



**Independent Medico-Legal Unit**  
A Just World Free From Torture



# **Access to Justice for Victims of Systemic Crimes in Africa:**

## **Challenges and Opportunities**

**Kololi, The Gambia: 13-14 April 2012**

**Summary of proceedings**

**5 April 2013**

## Background and Acknowledgments

From 13-14 April 2012, in the margins of the NGO Forum preceding the 51<sup>st</sup> Ordinary Session of the African Commission on Human and Peoples' Rights (ACHPR), lawyers and other experts met in Kololi, The Gambia, to discuss victims' experiences of accessing justice and seeking reparation.

Participants included lawyers and experts from Algeria, Burundi, Ivory Coast, Chad, the Democratic Republic of Congo, Ethiopia, Kenya, Libya, Rwanda, Sierra Leone, South Africa, Sudan and Zimbabwe. Participants explored challenges and potential solutions in accessing justice at the national, (sub-) regional and international levels. Their presentations and discussions form the basis of this paper. Any inaccuracies are solely those of REDRESS and cannot be attributed to participants.

This report provides a summary of the discussions on how victims have attempted to access justice and obtain reparation at the national, regional and international level, and considers avenues for human rights activists and lawyers to work together in advancing victims' right to justice. It also provides key proposals for improving victims' access to justice and reparation in Africa on the basis of the conference proceedings.

The meeting was organised by REDRESS under the auspices of the Victims Rights Working Group (VRWG) and 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).<sup>1</sup> We are grateful to the participants of the meeting and our partner organisations for their assistance in the organisation of this meeting. We are grateful to the John D. and Catherine T. MacArthur Foundation, which has supported the organisation of this conference and the work of REDRESS on the rights of victims at the International Criminal Court for a number of years.

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<sup>1</sup> For further information on the Organisers, see: VRWG- [www.vrwg.org](http://www.vrwg.org); REDRESS- [www.redress.org](http://www.redress.org); IMLU- [www.imlu.org](http://www.imlu.org); IHRDA- [www.ihrda.org](http://www.ihrda.org); CIHRS- <http://www.cihrs.org/?lang=en>.

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# Access to Justice for Victims of Systemic Crimes in Africa: Challenges and Opportunities

## 1. Introduction<sup>2</sup>

While there have been significant developments in international law recognising victims' rights to reparation, participation and protection over the past two decades, these are not always reflected in the practice of national courts, or (sub-)regional and international mechanisms. Too often, victims of torture and other serious human rights violations in Africa are denied justice for a number of reasons, including (i) a lack of political will to prosecute such violations and to provide reparation to victims, particularly in regards to crimes committed by State agents; (ii) political interference with the judiciary; (iii) a lack of enforcement of judicial decisions; (iv) inadequate legal frameworks; (v) lack of adequate resources; (vi) corruption and/ or poor training of staff. Often, proceedings take a long time, which, in practice, may mean that many victims will not be able to benefit from any reparation or justice, as they may not live long enough to see the end of the proceedings. The absence of a legal and practical framework providing for the protection of victims and witnesses prevents victims and witnesses from coming forward to participate or testify in proceedings. A lack of sufficient outreach to victims by mechanisms such as the International Criminal Court (ICC) leads to unrealistic expectations on the part of the victims which can undermine the credibility and indeed effectiveness of the Court.

Some, if not all of these challenges, exist to various degrees at national, (sub-) regional and international levels. The presentations and discussions during the meeting highlighted further that victims and their advocates encounter these challenges irrespective of the geographical, political or sociocultural context in which mass or systemic crimes are committed.

The common nature of these challenges presents an opportunity for lawyers and other victims' advocates to work together to share experiences, formulate strategies and identify best practices on how best to overcome them. Coalitions and networks of victims, lawyers and other advocates can therefore be a helpful tool to facilitate the sharing of experiences and formulate joint advocacy and effective legal strategies at national, (sub-) regional and international levels.

### 1.1 Victims' rights under international law<sup>3</sup>

The right to reparation for victims of core international crimes such as genocide, crimes against humanity, war crimes, enforced disappearances and torture is enshrined in international law. States' obligations to provide victims of these crimes with adequate reparation are reflected in the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted

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<sup>2</sup> Summary based on the presentation of Souhayr Belhassen, President of the International Federation of Human Rights (FIDH).

<sup>3</sup> *Idem*.

by the UN General Assembly in December 2005 ('UN Basic Principles').<sup>4</sup> The UN Basic Principles specifically provide that States must afford victims with effective access to justice and adequate reparation. Adequate reparation must be effective, prompt and proportional to the gravity of the violation and resulting harm. The Principles also clarify the different forms of reparation, which include: (1) restitution: measures to restore the victim to his or her original situation, without exposing the victim to a risk of further harm; (2) compensation for economically assessable damage from physical or mental harm; (3) rehabilitation through, for instance, medical/psychological care and social services; (4) measures of satisfaction, which may include a full investigation and prosecution of those responsible, a judicial decision restoring the dignity and reputation of the victim(s), and an apology by the State and acceptance of responsibility; and (5) guarantees of non-repetition, that could include law reform or reform of police or military services.

The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation of May 2007 ('Nairobi Declaration') provides a useful blueprint for devising comprehensive strategies to address sexual violence and related forms of gender based violence perpetrated against women and girls.<sup>5</sup> Specifically in the context of Africa, the 'Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa' ('The Robben Island Guidelines') of February 2002 provide that States have an obligation to offer reparation to victims and their dependents, including "appropriate medical care," "access to appropriate social and medical rehabilitation" and "appropriate levels of compensation and support."<sup>6</sup> More recently, the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted General Comment No.3 on Article 14 of the Convention against Torture which clarifies the obligations of State Parties to the Convention to provide redress and reparation to victims of torture.<sup>7</sup>

These developments towards a more victim orientated approach to justice have been shaped by the recognition that justice—whether on a national, regional or international level—includes not only the retributive aspect in punishing perpetrators, but must also include a reparative element for victims.

## 1.2 The role of civil society

Civil society and lawyers can play an important role in advocating for victims' rights as well as assisting them in accessing justice. The case of Hissène Habré is emblematic of how civil society can work with lawyers to put pressure on governments and work with regional and international institutions to ensure that justice is done. Other examples of successful civil society cooperation and activities include the work of the Victims' Rights Working Group on the rights of victims at the ICC and the work of the Khulumani Support Group in South Africa.<sup>8</sup>

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<sup>4</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, A/RES/60/147.

<sup>5</sup> The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, also known as the *Nairobi Declaration*, was issued at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007.

<sup>6</sup> The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, also known as the *Robben Island Guidelines*, were adopted by the African Commission on Human and People's Rights on 23 October 2002.

<sup>7</sup> Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General comment No.3 (2012),

'Implementation of article 14 by States parties', CAT/C/GC/3, 13 December 2012, at <http://www2.ohchr.org/english/bodies/cat/GC3.htm>.

<sup>8</sup> See further below, point 2.6. and Section 5.

Impunity for crimes such as war crimes or torture can prolong or revive conflicts. Assisting victims who have the courage to come forward to obtain justice and reparation can contribute towards ending impunity. An assessment of the role of the different mechanisms that are in place to provide victims with access to justice is therefore important to identify their contribution to fighting impunity, and to draw lessons with a view to advancing the realisation of victims' right to adequate reparation, including compensation, restitution, rehabilitation, just satisfaction and guarantees of non-repetition.

### 1.3 The role of the African Commission<sup>9</sup>

The African Commission is tasked with the promotion and protection of the rights enshrined in the African Charter on Human and Peoples' Rights ('Charter').<sup>10</sup> As part of its protective mandate, the Commission examines communications submitted by victims and/or civil society organisations alleging violations of the Charter by a member State. While the Charter does not include a separate express right to reparation, such a right is implied as victims have a right to file complaints with the Commission, which has the power to specify or recommend reparation where it finds that a State party has violated the Charter. Furthermore, articles 7 (right to a remedy) and 21 (right to restitution of property) imply certain measures of reparation.<sup>11</sup>

More recently adopted regional instruments have taken into account developments under international law and expressly provide for a right to reparation, such as articles 4 and 25 of the 'Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa,' which oblige States to, inter alia, "establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women."<sup>12</sup> Article 50 of the Robben Island Guidelines, which was adopted more recently than the Charter, can also provide some guidance to the Commission regarding the rights of victims.

The Commission's jurisprudence regarding victims' right to reparation is somewhat inconsistent and to date does not seem to take into account the various developments under international law. Where it does rule on reparation, it is mainly limited to recommending a State to pay compensation, while leaving it up to the State to decide on the amount. Only in very few cases has the Commission gone further and recommended, for instance, the commencement of an independent enquiry to clarify the fate of disappeared persons, the restitution of property and a change of legislation to prevent future violations of article 5 (right to be free from, inter alia, torture).<sup>13</sup> The Commission has confirmed that the obligation to provide reparation to victims continues to exist even after a change of government, in regard to violations committed by prior governments.

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<sup>9</sup>Summary based on the presentation of Jürgen Schurr, REDRESS.

<sup>10</sup> The African Charter on Human and Peoples' Rights, also known as the *Banjul Charter*, was adopted by the African states members of the Organization of African Unity (now African Union) on 27 June 1981.

<sup>11</sup> Article 7, Para 1 provides that: "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal." Article 21, Para 2 states that: " In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."

<sup>12</sup> The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, also known as the *Maputo Protocol*, was adopted by the African Union on 11 July 2003.

<sup>13</sup>African Commission, Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98, *Malawi African Association and Others v Mauritania*.

Another challenge for the African Commission in providing justice and reparation to victims is ensuring the enforcement of its decisions, which reportedly remains at approximately 35 per cent.<sup>14</sup> Arguably, lack of precision in the Commission's decisions leaves States considerable room to avoid implementation. Other challenges hampering victims' access to justice through the African Commission include the length of proceedings with some cases taking up to 10 years for a decision to be rendered, thereby failing to address the immediate need for reparation and lack of outreach to complainants who are not regularly informed about the progress in their cases.

The jurisprudence of the Court of Justice of the Economic Community of West African States (ECOWAS), which exercises jurisdiction over 11 West African States, provides a certain degree of contrast in the above respects, including in particular regarding the detail of its compensation awards to victims and enforcement of its (binding) judgments. The ECOWAS Court of Justice, for instance, ordered the government of The Gambia to pay damages up to \$200,000 USD in a case involving torture and arbitrary detention.<sup>15</sup> In a case against Niger, the Court held that the Government had violated its international obligations to prohibit slavery, and awarded the equivalent of \$19,000 USD to the victim, with which Niger complied.<sup>16</sup> However, in the few cases concerning article 5 violations that the ECOWAS Court has heard to date, it appears to limit its reparation mandate to awarding compensation, and does not take into consideration other forms of reparation.

The African Court could be another avenue for victims to obtain reparation in cases where the relevant AU member State has recognised the competence of the Court and allowed individual submissions under Rule 34(4) of the Court's Rules of Procedure.<sup>17</sup> The Protocol establishing the Court expressly provides in article 27 that the Court can order the State to provide reparation where there has been a violation of the Charter. The Court's judgments are furthermore binding on State parties and arguably therefore may carry more weight than the decisions of the African Commission. However, the Court has yet to rule on a case involving systemic crimes, and it remains to be seen how the Court will interpret article 27 so as to ensure that victims will obtain reparation in line with international law.

In the meantime, it is important for the Commission to address the challenges that victims experience in their pursuit of justice and reparation, particularly regarding delays and communication with plaintiffs, as well as the level of specificity in its reparation rulings. The establishment of a Working Group on Communications is a positive first step in addressing the problem of delays and communication with plaintiffs.<sup>18</sup> In ruling on the merits of a communication, the Commission could for instance build on the practice of the Inter-American Commission / Court on Human Rights and develop a precise and consistent practice of awarding reparation to victims in line with international law.

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<sup>14</sup> Sheila B. Keetharuth, 'Implementation of decisions of the African Commission on Human and Peoples Rights', 8 September 2009, at <http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/documents/sheilakeetharuthpres.pdf>.

<sup>15</sup> Community Court of Justice, ECOWAS, *Musa Saidykhan v Republic of The Gambia*, Judgment No. ECW/CCJ/JUD/08/10, 16 december 2010, at <http://bit.ly/11KL3S1>.

<sup>16</sup> *Mme Hadijatou Mani Koraou v The Republic of Niger*, 27 October 2008, ECW/CCJ/JUD/06/08; for further information see Helen Duffy, 'Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court', in *Human Rights Law Review*, 2008.

<sup>17</sup> To date, only 6 countries, namely Burkina Faso, Ghana, Malawi, Mali, Tanzania and Rwanda have made a declaration under Article 34 (6).

<sup>18</sup> The Working Group on Communications was established by Resolution 194. The resolution was adopted by the African Commission during its 50<sup>th</sup> Ordinary Session, held in Banjul from 24 October to 5 November 2011.

## 2. Victims' access to justice in domestic frameworks

### 2.1 Prosecuting mass violations in Ethiopia: a lost opportunity for victims<sup>19</sup>

Serious human rights violations were committed under the 17 year rule of Mengistu Haile Mariam in Ethiopia, particularly during the early years of the regime since the mid-1970s to the early 1980s. His rule resulted in massive repression, extrajudicial killings and torture of thousands of people. Following Mengistu's fall in 1991, the new government started investigating the human rights violations committed by the previous regime, establishing that at least 10,000 people had been killed and more than 2,000 tortured, though other estimates put the number of people killed much higher.

Large scale prosecutions of approximately 5,000 suspected perpetrators were launched, mostly for genocide,<sup>20</sup> crimes against humanity and 'abuse of power.' A variety of factors supported these prosecutions, including (1) the fact that the former regime was overthrown militarily and there was limited resistance to arrest and investigations, with most of the top officials handing themselves in voluntarily; (2) the meticulous records kept by former regime which provided ample evidence of the crimes committed; (3) lack of support and sympathy among the population for the regime; and (4) significant financial and political support from the international community. Approximately half of those charged were eventually convicted to sentences ranging from five years imprisonment to capital punishment, though capital punishment sentences were later converted to life imprisonment.

Victims of the crimes committed during this period did not participate in the proceedings, and no reparation was provided, even though the legal framework would have allowed 'civil party' participation in the prosecutions. The few victims who tried to join the criminal proceedings saw their submissions rejected by the court because they were not identified as victims in the charges against the accused. The only nationwide victims' association that could have advocated more actively for rights of victims at the time was viewed by many as being too close to the new government, which is also accused of serious human right violations, and therefore, did not enjoy the full support of all victims.

Overall, while there was a political will in Ethiopia to prosecute the crimes of the previous regime, the manner in which the prosecutions were carried out did not result in justice for victims. This is due to a number of factors, including the unrealistic scope of the prosecutions in light of Ethiopia's resource constraints and the fact that the trials took a long time. There was a clear lack of genuine commitment to due process and a lack of vision to conduct the trials in a manner that could provide a useful lesson for the future and help prevent the recurrence of similar human rights violations. Trials started in 1995, and were still not completed by 2010. Many of the accused as well as the victims passed away in the meantime, without having faced or seen justice. Other victims lost

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<sup>19</sup> Summary based on the presentation of Dadimos Haile, Legal Adviser, REDRESS.

<sup>20</sup> Under Ethiopia's Penal Code, the crime of genocide includes crimes committed against political groups, and thus political groups are included as a protected group in the definition of genocide of the 1957 Penal Code.

interest in the prosecutions. In the end, the overall value of the prosecutions in terms of prevention as well as establishing the truth has been minimal.

A selective approach to prosecutions combined with a thorough investigation through a commission of inquiry would have been more beneficial for the victims and society as a whole.

## 2.2 Victims' rights in DRC: law and practice<sup>21</sup>

The position of victims of mass or systemic crimes within the Democratic Republic of Congo's (DRC) legal framework is regulated by the Rome Statute of the ICC and specific national legislation. The Rome Statute is an integral part of Congolese law since its ratification in 2002. As the DRC is a monist legal system, the Rome Statute is—in theory—directly applicable and it is incumbent upon courts to ensure its application, including the definition of genocide, crimes against humanity and war crimes. In practice, some judges have also applied the provisions on victims' rights.

In addition to the direct application of the Rome Statute in Congolese law, specific legislation was introduced to better ensure that domestic legislation reflects the requirements of the Rome Statute. Accordingly, the Criminal Code was amended in July 2006 specifically in regards to sexual and gender based violence so as to reflect the Rome Statute as well as the jurisprudence of the ad-hoc tribunals for Rwanda and the former Yugoslavia on rape and sexual violence.<sup>22</sup> The Criminal Procedural Code was also amended in 2006, and specific legislation providing for child protection and criminalisation of torture was introduced in 2009 and 2011 respectively. Congolese law today therefore includes torture as a crime, with a definition in line with Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Severe penalties are provided for in regards to torture, and statutes of limitation do not apply. While further legislation is being introduced to specifically cover other core international crimes, questions remain about the jurisdiction granted to ordinary and military courts for mass crimes.

Furthermore, there is a clear need for legislation to be introduced specifically providing for the rights of victims to protection. The absence of such legislation is a significant lacuna in the domestic legal framework on international crimes, as victims are not protected more than any other party to the proceedings and, therefore, are often not able to come forward to testify. This was demonstrated, for instance, in the case of '*Colonel Kibibi*', who was tried and eventually convicted to 20 years imprisonment for crimes against humanity by a Military Court of South Kivu. While in this case victims' identities were kept anonymous throughout the trial, their full names were disclosed when the sentence was pronounced, despite the fact that many victims live in fear of reprisals.<sup>23</sup> Legislation is necessary to identify what protection measures are needed and when, and who should be responsible in providing such measures.

A variety of different pieces of legislation provide for some form of reparation to victims, including the Civil Code, the Criminal Procedural and the Military Judicial Code, which provide victims with the possibility to be a civil party in the proceedings. However, despite the relatively strong legal

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<sup>21</sup> Summary based on the presentation by Professor Niabirungu Songa.

<sup>22</sup> See e.g. International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Furundžija*, Case No. IT-95-17/1-A, Judgment (July 21, 2000); International Criminal Tribunal for Rwanda, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T (Judgment September 1998).

<sup>23</sup> Amnesty International, 'DR Congo colonel's rape conviction is first step on road to justice', 23 February 2011, at <http://www.amnesty.org/en/news-and-updates/dr-congo-colonels-rape-conviction-first-step-road-justice-2011-02-23>.

provisions for reparation, victims in DRC continue to face many challenges when claiming reparation before courts, including, (1) the challenge posed by some politicians who consider that prosecutions of those responsible for mass crimes will prevent the establishment of peace; (2) a serious lack of capacity of the judiciary to deal with mass crimes due to lack of human resources, lack of resources to provide for adequate infrastructure, equipment, salaries and social benefits for judges; political interference and widespread corruption; (3) a failure to properly assess the damage suffered by individual victims. In the majority of cases, damages are determined arbitrarily, and all civil parties receive the same amount, as long as the violations they suffered are of the same nature, which in practice means that in the same case, the loss of a relative is assessed in the same way irrespective of the level of kinship and other considerations; (4) the absence of other forms of reparation, particularly rehabilitation.

A significant discrepancy exists between law and practice also in regards to other pieces of legislation referred to above, particularly the law on sexual violence and the widespread practice of such violence in large parts of the country. This is mainly due to the fact that armed conflicts are ongoing in specific territories, combined with a complete lack of State authority and an effective judiciary to enforce the rule of law.

The biggest challenge specifically in regards to reparation, however, is addressing the lack of political will on the part of the government to comply with court judgments holding the State jointly liable to pay compensation for crimes committed by its agents. Even though the State is regularly condemned, it has yet to pay compensation to victims. The State's failure to provide reparation in the form of compensation seriously undermines the rule of law, and leaves victims empty handed, as most often, convicted offenders are unable to pay compensation.

This is a challenge for all actors involved in trying to assist victims to obtain reparation. In this regard, the obstacles to reparation are not so much of a legal nature but rather result from a failure to enforce the law in practice: what value does our work have if we do not manage to ensure that victims obtain compensation, and other forms of reparation, for harm suffered as a result of mass crimes? One solution could be the establishment of a Victims' Trust Fund at the national level, which would be a public institution with legal personality and a board of directors to set the policy and the establishment of a secretariat to carry out the management tasks of the fund. It would be funded by profits from fines and confiscated property, state subsidies and voluntary contributions from governments, international organisations, individuals, public and private companies.

## 2.3 Mass crimes in Burundi: the need for a nationwide victims association<sup>24</sup>

In Burundi, systemic crimes have been committed for decades, almost since the independence and up to the cessation of hostilities in 2008, when the last rebel movement signed a ceasefire agreement with the government. The first attempts to prevent systemic crimes were made in 1993, following the assassination of the first democratically elected president in Burundi, Melchior Ndadaye, which led to large scale massacres perpetrated between the two main ethnic groups in Burundi, the Hutu and the Tutsi.

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<sup>24</sup>Summary based on the presentation of Eugene Ntaganda.

Burundi's judicial system was then tasked with judging crimes that, at the time, did not exist in Burundi's legal system. The first lesson learned in 1993 was that a country needed an appropriate legal framework to prevent and punish such atrocities. In 1993, victims were not organised, and defining "victim" was a challenge for civil society organisations and the judiciary. Hutus felt persecuted and targeted by Tutsis and vice versa. The judicial system was dominated by one ethnic group, leading to trials based on ethnic identity, rather than facts. Another challenge was the perceived dilemma over peace versus justice. Temporary immunity was provided to perpetrators to allow leaders of rebel movements to participate in the peace agreement negotiations. The immunities were to be temporary until the establishment of transitional justice mechanisms, yet they effectively put an end to the possibility of prosecutions. The few prosecutions that did take place prior to the introduction of immunities were hampered because of the reluctance of victims and witnesses to testify due to fear of reprisals and the absence of a protection mechanism for victims and witnesses.

The lessons from 1993 have only partly been taken into account in the current justice process that addresses mass crimes committed over the past decades, a process that took place in two stages. First, the State decided that it would consult with the population to identify different positions, expectations and perceptions of what a potential justice process should entail. A report was published in April 2010 on the outcome of the consultation which highlighted that the population wished for a judicial system backed by a Truth and Reconciliation Commission, composed of national and international experts, who were considered necessary to ensure its independence and impartiality. The report also highlighted the need for the establishment of a protection mechanism for victims and witnesses.<sup>25</sup>

The second phase focussed on the implementation of the outcomes of the consultation process. In 2011, the Government established a technical committee to draft a bill on the Truth and Reconciliation Commission. The draft bill presented by the technical committee was severely criticised by civil society in Burundi, as well as the UN, who contested (1) the proposed composition of the Commission, which according to the draft bill would be exclusively made up of national experts, with an international committee serving in an advisory role; (2) the Commission's control of the work of the prosecution; (3) the failure of the draft bill to provide for the protection of victims and witnesses; (4) the timing of the Commission's establishment and potential interference with its work by the current President, who himself has been condemned by the Supreme Court for crimes committed during the conflict. There is an impression among some, that the current government is seeking a "forgiveness mechanism", rather than a "prosecution mechanism."

Victims' associations in Burundi are currently too divided and lacking in capacity to have an impact on the justice process. While about 15 victims' associations exist throughout the country, these are fragmented, organised locally or regionally and based on specific criminal events over the past decades as well as on ethnicity. No national coalition of victims' associations currently exists that could effectively influence the current justice process on behalf of all victims. Instead, different victims' associations are competing against each other. One important lesson learnt therefore would be to overcome ethnic identity so as to form a national victims' association that is based on rights,

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<sup>25</sup>See Government of Burundi and Office of the High Commissioner for Human Rights, 'Rapport des consultations nationales sur la mise en place des mecanismes de jusice de transition au Burundi', 20 April 2010, available (in French) at <http://www.ohchr.org/Documents/Countries/BI/RapportConsultationsBurundi.pdf>.

rather than ethnicity and specific criminal events. Such an association would build on the capacity of its members and could establish links to international organisations to further develop skills in advocacy and knowledge of victims' rights under international law.

The establishment of such a national victims' movement or association is fundamentally important for victims' rights, and needs to be reflected in future mechanisms of transitional justice in Burundi. As such, international organisations with a victims' rights mandate should explore the potential for assisting existing organisations within Burundi to form a national victims' organisation based on rights, rather than crimes or ethnicity.

## 2.4 Reparation for victims in Sierra Leone<sup>26</sup>

A Truth and Reconciliation Commission (TRC) and the Special Court of Sierra Leone were set up in Sierra Leone in 2002, following the end of the war in Sierra Leone. The TRC did not have a mandate to establish criminal responsibility, yet it made comprehensive recommendations to address mass crimes committed during the 11 year long conflict, including recommendations aimed specifically at reparation for victims.<sup>27</sup>

In contrast, the Special Court of Sierra Leone was established specifically to try those bearing the greatest responsibility for "serious violations of international humanitarian law and Sierra Leonean law", including crimes against humanity and violations of article 3 common to the Geneva Conventions and Additional Protocol II.<sup>28</sup> The Special Court did not have a mandate to provide reparation to victims, and victims did not play any role in the proceedings aside from being witnesses. Also, victims have not had an opportunity to seek redress in civilian courts in relation to the accused before the Special Court, in breach of Section 28(1) of the 1990 Constitution of Sierra Leone.

However, much has been done within Sierra Leone to address these shortcomings of the Special Court's mandate. In April 2008, legislation was adopted establishing a 'Reparation Directorate' within the National Commission for Social Action (NACSA). The Directorate registered about 32,100 victims across Sierra Leone and started implementing reparation measures in line with the recommendations of the TRC in 2009. This included providing victims with significant medical assistance, including for instance the removal of bullets (80 victims), gynaecological treatment such as fistula surgery provided to 235 victims as well as educational grants to 6,984 child victims and psycho-social support throughout the country for approximately 15,200 victims.

A particular feature of Sierra Leone's reparation programme is its focus on addressing the rights and needs of women who have been subjected to sexual and other forms of gender based violence. In addition to the gynaecological treatment referred to above, 650 out of 3602 officially registered sexually violated women received skills-training and micro grants. The Human Rights Commission of Sierra Leone successfully worked towards the repeal of discriminatory laws and insisted on an

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<sup>26</sup> Summary based on the presentation of Rosaline McCarthy, Sierra Leone Women's Forum.

<sup>27</sup> See further below, p.14.

<sup>28</sup> See Statute of the Special Court for Sierra Leone, at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeFw%3d&tabid=176>.

apology by the President to women in Sierra Leone for the violations they women during the war, as recommended by the TRC. The President apologised in March 2010.<sup>29</sup>

Even though the process of providing reparation to all victims of the war in Sierra Leone is far from over, there has been significant progress. A 'War Victims Trust Fund' was launched in December 2009 which will help to implement the recommendations of the TRC. The progress made over the past decade is in part due to national victims' associations, such as the Women's Forum, which sensitises and advocates on victims' reparation needs, using in particular the Nairobi Declaration and the specific recommendations of the TRC. The Forum's work included for instance counselling of victims; consultations with donors; outreach to media, to the UN Special Rapporteur on violence against women, and to the TRC; as well as the establishment of victims' associations across the country.

While a large number of victims have been identified as beneficiaries of reparation measures, many victims, particularly victims of sexual violence, have missed the deadline for registration. Victims' associations have repeatedly called on the Reparation Directorate to extend the deadline to allow more victims to register, and these discussions are still on-going.

## 2.5 The right to protection in Kenya<sup>30</sup>

Witness and victim protection is a vital pre-condition for delivering justice to victims and to prosecute perpetrators. Where the State fails to provide protection, witnesses and victims can be exposed to intimidation or threats, preventing them from coming forward. Accordingly, the protection of witnesses and their families contributes to the administration of justice by allowing testimony without fear of retribution.

The multifaceted challenges involved in providing victims and witnesses with adequate protection require States to adopt a holistic approach that encompasses taking political, legislative and practical steps. In Kenya, a revised Witness Protection Act was adopted in 2012, putting in place a Witness Protection Agency and Witness Protection Programme that cater for different forms of protection provided by the police and the judiciary.<sup>31</sup> These can include police escorts to the court room, temporary residence in a safe house, providing testimony via video link, resettlement of a witness in an undisclosed location, and sensitive investigatory relocation and identity change. The primary objectives of the Witness Protection Programme are (a) to protect the physical security of the witnesses to secure testimony, and (b) develop protective practices at each phase of the criminal justice process.

Within Africa, sophisticated witness protection programmes are still the exception rather than the norm, limited to just a few countries, including South Africa, Kenya, Uganda, as well as the international criminal tribunals or courts operating in some African countries. Accordingly, there is a need for more countries within Africa to adopt specific witness protection legislation and

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<sup>29</sup> Human Rights Commission of Sierra Leone, 'Restoring Women's Dignity: President Ernest Bai Koroma's apology to Sierra Leonean Women', 29 March 2010, <http://www.gnwp.org/president-ernest-bai-koroma-apologizes-to-sierra-leonian-women>.

<sup>30</sup> Summary based on the presentation of Diana Watila, IMLU.

<sup>31</sup> Witness Protection Act, Chapter 79, revised edition of 2012, original Act commenced on 1 September 2008, available at [http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/WitnessProtectionAct\\_No16of2006.pdf](http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/WitnessProtectionAct_No16of2006.pdf).

programmes so as to provide effective protection. Lessons can be learned from the experiences of the ICC, International Criminal Tribunal for Rwanda and the Special Court of Sierra Leone.

Western models of witness protection base their success on a properly functioning and independent judiciary, as well as the existence of expensive witness protection programmes and agencies. In many African countries, however, implementing a witness protection programme can include a number of challenges such as (i) a lack of capacity and integrity in the justice system; (ii) the diversity of individual and State criminality; (iii) widespread corruption which can result in compromising protection officers; (iv) small State budgets, which may automatically exclude certain protection measures, such as relocating witnesses and their families. A general lack of resources and competing needs risk that any witness protection programme will experience funding gaps, which in practice could threaten their integrity.

Experiences made in Kenya have underlined that the independence of the programme—in terms of authority and financial autonomy—as well as vetting of the programme’s personnel are crucial first steps in ensuring that effective protection can be provided, particularly in the context of human rights violations which often are committed by State actors.

## 2.6. Activism for victims’ rights in South Africa<sup>32</sup>

The end of the Apartheid regime in South Africa in 1994 presented a unique opportunity for the country to address the systemic human rights violations committed over decades during Apartheid and to provide victims with justice and reparation. Today, however, more than 18 years later, victims and civil society activists speak of their ‘high-jacked’ revolution, given their hopes in 1994 and what subsequently transpired.

Following the change of government in 1994, political leaders, including then President Nelson Mandela, focussed on the future, rather than the past. Painful memories of the ‘long walk to freedom’ were marginalised, together with victims seeking justice. The Truth and Reconciliation Commission (TRC) was the creation of a political compromise which was and still is valued very differently by the different segments of society in South Africa. It was vehemently rejected by the beneficiaries of Apartheid, many of whom remain in powerful and influential positions today. It was also rejected in part by those in exile during Apartheid, who saw its value primarily in securing conditional amnesties for the crimes committed in the course of resistance to Apartheid.

The TRC never had a reparative mandate. In fact, it was viewed as a weakness by many to testify about human rights violations and seek reparation before the TRC, as human rights violations by the Apartheid regime were considered natural—and therefore accepted—consequences for those involved in the resistance struggle.

The TRC’s amnesty provisions were used primarily by liberation forces and only about 300 agents of the Apartheid Security made use of the amnesty provision. That presented a challenge for victims of the many perpetrators who did not make use of amnesty provisions, and who therefore did not disclose or confess to any crimes. In the absence of effective prosecutions of those who did not use the amnesty provision, it is very difficult for victims and their families to obtain information and to

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<sup>32</sup> Summary based on the presentation of Marjorie Jobson, Khulumani Support Group.

know the truth about violations. Another problem was that full disclosure was difficult to adjudicate as in the majority of cases, there were no witnesses to the torture and killings. None of the perpetrators who confessed under the amnesty provisions confessed to the crime of rape, as, at the time the TRC was instituted in 1996, rape was not defined as a crime for which any perpetrator could apply for amnesty.

The TRC today remains a source for divided views, reflecting to an extent the division between those in exile during Apartheid, some of whom preferred armed resistance, and those who remained in South Africa and fought a non-violent mass struggle against Apartheid. Indeed, those in exile who had received military training and provided affidavits that they served in a liberation movement are today entitled to substantial special pensions, while those who suffered gross human rights violations, including killing, abduction, torture and ill-treatment, continue to be excluded from reparation benefits.<sup>33</sup> Today, the struggle for reparation has assumed huge significance and informed the growth and continuing mobilisation of a victims' movement that resembles the traditions of the decades' long struggle prior to the negotiated transition in 1994.

The Khulumani Support Group (KSG) operates in that context and focusses on citizen activism and creating political agency among victims aiming to 'transform victims into victors.'<sup>34</sup> The KSG has made significant progress in the fight against impunity with a view to holding perpetrators of human rights violations to account. However, the campaign for reparation for victims has initially been more challenging. It involved a wide range of advocacy strategies, including formulating victims and reparations' policies, producing a charter for redress, picketing of public political events, submissions to Parliament and training to strengthen the political agency of victims. Communities are trained so as to engage constructively, to use access to information and legislation. Strategic alliances are created throughout the country to formulate nationwide strategies. The activities aim at securing a shift in political will that enables a political discourse about reparation for victims of the Apartheid regime and eventually reparation.

### **3. Accessing justice through regional and sub-regional human rights mechanisms**

#### **3.1 The African Commission: addressing systemic crimes in Sudan<sup>35</sup>**

Sudanese human rights activists and lawyers have a long history of engagement with the African Commission, with the first cases being filed before the Commission in the early 1990s.<sup>36</sup> The human rights violations committed across the country, in conflict zones, such as Darfur, South Kordofan and Blue Nile, as well as beyond these regions, have been brought to the attention of the Commission.<sup>37</sup>

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<sup>33</sup> This does not apply to the same extent to the 17,000 individuals identified by the TRC.

<sup>34</sup> See website of the KSG for further information: <http://www.khulumani.net/>.

<sup>35</sup> Summary based on a presentation by Osman Hummaida, Director, African Centre for Justice and Peace Studies.

<sup>36</sup> For cases decided by the Commission regarding Sudan, see Institute for Human Rights and Development in Africa, Case Law Analyser, at <http://caselaw.ihrda.org/acmhpr/search/?c=72>.

<sup>37</sup> See for instance the case brought by REDRESS, together with Interights, Sudan Democracy First Group, Human Rights Watch, regarding alleged mass human rights violations committed in South Kordofan and Blue Nile, at <http://www.redress.org/case-docket/redress-sdfg-hrw-and-interights-request-for-provisional-measures-in-regards-to-southern-kordofan-sta>.

Systemic crimes raised included torture by law enforcement and national security officials, corporal punishment, enforced disappearances, extrajudicial killings and other serious violations of the African Charter.

The Commission has rendered several decisions that found the Government of Sudan in violation of the African Charter and has carried out two promotion missions and one fact finding missions to Sudan in 1996, 2003 and 2004 respectively.<sup>38</sup> However, despite some encouraging steps taken, the Commission remains remarkably silent in the face of on-going systemic human rights violations in Sudan, including in South Kordofan and Blue Nile as well as the increasing repression of protest movements and the continued pervasive discrimination of women and marginalised groups.<sup>39</sup> In over 26 years of its existence, the Commission has released only a total of three statements and five resolutions specifically on Sudan.<sup>40</sup>

Human rights activists criticise the Commission particularly for:

- its delayed responses to cases filed against Sudan for violations of the African Charter, with individual cases pending before the Commission for 4-5 years until a decision is taken on admissibility;
- its inaction regarding requests for provisional measures filed with the Commission in cases where there was a risk of torture against human rights defenders;
- a lack of willingness within the Commission to confront the government of Sudan and to directly address the human rights situation in Sudan, including through (i) further fact-finding missions to conflict regions; (ii) the publication of 'concluding observations' on Sudan's latest periodic report; (iii) issuing statements on human rights abuses; (iv) adoption of resolutions and other measures at the Commission's disposal; and
- its failure to address the impunity with which crimes are being committed, including through bringing these issues to the attention of the African Union Assembly of Heads of State and Government.

### 3.2 The African Commission: victims of systemic crimes in Algeria<sup>41</sup>

As a result of the blanket amnesty law and other provisions of immunity in Algeria, victims of systemic crimes, including torture and enforced disappearances, have had to rely on international mechanisms in their attempts to obtain justice and reparation. Victims have been unsuccessful in seeking prosecution of Algerian officials allegedly responsible for torture on the basis of universal jurisdiction in France and Switzerland, and have turned to the UN Human Rights Committee.

Initially, many victims within Algeria did not trust the Commission to be in a position to deliver justice. It was perceived as a political body, which from 1995 to 2007, included a Commissioner who was also the Algerian ambassador to Libya, and who today is a presidential advisor in Algeria on the

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<sup>38</sup> African Commission on Human and Peoples' Rights, [http://www.achpr.org/search/?t=834&c=30&sort=\\_date](http://www.achpr.org/search/?t=834&c=30&sort=_date).

<sup>39</sup> See for instance, African Centre for Justice and Peace Studies, Sudan Democracy First Group, REDRESS, 'Comments on Sudan's 4<sup>th</sup> & 5<sup>th</sup> Periodic Report to the African Commission on Human and Peoples' Rights: Article 5 of the African Charter: Prohibition of torture, cruel degrading or inhuman punishment and treatment, April 2012, at <http://bit.ly/10huMmj>.

<sup>40</sup> African Commission on Human and Peoples' Rights, [http://www.achpr.org/search/?t=924&c=30&sort=\\_date](http://www.achpr.org/search/?t=924&c=30&sort=_date).

<sup>41</sup> Summary based on the presentation of Nassera Dutour, Director, Collectif des Familles de Disparus en Algerie, CFDA.

fight against terrorism.<sup>42</sup> The few cases that have been brought to the Commission concerning alleged human rights violations in Algeria in the late 1980 and early 1990s have all been dismissed citing lack of information regarding specific breaches of the African Charter.

In 2007, the *Collectif des Familles de Disparus en Algerie*(CFDA), filed a detailed submission with the Commission in the case of Benidir Ali, involving forced disappearances of three persons in 1995.<sup>43</sup> The Commission allowed the State to submit its response on admissibility of the complaint two years later, in 2009. In 2010, the Commission declared the case admissible, thereby providing victims in Algeria with a real possibility of obtaining justice and reparation for enforced disappearances. However, the Commission has yet to issue a decision on the merits, almost 6 years after the case was filed, making instead regular promises to the victims that their case will be considered, only to postpone it again. While these procedural delays and the failure to adequately explain them are frustrating for victims, there is an understanding that the Commission is trying to reform and improve its handling of cases. The establishment of a Working Group on Communications gives reason for cautious optimism that cases will be handled more promptly and in line with the Commission's Rules of Procedure in the future.

### 3.3 The SADC Tribunal and its Judgments on Zimbabwe<sup>44</sup>

In Zimbabwe, police and army officials are the main perpetrators of torture, using it to suppress political opposition and to extract confessions. The 'Zimbabwe NGO Forum' has been representing victims of torture before Zimbabwean courts for years, and some cases have resulted in High Court judgments ordering the State to pay compensation to victims. However, in all such cases, the State has refused to pay the amounts ordered. Enforcement of judgments was made impossible by section 5 of the State Liabilities Act which provides that government property cannot be attached and sold to satisfy a judgment debt.

As victims had no access to effective remedies inside Zimbabwe, the Forum decided to take 12 cases as a 'test case' before the Tribunal of the Southern Africa Development Community ('SADC Tribunal') (Case No.5/2008).<sup>45</sup> The Forum alleged that by failing to honour the judgments and provide compensation to victims in these cases, the government of Zimbabwe had failed to uphold the principles of human rights and the rule of law, in breach of articles 4 and 6 (1) of the SADC Treaty. The government of Zimbabwe filed submissions on procedural issues as well as on the merits of the case. Neither submission indicated that the government would object to the competence or constitution of the Tribunal itself.

In June 2009, just prior to hearing the case on the merits, the Tribunal ruled in the *Mike Campbell* case concerning farmers who were victims of Zimbabwe's land reform process. In November 2008, the Tribunal had ruled against the government of Zimbabwe in the initial application by the plaintiffs, finding the government's actions to amount to *de facto* discrimination on grounds of race

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<sup>42</sup>See ACmHPR website at <http://www.achpr.org/members/kamel-rezag-bara/>.

<sup>43</sup>A copy of the complaint submitted is available at : [http://www.algerie-disparus.org/cfda1/images/pdf/benidir\\_cadhp-2009.pdf](http://www.algerie-disparus.org/cfda1/images/pdf/benidir_cadhp-2009.pdf).

<sup>44</sup>Based on the presentation of Susan Chenai Mutambasere, Zimbabwe NGO Forum.

<sup>45</sup>Zimbabwe Human Rights NGO Forum, Press Release, 'Zimbabwe Human Rights NGO Forum v The Government of Zimbabwe SADC Tribunal Case No.5/2008, 21 April 2009, at <http://www.hrforumzim.org/pressreleases/zimbabwe-human-rights-ngo-forum-v-the-government-of-zimbabwe-sadc-tribunal-case-no-52008/>.

and awarding the plaintiffs compensation.<sup>46</sup> In its ruling on their subsequent application in June 2009, the court found Zimbabwe had failed to enforce the earlier judgment. Following this decision, the government announced it would no longer recognise the judgments of the SADC tribunal as it was improperly constituted.

On 9 December 2010, the Tribunal decided in the case brought by the Forum, finding section 5 of the State Liabilities Act to be in contravention of the right to an effective remedy and the government of Zimbabwe in violation of Articles 4 (c) and 6 (1) of the Treaty by failing to comply with the orders of the High Court of Zimbabwe regarding the applicants as well as the persistent failure to pay compensation.

The Tribunal's judgments are final and binding upon member States, which are responsible for their enforcement. As the government of Zimbabwe had declared that it no longer recognises the competence of the Tribunal, it did not take any steps to enforce the judgment and provide reparation to victims. Following attempts by the plaintiffs in the Campbell case to have their judgment enforced in Zimbabwe, the government of Zimbabwe wrote to the Tribunal to withdraw from its jurisdiction. This ultimately led the SADC Summit to suspend the Tribunal, pending a review of its mandate.<sup>47</sup>

The suspension of the Tribunal meant that victims in Zimbabwe, as well as in other countries subject to the Tribunal's jurisdiction, lost - at least temporarily- an important, accessible and reasonably well-functioning justice mechanism that offered them an expedient decision making process in comparison to other regional mechanisms. It also demonstrated the level of dependency of such (sub-)regional mechanisms on States' willingness to cooperate, in particular in the absence of a clear enforcement mechanism and a procedure to deal with defaulting member States.

## 4. Engaging international justice: Victims and the ICC

### 4.1 The ICC's involvement in Libya<sup>48</sup>

The ICC's involvement in Libya began with UN Security Council Resolution 1970,<sup>49</sup> which referred the situation in Libya and potential crimes committed there since the uprisings began to the ICC. The limited scope of the referral had four notable repercussions in the way the public and victims in Libya viewed the Court: (1) Libyans saw the referral as a definite act of solidarity with the revolution; (2) the ICC was seen as a saviour, creating extremely high expectations; (3) because of the mandate limited to crimes committed during the 2011 uprising, victims' rights were seen in a very unique light: those who had suffered from crimes during the uprising were considered as heroes and

<sup>46</sup> Southern African Development Community Tribunal, *Mike Campbell (Pvt) Ltd and 78 others v The Republic of Zimbabwe*, SADC (T), No2/2007, Judgment of 28 November 2008, at <http://www.sadc-tribunal.org/docs/case022007.pdf>.

<sup>47</sup> See the page of the SADC Tribunal on the website of the Southern African Development Community, available at <http://www.sadc.int/about-sadc/sadc-institutions/tribunal/>. See also Human Rights Watch Q and A on the SADC Tribunal, *Regional Court's Future Hangs in the Balance*, August 2011, available at <http://www.hrw.org/news/2011/08/11/sadc-qa-tribunal>; on the outcome of the review, see joint statement of International Commission of Jurists, Southern African Litigation Centre, SADC Lawyers' Association 22 August 2012, at <http://www.icj.org/icj-disappointed-by-decision-taken-on-sadc-tribunal/>.

<sup>48</sup> Summary based on introductory remarks by Elham Saudi, Lawyers for Justice in Libya (LFJL).

<sup>49</sup> UN Security Council, in *Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime*, Adopting Resolution 1970 in Wake of Crackdown on Protesters, 26 February 2011, SC/10187/Rev.1, at <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>.

martyrs of the revolution. Many victims therefore felt it was not appropriate to seek compensation as suffering for the revolution was a greater reward than anything that could be granted by any court; (4) the referral referred to the situation and was not limited to crimes committed by the former regime.

The latter, in turn, had two key consequences: (1) it was a good tool for advocacy for human rights organisations to train parties to the conflict on the laws of armed conflict, emphasising that their conduct is being monitored by the ICC; (2) the distinction between who would constitute a victim and who would be a perpetrator became more complicated as the nature of the conflict changed.

The ICC experience in Libya to date, however, has highlighted some significant shortcomings. First, in respect of management of expectations, the ICC was seen by many as an all-powerful, highly resourced, militarily supported, global justice organisation. These unrealistically high expectations were not managed by the Court, but rather dismissed as 'misguided.' They were also fostered by public statements made by the then prosecutor on TV, radio, magazines and newspapers, about the strength of the case file and on statements given by alleged victims. The publicity of the process created false expectations and perceptions about the Court, but also deterred some victims, particularly victims of rape, from coming forward as they feared that their cases would become public.

Secondly, while the Court purports to give victims a voice, there is a shortcoming in its accessibility. In Libya, strategies of the Office of the Prosecutor (OTP) appeared to try to limit the number of victims, and did not take into account the 'cathartic experience of reporting crimes.'

The third shortcoming is its failure to fully engage and cooperate with local organisations. The Libyan situation underlined that the Court needs information from sources on the ground, yet it fails to publicly recognise the valuable role played by individuals and organisations.

## 4.2 ICC and Kenya: Challenges for Victims<sup>50</sup>

Following the general election in Kenya in December 2007, allegations of vote rigging led to widespread protests which quickly degenerated into violence across the country with some element of an ethnic dimension. The violence left more than 1,300 people dead and forcibly displaced over 300,000 people from their homes. The scale and extent of the violence was unprecedented in Kenya. To stop the violence, former UN Secretary General Kofi Annan brokered a power-sharing agreement between the Prime Minister and President. The agreement provided for certain measures to be taken, including the establishment of a commission to investigate the post-election violence and a truth, justice and reconciliation commission. The investigatory commission set up pursuant to the agreement recommended the establishment of a special tribunal within a certain time frame and, in the event that no such tribunal was established, the transfer of information on the post-election violence, including names of suspects allegedly responsible for the crimes committed, to the ICC.

When the proposed establishment of a special tribunal failed to materialise within the stipulated time frame, the information was provided to the ICC OTP. In March 2010, the OTP opened investigations, and in December 2010 the prosecutor requested the ICC Pre-Trial Chamber to issue

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<sup>50</sup> Summary based on the presentation of Carole Theuri, Kenyans for Peace, Truth and Justice.

summons for six suspects, including high ranking officials belonging to the opposition party and members of the cabinet.<sup>51</sup> Since then, the ICC's engagement in Kenya has been perceived as being so politicised that victims feel forgotten and the focus seems to be exclusively on the suspects.

Even though the ICC's engagement presented an opportunity for some victims to obtain justice, most victims continue to experience significant challenges, including the government's general unwillingness to deal with the crimes of the post-election violence. In many areas this has meant complete impunity for perpetrators and a denial of justice for victims. Although some victims instituted civil proceedings against the State and were awarded compensation, the government refused to pay the requested amounts. In view of the government's complete disregard for the rights and needs of victims, victims have high hopes in the ICC, which itself has a very limited capacity to accommodate a large number of victims. On the other hand, the ICC's engagement with victims was originally mainly limited to Nairobi, and it did not have a presence in Kenya for the first year, making it difficult for victims to engage in the ICC process and to clarify questions regarding, for instance, their possible participation. A lack of early outreach outside Nairobi has led to unrealistic expectations and a lack of understanding on how the process works, something that national NGOs could only address to a certain extent.

On 5 and 25 August 2011 respectively, 560 victims were accepted as participants for the confirmation of charges hearings. However, their common legal representatives face significant challenges in reaching out to victims as the post-election violence caused many to flee their homes, with many of them living very far apart. More victims are likely to participate by the time the cases move to trial stage, which will exacerbate the challenges, particularly in light of proposals to further cut the budget available to victims' representatives.

The biggest challenge, however, is the provision of protection to victims and witnesses alike in a process that has increasingly become politicised. The suspects have used their positions within the government and control of the media to influence the communities' views of the ICC. Many victims who are known to participate in proceedings or otherwise interact with the ICC are now scared to come forward as it has become a taboo in some communities to be so associated. Since the difference between a victim and a witness has not been adequately explained by the ICC, anyone seen as participating in the cases is considered to be a witness, a categorisation that can entail significant security risks.

While civil society does not have the resources to fill the gap left by the ICC's lack of outreach, it has a significant role to play to adequately inform victims and others throughout the country about the ICC, its role and potential impact, to assist victims to participate and to de-politicise the process.

### 4.3 The ICC and Victims in the DRC<sup>52</sup>

Past and on-going conflicts in the DRC are characterised by mass human rights violations committed by the army and a range of militia groups with almost complete impunity. Indeed, impunity for serious human rights violations has become so entrenched that it is the main obstacle to peace and

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<sup>51</sup> The Hague Justice Portal, *ICC Prosecutor reveals names of six alleged orchestrators of Kenyan violence*, 15 December 2010, available at <http://www.haguejusticeportal.net/index.php?id=12352>.

<sup>52</sup> Summary based on the presentation of participant from DRC.

good governance. People living in the affected regions want nothing more than peace, security and the punishment of the crimes committed by their 'leaders.'

The ICC's announcement in 2004 of the opening of an investigation into human rights violations committed in Congo was therefore met with great hope by victims in the Great Lakes region, and in Ituri in particular.<sup>53</sup> It was seen by many as a mechanism that could help sidestep the problems hampering trials at the national level, in particular the political manipulation of judges and lack of resources. Generally, it was believed that the ICC would work like a universal, credible and independent institution that would provide justice to victims.

In Ituri, in particular, the investigations were expected to send a strong signal to actual or potential perpetrators that no one is above the law. Many victims throughout Ituri specifically hoped that the ICC would (1) serve as a tool for prevention; (2) establish a historical record of the truth of the conflict and as such contribute to reconciliation efforts; (3) provide victims with an opportunity to be heard.

Yet, the OTP faced significant challenges in investigating crimes committed in Ituri, including access to evidence, witnesses and victims without putting the latter at risk. Operating in an often unstable environment, with different languages, a different culture and a long history of conflict, the investigators were dependant on collaboration with local civil society organisations and individual intermediaries so as to have access to witnesses and victims, obtain information on the security situation as well as for translation and interpretation. However, the investigators were not always scrutinising in their selection of civil society groups to rely on and collaborate with, and it appeared that no assessment was made of the particular organisations or individuals they chose to work with. This opened the door for organisations and individuals who had their own agenda, including those who may have had financial interests or were biased towards particular ethnic groups. In some instances, the organisations and individuals working with the ICC had no qualification to identify witnesses or victims or to carry out interviews.

The absence of clear guidelines on how the investigators and other Court staff managed their interaction with 'intermediaries' had a negative impact not only on perceptions in the region about the Court, but also on the intermediaries themselves, who found it difficult to carry out their role of assisting the Court in the absence of such guidelines.<sup>54</sup> Often, intermediaries also carried out outreach, as the outreach section of the Court had difficulties in accessing victims in remote areas. In many cases, intermediaries carried out their task without pay, without compensation for their time, and, importantly, without any protection from the Court in case something went wrong. Over the years, this led many intermediaries to become frustrated with what they considered an unprofessional approach of the Court.

Victims became similarly disillusioned, questioning the indifference of the Court officials as to their suffering, the failure of acknowledgment, as well as the selectiveness and limited number of the

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<sup>53</sup> ICC, Office of the OTP, *Office of prosecutor of international criminal court opens first investigation*, Press Release L/3071, 23 June 2004, available at <http://www.un.org/News/Press/docs/2004/l3071.doc.htm>.

<sup>54</sup> See e.g. VRWG, 'Intermediaries' Guidelines: Outstanding Issues: April 2011, at [http://www.vrwg.org/VRWG\\_DOC/2011\\_VRWG\\_Intermediaries.pdf](http://www.vrwg.org/VRWG_DOC/2011_VRWG_Intermediaries.pdf).

charges in the case of Thomas Lubanga. This led those victims who were unable to relate to the narrow charges brought by the OTP to believe that the crimes they were subjected to were less important or relevant for the ICC. The fact that only very few areas in Ituri have been investigated excluded many victims, and there is the impression that the real culprits, those most responsible for the crimes, were still enjoying impunity. The only high level Congolese official who is currently being tried before the ICC is Jean-Pierre Bemba, a former Vice President of Congo, yet he is accused of crimes committed in the Central African Republic, and not the DRC. This has led many to lose confidence in the ICC as an institution that can fight impunity, deter and prevent future atrocities and provide reparation to victims.

What was and still is needed within the DRC is a new and credible coalition of civil society organisations working for justice for victims that coordinates different activities, carries out joint advocacy and enables victims' voices to be heard outside Congo, at both the regional and international level.

The past 10 years of the ICC's existence and over 7 years of its work in DRC raise a number of questions as to how civil society working for justice for victims should engage with the ICC in the future: how can political influence on international justice be limited so as to avoid the impression of a biased justice and double standards? What mechanisms need to be put in place to protect intermediaries and their families? How can the Court convince people in Ituri that it is not a tool in the hands of the authoritarian government of the DRC? What can the Court do to avoid being instrumentalised, to regain its credibility and exercise its mandate independently and impartially?

#### 4.4 Upcoming Challenges for Victims in Ivory Coast<sup>55</sup>

The pre-trial Chamber of the ICC announced on 3 October 2011 that it authorised the OTP to start an investigation into crimes against humanity and war crimes committed in Ivory Coast in the period after 28 November 2010 in connection with the post electoral violence.<sup>56</sup>

At the national level, the new government established a Ministry for War Crimes Victims, which is responsible for identifying and compensating victims. However, by its very nature, this is a political body that is not independent and neutral. To date, only victims of crimes committed by the previous government have been identified, while nothing has been done to provide those or other victims with reparation. Overall, victims' access to justice at the national level is hampered by a number of obstacles, including (1) the failure to include international crimes in the national criminal code; (2) the complete absence of accountability as far as government and rebel movements are concerned; (3) different pieces of legislation signed between different actors; (4) political agreements that support perpetrators to the detriment of the victims.

In this environment, only a few NGOs such as the Ivory Coast Coalition for the ICC, carried out some

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<sup>55</sup> Summary based on presentation of Ali Quattara, President of the Ivorian Coalition for the ICC.

<sup>56</sup> International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire*, Decision No. ICC-02/11, 3 October 2011 available at <http://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf>; This was later extended to cover the period starting from 19 September 2002, International Criminal Court, *Decision on the "Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010"*, Decision No. ICC-02/11-36, 22 February 2012,

outreach activities for the ICC vis-à-vis victims as well as authorities, including through a play entitled 'Dame CPI' ('Lady ICC'). The Court itself had not carried out many activities within Ivory Coast, aside from a seminar organised by the Registry and the Victim Participation and Reparation Section (VPRS). The lack of engagement and assistance from the ICC in reaching out to victims in Ivory Coast at an early stage risks leaving behind many who have great hopes that it would assist in providing justice and reparation.

Some of the measures that need to be taken to address the main shortcomings include: (1) providing clarity as to who qualifies as a victim in the specific context of Ivory Coast, since different criteria are being applied by the State, NGOs, and the ICC; (2) ensuring that all victims of human rights violations from 2002 to 2011 are taken into account, irrespective of their political allegiances, placing particular emphasis on victims of rape and other forms of sexual violence, as they have been marginalised; (3) providing information to victims so as to ensure that expectations are realistic; (4) simplifying and explaining how to complete the form for collective victims' participation; (5) putting in place protection mechanisms that enable victims to come forward and participate without fear; (6) establishing a permanent presence of the Victim's Participation and Reparations Section in the country.

The majority of the victims of the post-election violence do not have the level of education that would be required to follow and participate in the different procedures before the ICC. The ICC therefore needs to be more proactive and carry out more visible outreach to victims, and be more present on the ground, explaining and providing information on its procedures to victims. It cannot leave this task to NGOs which have limited means. The manner in which the ICC handles victims' concerns will have a serious impact on its credibility and thus it is also in the Court's best interest to ensure that all victims are adequately informed about their rights early on in the process.

#### 4.5 Victims' Engagement in the Central African Republic<sup>57</sup>

The Central African Republic (CAR) has experienced several years of internal armed conflicts during which serious human rights violations were committed, including torture, murder and looting, resulting in both military and civilian victims. The conflicts were politically motivated and fostered by recurring impunity of perpetrators of these abuses, through amnesties, dropping of charges or power sharing deals.

The ICC became engaged against the background of a failed coup in 2001 against the regime of Ange-Félix Patassé, then President of the Republic, by his predecessor, André Kolingba. Patassé called on foreign militia, including the 'Movement for the Liberation of Congo' of Jean-Pierre Bemba, to defeat the coup. An armed conflict and violence followed, focussing mainly on an area close to the capital Bangui, which included mass looting, murder and rape of civilians by the MLC. In 2002, after another attempted coup by his former chief of staff, General Francois Bozize, Patassé again relied on Bemba's troops to avert the coup. Bozize's rebels withdrew from the capital, and having met no resistance, Bemba's troops, commonly referred to as 'Banyamulenge', engaged in murder, ransacking and rape throughout the capital. The victims were civilians suspected of being or supporting rebels. The Banyamulenge systematically looted houses and killed those trying to resist

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<sup>57</sup> Summary based on the presentation of Marie Edith Douzima.

the looting and rape. Many central African women were systematically raped, regardless of places, age of the women (ranging from 6 to 70 years) and whatever their medical condition, including women who were pregnant or ill.

The Banyamulenge troops then continued to fight Bozize's rebels outside the capital, committing the same acts in the same fashion against the civilian population across the country. This lasted for about five months, until the fall of the Patassé regime on 15 March 2003. Of all armed conflicts experienced in the Central African Republic before, the violence of this conflict was unprecedented in terms of magnitude, duration and severity of the crimes. It resulted in complete desolation among parts of the population and the displacement and breaking up of families due to the stigmatisation of rape and widespread HIV/AIDS infection.

With the help of civil society, victims started demanding justice. They formed associations in efforts to obtain the truth of what happened, to know why they suffered these crimes, and to obtain reparation.

National authorities opened an investigation against the former regime for economic crimes as well as human rights violations, yet there were significant doubts as to the ability of the CAR authorities to provide justice to victims, given the entrenched culture of impunity in the country. In late 2004, the government referred the crimes committed during the events of 2002 and 2003 to the ICC.<sup>58</sup>

On 22 May 2007, the OTP announced that it would open an investigation into the crimes committed in the CAR during the said period, stating "this is the first time the Prosecutor is opening an investigation in which allegations of sexual crimes far outnumber alleged killings...the allegations of sexual crimes are detailed and substantiated. The information we have now cannot be ignored under international law."<sup>59</sup>

OTP's investigation led to Jean-Pierre Bemba's arrest on 24 May 2008 in Belgium. He is alleged to have committed war crimes and crimes against humanity among the Central African population from October 2002 to March 2003. During the confirmation of charges hearing in January 2009, 54 victims were allowed to participate, a number that has increased throughout the evolution of the proceedings to almost 5000 victims at the time of writing, the largest number of participating victims in any of the cases currently pending before the ICC.

As in other situations currently pending before the Court, one main challenge from the perspectives of victims in the CAR is how to adequately respond to high expectations. Victims want this trial to serve as deterrence, they want to know the truth about who was responsible for the crimes, about 'who did what and why.' Victims expect recognition and compensation for the harm they suffered and the punishment of the perpetrators. The ICC as an institution may not be able to meet all of these expectations yet it can do more to respond to them and reach out to victims, who have been

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<sup>58</sup> ICC, Office of the OTP, *ICC - Prosecutor receives referral concerning Central African Republic*, Press Release ICC-OTP-20050107-86, 7 January 2005 available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2005/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx).

<sup>59</sup> ICC, Office of the Prosecutor, 'ICC prosecutor opens investigation in the Central African Republic, 22 May 2007, ICC-OTP-20070522-220, at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2007/Pages/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2007/Pages/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic.aspx).

concerned about the ICC's distance and remoteness from CAR and the slow pace of proceedings. Victims are anxious about the type of reparation they will receive given the high number of victims, and yet expect that the ICC to do everything it can to ensure that all victims obtain reparation.

## 4.6 Concluding Observations on victims' before the ICC<sup>60</sup>

There is a recurrent theme regarding victims' access to justice at the ICC in all situations and cases currently pending before the Court, which is the need for the ICC to significantly strengthen its response to expectations of and outreach to victims. Its nearly exclusive reliance on (inter-)national organisations to bridge the gap between The Hague and the victims in the countries it is investigating has led to disillusionment and frustration among many. It fostered misunderstandings, which risks undermining the credibility of the Court, particularly its victims' mandate. This is not to say that outreach, adequate information of victims about modalities of participation, reparation and progress in investigations will satisfy all victims. However, it certainly goes a long way in addressing some of the more pressing concerns and can help putting expectations into context.

The close linkage between international justice and politics can be seen in all situations currently pending before the ICC, where often only one side to a conflict is subject to prosecutions, and where cooperation from States tends to be selective and may vary from case to case. Furthermore, the UN Security Council, as the ultimate political organ, can decide which situations to refer and which cases to suspend, further raising concerns as to how international justice through the ICC can be independent from political pressure.

The past decade of the ICC's experience also provides an opportunity to NGOs to assess their strategies and the ICC's capacity and limitations in providing justice to victims. While a significant focus has been placed on supporting ICC investigations, this may have come to the detriment of strengthening domestic justice efforts and it could be helpful to place additional emphasis on positive complementarity in the sense of enabling national authorities to investigate and prosecute ICC crimes.

## 5. Networking for Victims' Rights

### 5.1 Role of the Victims Right Working Group<sup>61</sup>

The Victims' Rights Working Group (VRWG) is a network of over 400 national and international civil society groups and experts created in 1997 under the auspices of the NGO Coalition for the International Criminal Court. It has an informal membership structure that is currently facilitated by REDRESS. The VRWG's initial goals were to ensure that the Rome Statute, the Rules of Procedure and Evidence and other ICC legal texts under consideration incorporated strong provisions on victims' rights. Since then, the VRWG's work evolved to monitoring the application of victim-related provisions to ensure that they are implemented fully.

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<sup>60</sup> Summary based on the discussion of all conference participants.

<sup>61</sup> Summary based on the presentation by Dadimos Haile, REDRESS.

The VRWG carries out a range of activities in supporting rights of victims, including: (1) raising concerns of victims and their advocates in a variety of national, regional and international fora; (2) contributing to the Court's evolving jurisprudence and policies on victims' rights through advocacy and submission of position papers on a range of victim related issues; (3) organising meetings with officials of the ICC and States; (4) publishing a bi-annual bulletin (ACCESS) in multiple languages, and preparing a monthly legal update covering filings and decisions in relation to victims that have come up in proceedings before the Court.<sup>62</sup>

Organisations and/or individuals working on issues concerning victims' rights and interests in relation to the ICC can join the VRWG so as to use its platform to share expertise, best practice, develop common advocacy strategies and positions on common issues. To apply to subscribe to the (restricted) VRWG e-mail listserv, those interested can send an e-mail to [icc\\_victimrights\\_subscribe@yahoo.com](mailto:icc_victimrights_subscribe@yahoo.com).

## 5.2 The NGO Forum: advocating for victims' rights at the African Commission?<sup>63</sup>

The NGO Forum provides a platform for human rights activists and civil society organisations working across Africa for the purposes of developing common strategies and information sharing as well as developing best ways of working with the African Commission. The Forum today has a regular participation of about 200 organisations. It usually spans three days and precedes the ordinary session of the African Commission. The Forum allows participants to share experiences, identify best practises and develop strategies in regards to specific issues.

It is also a platform for advocacy with individual Commissioners, as well as State representatives who may otherwise be more difficult to reach. Specific interest groups meet regularly in the context of the NGO Forum, including for instance interest groups on torture, ill-treatment and prisons and conditions of detentions, and, more recently, for a group of litigants who bring cases before the Commission on behalf of victims. To date, no interest group exists that focusses specifically on rights of victims of mass or systemic crimes, yet there is a lot of scope within the NGO Forum, as well as the Commission itself, to develop greater awareness on the rights of victims and their experiences.

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<sup>62</sup> All publications in the name of VRWG, as well as some publications of member organisations are published also on the VRWG's website at [www.vrwg.org](http://www.vrwg.org).

<sup>63</sup> Humphrey Siphalla, Communications Officer, IHRDA.