (declarations) for the purpose of registration.⁸ An advantage of this approach is that the forms are not transmitted to the Chambers or the parties, expediting the process to some extent. However, this new system is questionable in several respects. From a legal perspective, the fact that no organ of the Court is involved in making a determination on the admissibility of victims' requests for registration is problematic. For some victims, it may be important that their stories reach the judges and that an independent determination on their victims' status is made by the Court. Finally delegation of registration to the legal representatives, without allocating the corresponding resources from the Registry to the legal representation teams, can lead to an increase in legal aid expenses.⁹

More recently, in May 2013, Pre-Trial Chamber II ordered the

use of a simplified, one-page individual application form in the *Ntaganda* case, and directed the Registry to group the applications prior to transmitting them to the Chamber for a ruling.¹⁰



In order for victims to apply to participate, they first need to be informed of their right to do so. Information session in CAR © ICC-CPI

According to the Chamber, criteria to be used to group the applications include: the location, time and nature of the alleged crime(s), the harm(s) suffered, the gender of the victim(s) or other specific circumstances common to victims.¹¹ Taking into account the need to avoid overlaps, the Registry has considered that the use of simple criteria, such as location, should be preferred.¹² The new system is being tested and a critical assessment of its implementation should be made in due course. It is noted, however, that while simplifying the information in the forms facilitates treatment of the applications, it may have an adverse impact on legal representation. Considerably less information on the victims' profile is documented through the application phase, which is likely to require counsel to obtain further information in order to fully determine who his/her clients are.

Efforts to build a new system that makes the application process more manageable for all those involved should be praised. However, it is important, that first, broad and genuine consultations are conducted before designing new approaches, and, second, that a critical assessment be made after implementation. This is crucial to build upon past practices and optimise the application process. As far as consultations are concerned, it is imperative that those involve actors outside the court, including victims and those assisting them, external counsel and other experts.¹³ ●

¹ ICC-ASP/11/22; ICC-ASP/11/32; ICC-ASP/11/Res.7

² ICC-02/11-01/11-86.

³ ICC-01/04-02/06-57.

⁴ *Id.*

⁵ ICC-01/09-01/11-460; ICC-01/09-02/11-498.

⁶ See Mariana Pena, 'Report on Modes of Participation and Legal Representation', ASF, November 2013.

⁷ ICC-01/09-01/11-566-Anx; ICC-01/09-02/11-606-Anx.

⁸ *Id.*

⁹ See also Anushka Sehmi, 'New victim participation regime in Kenya', in ACCESS - Victims' Rights Working Group Bulletin, Issue 22, Spring 2013, <http://www.vrwg.org/downloads/130617EnglishVersionFinal.pdf>

¹⁰ See ICC-01/04-02/06-67-Anx.

¹¹ ICC-01/04-02/06-67.

¹² See Mariana Pena, 'Report on Modes of Participation and Legal Representation' ASF, November 2013.

¹³ *Id.*

Libya: recent developments and their impact on victims

Angelina Nicolau, *Lawyers for Justice in Libya*

On 11 October 2013, the International Criminal Court (ICC) ruled that Libya was “able and willing” to try Abdullah Senussi and held that the case against the former spy chief was therefore inadmissible before the ICC. This contrasts with the Court’s decision in May 2013, which had found that Saif Al-Islam Gaddafi remained a legitimate candidate for prosecution by the ICC and that the Libyan government should facilitate his immediate surrender to the Court. These decisions are not final - and appeals processes are underway in both instances - but it remains important to continue to evaluate how these developments impact victims of the abuses.

The principle of “complementarity”, whereby the ICC can only act where national courts are unable or unwilling, is fundamental to the notion of international justice. It not only recognises the importance of State sovereignty but also the value of holding trials closer to victims. This is particularly important to transitional societies, as national proceedings can be positive for victims. In Libya, where the population has been affected and defined by decades of human rights abuses, such proceedings offer the chance for victims to foster new institutional values of respect for human rights.

It is undeniable, however, that a number of continuing concerns remain in relation to the capacity of the Libyan state to provide justice in such cases. The government is seemingly incapable of gaining custody of Saif Al-Islam Gaddafi from his Zintani jailers. Frequent declarations from public officials and a recent ruling from a Tripoli court on 24 October 2013 that called for him to be tried for serious crimes have so far been fruitless. This clearly calls into question the authority that the new state bodies possess.

Furthermore, in order to ensure justice the state must be able to assure the safe involvement of victims and witnesses in trial processes. If not, it is likely to undermine the safety of those that wish to participate and risks further acts of violence and societal disruption. The recent abduction of Senussi’s daughter, Anoud Senussi, upon her release from state custody clearly illustrates apprehensions regarding the Libyan government’s capacity to protect even high profile persons for whom there are security concerns. Anoud Senussi was held for days by her captors for unknown reasons, which created a great deal of confusion and frenzied speculation and uproar. In turn this led her tribe, the Magarha, to cut the water supply in the west of Libya.¹

It is vital that the legacy of high profile trials does not perpetuate human rights violations and create new victims of systematic abuse. For victims it is important that due process is observed, even for those alleged to have committed atrocious acts, so that judicial decisions are not discredited and branded ‘victors’ justice’. A recent high profile case heard by the Misrata Appeals Court highlights such concerns. Ahmed Ibrahim and Walid Dabnoon faced charges for crimes, including murder and kidnaping, that allegedly occurred during the revolution. Both defendants were sentenced to death following investigations and trial hearings that reportedly denied their basic rights.² It is claimed by Human Rights Watch that they were not granted confidential access to their legal representatives, nor protection from intimidation, and that evidence was admitted, which was obtained through coercive means.³

Despite these challenges, there are signs that the Libyan government is making substantive efforts to assure the rights

of victims of human rights abuses and assure greater access to justice. In September 2013, the President of the General National Congress (GNC), Nuri Abu Sahmain, held a conference outlining the proposal for a Transitional Justice Law. The law envisions setting up a “Fact-Finding and Reconciliation Board” which promises to address the issue of internally displaced persons in Libya and to investigate attacks on victims of violence. The GNC is also in the process of reviewing a draft law that will recognise rape in armed conflict as a war crime and ensure compensation for victims of such crimes. If approved and properly implemented, these laws could be a significant steps toward allowing victims to obtain justice and advancing the transitional process.

It is essential that the ICC and the Libyan government prioritise the need to bring justice to victims of human rights abuses throughout their discussions. There has been a marked lack of creativity in this regard, and both parties must explore and promote existing alternatives. For example, the ICC could consider conducting its trials in Libya. Irrespective of where Saif al-Islam Gaddafi and Abdullah Senussi are ultimately tried, the experiences and traumas of the victims must be the driving force behind the pursuit for justice and accountability. To forget this allows such individuals to become victims once again and further obstructs their opportunity for redress. •



Libyan refugees in Egypt protest outside a court building in New Cairo at plans to export a senior pro-Gaddafi official (March 2013) © Amr Emam/IRIN

¹ ‘Anoud Senussi “freed” and flown to Sebha’, Libya Herald, 7th September 2013. <http://www.libyaherald.com/2013/09/07/anoud-senussi-freed-and-flown-to-sebha/#axzz2i0nnBDS7>

² ‘HRW Calls for All Death Sentences to be Suspended’, Libya Herald, 4th October 2013 <http://www.libyaherald.com/2013/10/04/hrw-calls-for-all-death-sentences-to-be-suspended/#axzz2i0nnBDS7>

³ ‘Libya: Suspend Death Sentences Against Gaddafi Loyalists’, Human Rights Watch, 4th October 2013 <http://www.hrw.org/news/2013/10/04/libya-suspend-death-sentences-against-gaddafi-loyalists>

Preventing Sexual Violence - A call for action

Madeline Rees, Women's International League for Peace and Freedom

There has been a lot of attention on sexual violence of late in various fora, including in the General Assembly, with a UK sponsored Declaration signed by 134 States (at the time of writing)¹, in the Security Council with Resolution 2106,² and before the UK sponsored G8 *Foreign Ministers Declaration on Preventing Sexual Violence in Conflict* issued on 11 April 2013. Whatever one thinks of the UK's Preventing Sexual Violence Initiative (PSVI), there is a heightened focus on sexual violence in the context of armed conflict at the international level.

The PSVI includes the drafting of an *International Protocol on Documentation and Investigation of Sexual Violence in Armed Conflict* (Protocol) aimed at better harmonizing the collection of evidence by various relevant actors in order to support criminal prosecutions. A metaphorical jury will one day decide whether this initiative has been successful and the first step will be to determine whether it has made a difference. This should take into account how well the various elements of sexual violence crimes have been addressed in addition to considering necessary steps to ensure that perpetrators are held to account.

There is a myriad of entry points to address cycles of violence and specifically sexual violence, including the multi-dimensional responses required to prevent it. While sexual violence can amount to a war crime, crime against humanity, torture, or a component part of genocide, and is often described as a weapon of war, sexual violence goes beyond these legal constructs. One cannot ignore the element of misogyny attached to it; how it actually happens in real life; why it could possibly work as a "weapon"; its use and the fact that it is pervasive in all wars. To do so would fail to address the root causes of the violence and fail in its prevention. It would also allow for the shame and ostracism to continue, encourage "honour" killings, and fail to provide the adequate and comprehensive support for survivors. Shame, ostracism and honour are indeed embedded in a culture where ownership by men over women's bodies is acceptable. It also works because it shows other men that they cannot protect their women from being "dishonored" by the enemy.



A woman injured in recent fighting between rebel M23 soldiers and Congolese government soldiers at the Heal Africa Hospital in Goma, Democratic Republic of Congo (November 2012) © Kate Holt/IRIN

The first entry point for the prevention of sexual violence is the consideration of gender relations and the construction of violent masculinities. This is linked to political economy and equality and is a huge task for one initiative to undertake. The second entry point is protection in conflict. This work obviously starts before a conflict occurs, through work on gender relations and

building effective military discipline based on International Humanitarian Law and human rights standards. While peacekeepers may play a positive role in ensuring protection, in practice the track record has not been very positive with far too many abuses still being documented. The third entry point is through the participation of women in peace processes - not only just because it is a legal obligation (something which is often forgotten) but also to ensure that women are not categorized as passive victims when the truth is that they play a multiplicity of different and vital roles in times of conflict.

The fourth entry point is the transition moment (from conflict to peace) and the process of justice. It is this aspect that the PSVI has chosen to specifically address. The PSVI's focus is on ending impunity and showing that sexual violence is a crime that the international community must not tolerate and must address at the highest levels. This explains the emphasis on seeking engagement from the G8, the UN General Assembly and the Security Council. It also explains the decision to draft a Protocol in order to create standards on documentation, investigation and prosecution of crimes of sexual violence.

Some have criticized the UK for choosing this as the entry point for their initiative, questioned the approach and expressed concerns at possible duplication with existing initiatives. They have also queried the failure to immediately address aspects relating to prevention or to guarantee participation in peace negotiations, transition and post conflict governance. On the latter there have indeed been missed opportunities, Libya being a case in point, where there was no support when women asked for quotas to guarantee their participation in the drafting of the constitution. One hopes that the lesson will be learnt in the context of the conflict in Syria: women must be present in the negotiations, fully participating in deciding their own futures.

It would be churlish to criticize the fact that emphasis is placed on one element at this stage, like criticizing someone for starting a jigsaw puzzle by collecting all the blue pieces. It is the entry point chosen, not the end of the process. It is vital that we engage with and reinforce mutually complementary strategies, and the PSVI gives us the possibility of doing so. If we combine our forces to fill all the pieces of the jigsaw, then the picture will be compelling and our jury will give us a verdict we can all be proud of being part of. •

¹ See <http://www.unmultimedia.org/radio/english/2013/09/over-100-countries-pledge-to-act-against-sexual-violence-rape-in-war/>

² UN Security Council Resolution, adopted on 24 June 2013, S/RES/2106 (2013).

Justice for victims of sexual violence in DRC: Potential opportunities from regional and international mechanisms

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Since 1996, successive wars in the Democratic Republic of Congo (DRC) have been the scene of endemic rape and other forms of sexual violence that continue to be committed in a widespread manner. All parties to the conflicts have perpetrated sexual violence crimes, including the Congolese armed forces (FARDC) and numerous national and foreign armed groups in the provinces of North Kivu, South Kivu and in Ituri.

Despite the 2006 Law on Sexual Violence² and efforts to make justice more accessible to victims, for instance through mobile courts, victims rarely obtain justice, and when judgements are passed, compensation awards are not enforced.

In Eastern DRC, victims of sexual violence face serious challenges to access justice³:

- Insecurity prevails in several territories; most perpetrators of sexual violence are armed, are difficult to identify and investigations are never carried out to identify them;
- Many victims and witnesses live in remote areas and have to travel long distances to access a police station, courts, tribunals or prosecution offices. Where there are police stations, there is often no trained or qualified Judicial Police Officer (OPJ) stationed there;
- Victims lack trust in the justice system and question its independence and impartiality, due partly to the corruption of the judicial personnel;
- There is fear of stigma and rejection by the community and/or by the victims' spouse.
- Victims and witnesses are afraid of reprisals due to a lack of adequate protection measures as well as prison escapes;
- Legal and illegal fees are prohibitive;
- Victims are not aware of their rights and the procedures to be followed;
- Arrest warrants have been filed against several FARDC officers, but arrests have never been carried out;
- Amicable settlements between the perpetrator and the victim or her family are facilitated by customary law processes. While these secure concrete results these do not necessarily support women's rights or empowerment.

For victims who are able to successfully lodge a complaint, legal proceedings themselves are marred with challenges. Files can get lost or destroyed, delays are *de rigueur* due to unavailability of qualified judicial staff, and there are additional difficulties relating to the definition of crimes and the handling of evidence.

Regarding compensation, challenges also result from the various ways judicial staff apply or even breach the law on sexual violence. The code of criminal procedure provides the possibility for temporary release of the suspect under certain bail conditions. However, this scheme further weakens the application of the law on sexual violence. Some magistrates receive bribes as the criminal procedure code does not provide a fixed fee. In exchange they release the suspected perpetrators, despite probative statements of victims, confessions and medical reports. It is then very difficult to ensure that suspected perpetrators appear before the court. Furthermore, while judges must issue a judgment within 8 days following the closure of hearings, many decisions relating to rape are taken under advisement by the tribunal, and civil parties sometimes wait over a year to obtain the judgment.

Even in cases where investigations and convictions succeed, there is a complete failure to enforce judgments awarding rep-

aration to victims of crimes under international law against the Congolese State. In such situations victims must resort to a distinct judicial procedure to implement the judgment. But this is a very complicated and expensive process as victims must pay up to 6% of the total amount of compensation to initiate the procedure. Even if this were possible, there is no procedure to force implementation against the State. Payment is discretionary. Such obstacles exacerbate the distrust of victims towards the justice system and the risk of stigma for those who file complaints.



Survivors of sexual assault who have babies resulting from the violence stay in a shelter in Goma, Democratic Republic of Congo. The city was captured by M23 rebels days before. [November 2012] © Kate Holt/IRIN

Against this backdrop, international and regional human rights mechanisms, such as the African Commission on Human and Peoples' Rights or the UN Human Rights Committee offer another opportunity for victims of sexual violence to raise their cases as well as the systemic failings of the justice system. Despite the necessity to meet several conditions for the admissibility of such complaints, notably the exhaustion of local remedies, the structural weaknesses of the Congolese justice system must be taken into account. In this respect the international mechanisms only require "available", "effective" or "adequate" remedies to be exhausted by victims. If victims can show that there is no "effective" remedy available or that available remedies do not provide "adequate" redress for the complaint, then, a regional or international mechanism may constitute a potentially useful avenue to raise the specific failings that need to be addressed in order to advance domestic justice for victims of sexual violence in the DRC. •

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¹ Law n°06/018 of 20 July 2006.

² SAJ/ REDRESS, Submission for the second cycle of the Universal Periodic Review of the UN Human Rights Council scheduled for April-May 2014, dated 16 septembre 2013, at : <http://www.redress.org/downloads/publications/130921%20REDRESS%20-%20SAJ%20Communication%20conjointe%20EPU%20RDC%20Session%20Avril-Mai%202014.pdf>

Reinforcing the ICC's participatory scheme for victims

Norbert Wühler, Chair, Independent Expert Panel on Victims Participation at the ICC

In April 2013, a panel of nine experts with experience in legal processes involving large numbers of victims met in The Hague to consider the challenges that the ICC is currently facing in giving effect to the rights of victims to participate in its proceedings. The implementation of the Court's mandate in this regard has not been without challenges. The Court has struggled to cope with the increasing number of application for participation and, despite significant efforts and investment, the ICC's participation system is not achieving its full potential. In the face of tight resources, logistical constraints and doubts as to the meaningfulness of current approaches, increasing concerns have arisen, including calls for the system to be reformed, some going so far as calling for amendments to the legal framework of the Court. I highlight here some of the key findings of the panel.

Having looked closely at the way the Court has implemented its mandate in relation to victims' participation, the first finding of the panel is that the system has been undermined by the way it has been developed, i.e., primarily on a case by case basis. Procedures and processes designed for and used in the first cases only had to deal with relatively low numbers of victims and seem unable to handle the much larger numbers of victims that are applying in other cases. Divergent visions of the participation system exist within the ICC. Various efforts aimed at addressing the current challenges are disjointed, and in particular the different procedures implemented by Chambers as to how victims apply to and participate in the proceedings risk further undermining the system of participation. In addition, discussions around reviews of the system are also taking place at the level of the States Parties of the ICC with more than one forum considering the issue.

The fact that the participatory system of the Court is facing challenges should not lead to modifications which undermine victims' rights and ultimately reduce, rather than enhance their ability to be heard in the proceedings. The panel felt strongly that the Court's participation system can be tailored to effectively respond to larger numbers of victims and that creative and effective solutions can be found to overcome the challenges. Essential to this is a shared vision of what victim participation should seek to achieve within the ICC, for the ICC and most importantly, for victims.

While the serious challenges that the ICC is facing in processing increasing numbers of applications in some cases should be acknowledged, creative approaches need to be explored to expand the ICC's processing capacity promptly and efficiently and to enable the ICC to scale up to meet peak periods of application submissions, particularly around deadlines. Drawing on the experience of other mass claim processes, the ICC should streamline the current multi-layered process and explore the implementation of a range of techniques, including the enhanced use of databases, further development of the use of the Registry's reports on applications and monitoring the quality of processing through sampling applications.

Another aspect considered by the panel is the possibility to group victims for the purpose of applying and participating, and to consider the use of group application forms as well as



To participate in the proceedings, victims first need to apply © REDRESS

of grouping individual applications after they have been received. In this regard, while group approaches may provide part of the solution, we must acknowledge that they are not without their challenges. If group approaches are considered, the individual right of victims to participate, as set out in Article 68 (3) of the Rome Statute, still needs to be respected and the voices of all victims, including women, people from marginalized groups and children, need to be heard.

In addition, if the participation of victims in ICC proceedings is to be meaningful and effective, ensuring the quality of the legal representation victims receive will be essential. Providing legal representation to large groups of victims is a complex process and legal representatives should be provided with guidance on best practices. Information should also be provided to victims on what they should expect from counsel and what avenues are available to them, should they wish to raise concerns regarding their representation. Legal representatives must be able to consult regularly with their clients to keep them informed of the proceedings and gather their views and concerns. Regular in-person consultations with legal representatives must be maintained, including during periods of low or no judicial activity.

Finally, victims need to receive information to understand the wider Court process in a format that is accessible. Coordinated communication between the various organs and units interacting with victims and legal representatives will assist in ensuring that participating victims are regularly informed of developments in proceedings. Where the security situation allows, *in situ proceedings* should be considered so that victims can directly witness the justice process, including their representative in the courtroom. •

The full report is available here:

<http://www.redress.org/downloads/publications/130711%>

Working Group affiliated organisations include:

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