

**Victim Participation at the  
International Crimes Division in Uganda  
Stakeholder Roundtable  
16 and 17 January 2017  
REPORT**



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## I. INTRODUCTION

The International Crimes Division (ICD) at the High Court in Uganda is the first domestic judicial body in Uganda to try international crimes, in particular war crimes, crimes against humanity and genocide. Its Rules of Procedure provide for a number of victims' rights as recognised under international law. In the ICD's first case, against Thomas Kwoyelo, the Pre-Trial Judge ruled that victims have the right to participate in the proceedings in accordance with the model of victim participation contained in the Rome Statute and Rules of Procedure and Evidence of the International Criminal Court (ICC).

On 16 and 17 January 2017, the **Human Rights Center at the University of California, Berkeley**, the **International Center for Transitional Justice (ICTJ)** and **REDRESS**, convened a stakeholder roundtable with relevant actors of the ICD, including judges, the registrar, prosecutors, victims' counsel, defence counsel and civil society organisations. The purpose was to assess how best to incorporate at the ICD the lessons learned regarding victim participation at the ICC and other comparative jurisdictions. Experts working to implement victims' rights at the ICC, and working on the domestic implementation of victims' rights in the United States and Kenya, were invited to provide insight on the law and practice in these jurisdictions.

This report summarises the proceedings and discussions of the stakeholder roundtable which was held under Chatham House rules.

The organizers would like to thank John D. and Catherine T. MacArthur Foundation for its support of this initiative.

## II. Victim Participation at the ICD

One of the purposes of the roundtable was to use the lessons learnt from other jurisdictions to establish common ground among the key actors on the modalities for victim participation to apply at different stages of the trial before the ICD. Following extensive discussions, the participants considered the following points:



### II.1. Pre-Trial Stage

The participants recognised that the ICD Rules of Procedure provide for the right to protection and the right to information, yet do not explicitly mention the right of victims to participate fully at the pre-trial stage. The Rules also do not contain specific provisions on the process of registration. The ICD can take into consideration the experiences made in other jurisdictions, and develop jurisprudence which can help to fill the gaps in the current ICD Rules of Procedure. The participants were of the view that the ICD Trial Chamber can determine whether or not to adopt the modalities applied at the pre-trial stage by the Pre-Trial Judge or amend them.

The participants recommended that at pre-trial stage, the ICD Rules of Procedure should be interpreted in a manner to allow victims the following rights as recognised under international law:

- 1) **Right to information:** Victims should be given information on the proceedings at all stages. They should have the right to make submissions on disclosure if their rights are affected.
- 2) **Right to protection:** Victims should be permitted to address the court through their counsel on their protection needs at any stage of the proceedings. The judiciary should work with the police to set up the necessary protection measures where required. The pre-trial judges may make orders regarding protection on their own motion.
- 3) **Right to be heard on charges:** Victims should be allowed to submit on the amendments or additions to the indictment. However, it remains within the discretion of the prosecution to request an amendment of the charges.
- 4) **Right to assistance:** The ICD Rules of Procedure oblige the Registrar to assist victims at all stages of the proceedings (this can include assisting in obtaining legal advice, organizing legal representation, arranging accommodation, and obtaining medical and psychosocial support). To secure funding for such assistance the registry should get in touch with other relevant government ministries and agencies that could offer support.

The registry should be in contact with the ICC Trust Fund for Victims to avoid duplications in the granting of benefits where appropriate.

- 5) **Best interest of victims:** The ICD Rules of Procedure require all ICD actors to consider the best interests of the victims. Victims' counsel should submit written reports on the situation of participating victims every two months to inform the court about their interests and changes in their protection needs. The reports should continue to be filed throughout the proceedings.
- 6) **Right to make opening statements:** Victims should be allowed to make opening statements at the pre-trial hearing.

With regard to the **victim registration process**, the participants agreed that

- A simple application form should be developed by victims' counsel and endorsed by the registry.
- As part of the registration process, victims must submit personal information to confirm their identity, the harm they suffered as well as proof of the link between the harm suffered and the crimes charged. The description of the harm suffered would only need to be capable of linking the victim's experience to the crimes charged. A full account is not required for the application. Victims' counsel can of course use this opportunity to collect a full statement for the purpose of submitting impact statements or evidence in the future.
- Requirements for proof of identity should be clarified and disseminated by the registry.
- Individuals (counsel, civil society groups or others) who register victims using the application form should be trained on interviewing techniques and on the form.
- Victims' counsel should complete the application form with victims and submit it to the registry.
- The registry should redact it where necessary and send it to the parties (prosecution and defence) for their views.
- The registry should review the applications and objections made by the parties and submit a report to the pre-trial judge.
- The pre-trial judge should make a ruling on who can participate.
- The victim application forms should be stored safely by the registry.

## II.2. Trial and Post-Trial Stage

The participants recognised that victim participation at trial stage as it is envisioned by the ICD Rules of Procedure is a novelty in the Ugandan justice system. There is a need to balance this new role of victims with the interests of all the parties, especially with the rights of the accused.



The participants suggested that at trial stage, the ICD Rules of Procedure should be interpreted in a manner to allow victims to exercise the following rights:

- 1) **Right to legal representation:** Legal representatives for victims should be appointed by the registry. These victims' counsel should represent all victims who do not have their own counsel and should be free of charge. Victims have the right to appoint their own counsel but at their own cost. Victims must inform the registry if they wish to appoint their own counsel.
- 2) **Right to protection:** Victims' counsel should have the right to raise security concerns at any stage of the proceedings, including during a pre-trial status conference.
- 3) **Right to information:** Victims should be notified about trial hearing dates and decisions taken by the registry. There is no obligation to translate the entire proceedings to a language understood by victims. However, the registry should conduct outreach activities in a language understood by victims where the proceedings are summarised. The victims' counsel should keep those victims that are participating in the case informed about the proceedings.
- 4) **Rights in status conference:** According to the ICD Rules of Procedure, the Trial Chamber should hold status conferences before the trial hearings to discuss case management matters. Victims' counsel should be notified and have the right to participate in these status conferences. Victims' counsel have the right to raise security concerns, the modalities of opening statements, appointment of victims' counsel and other matters related to victims.
- 5) **Right to make opening statements:** A maximum number of two victims' counsel should have the right to make opening statements. There is no need to seek approval from the Trial Chamber in advance. Where there are more than two victims' counsel, they should nominate two lawyers from among them. The Trial Chamber should set out time limits for making opening statements. The order for the making of opening statements should be: prosecution, victims' counsel and then defence.

- 6) **Right to examine / cross-examine witnesses:** Victims' counsel should have the right to examine or cross-examine witnesses however approval would need to be obtained in advance from the Trial Chamber through a reasoned application indicating the subject-area of the proposed questioning. The prosecution and defence should be heard on such an application to examine witnesses. The application can be made during the status conference or in writing before the witness is called to testify. If allowed, victims' counsel should examine witnesses after the prosecution and before the defence. The criteria to determine which questions should be allowed need to be developed by the Trial Chamber. These for instance could include a requirement that the questioning by victims' counsel should raise a new aspect and avoid duplication.
- 7) **No right to be heard on no case to answer motion:** Victims' counsel should not have the right to make submissions on a no case to answer motion as this question pertains only to the prosecution and defence.
- 8) **Right to call victims to testify:** Victims' counsel should have the qualified right to call their clients to testify after the prosecution closed its case. In order for victims to testify, a reasoned application should be made to the Trial Chamber ideally before the start of the trial. The application should be shared with the parties to the proceedings for their views. The Trial Chamber should issue a reasoned ruling on any such application. When victims are called to testify, they would testify as any other witness, which includes taking an oath and being subjected to cross-examination. The Trial Chamber can rely on the information presented in those testimonies to determine the guilt or innocence of the accused as they are heard under the same conditions as witness testimonies.
- 9) **No right to call additional witnesses:** Victims' counsel should not have the right to call additional witnesses (who are not victims) after the prosecution closed its case. However, victims' counsel can informally bring such persons to the attention of the Trial Chamber which can call them on their own initiative.
- 10) **Right to make final submissions:** Victims' counsel should have the right to make final submissions at the end of the trial proceedings. This requires an application indicating the content of the submission to the Trial Chamber prior to the date for final submissions. The Trial Chamber should issue a reasoned decision on the application after hearing the parties on it.
- 11) **Right to submit impact statements and reparation claims:** The ICD Rules of Procedure explicitly allow victims to submit impact statements and claim reparation from the convicted person. Impact statements should use the template according to

the Sentencing Guidelines.<sup>1</sup> Both the prosecution and victims' counsel can complete the form with victims and submit it to the Trial Chamber. They should coordinate where possible. In addition, victims' counsel should have the right to file an application to the Trial Chamber to call victims to present the impact statement orally. Victims' counsel should submit the claim for reparation together with the impact statements and/or the application to call the victims to present the statements orally.

- 12) **Right to be heard for plea bargaining:** Victims should have the right to be informed and consulted by the prosecution during any negotiation of a plea. Victims cannot determine the contents of the plea bargain but the court should ensure that they have been heard by the prosecution before any plea agreement is accepted.
- 13) **Right to appeal:** The participants did not come to an agreement on whether or not victims should have the right to appeal any decisions of the Trial Chamber, such as the first instance judgement, interlocutory appeals or reparation orders, on their own motion or to join an appeal filed by the prosecution.
- 14) **Right to be heard on bail:** Victims should have the right to be heard for bail decisions.

### III. The Way Forward

The participants were cognisant of the fact that some of the modalities considered by the group and listed above are not set out explicitly in the ICD Rules of Procedure or other applicable domestic law. Consequently, the participants discussed how to make the modalities clearly applicable at the ICD.

The participants discussed the following options:

- **Amendment of the ICD Rules of Procedure:** The amendment of the ICD Rules of Procedure requires a certain amendment process which might not be achieved immediately. In the meantime, the participants proposed to encourage jurisprudence on victim participation at the ICD through filings before the Court, and reasoned rulings by the judges.
- **Issuance of a legal notice (practice direction) by the Chief Justice:** The Chief Justice can issue a legal notice to direct a certain practice to be followed by all judges, including at the

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<sup>1</sup> The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, First Schedule: Form A – Victim Impact Statement, available at: <http://www.jlos.go.ug/index.php/document-centre/sentencing-guidelines/264-sentencing-guidelines/file>.

ICD. Such a legal notice is the least time-consuming way in which to clarify procedures but would require that the Chief Justice is brought on board to support the modalities.

- **Development of jurisprudence through ICD:** By issuing rulings in the ongoing case, the ICD can develop jurisprudence on victim participation. However, it should be noted that such rulings are not binding for future ICD cases as they are issued by the court of the same instance. The rulings have a persuasive character which often means that other judges will follow them even if they are not binding. In their rulings, judges can rely on international jurisprudence to fill the gaps in the ICD Rules of Procedure.
- **Adoption of the ICD Bill:** Currently, the ICD Bill is tabled with parliament but it has not gone through a first reading yet. The draft contains details on the modalities of victim participation, some of which reflect the perspectives of the meeting participants as set out above. The adoption of the ICD Bill, however, is uncertain and will be a lengthy process. The participants agreed that in the meantime, the other options above should be pursued.

## IV. Presentations

Guest speakers were invited to present on relevant legal frameworks and practices in their jurisdictions. These presentations are summarised below.

### IV.1. International legal framework on victims' rights

Ms **Beini Ye**, Legal Adviser to the Post-Conflict Justice Programme at REDRESS, provided an overview of the international legal framework on victims' rights which serves as the legal basis for many of the procedural rights accorded to victims in criminal proceedings. Reference to victims' rights can be found in international and regional treaties, declaratory instruments and jurisprudence.

#### a) International and regional treaties

International treaties with specific provisions on victims' rights include the International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention against Torture, Convention of the Rights of the Child, Convention for the Protection of All Persons from Enforced Disappearance, and the Rome Statute of the International Criminal Court. The Rome Statute includes specific provisions on victim participation in criminal proceedings.

At the regional level, Ms Ye pointed to the African Charter on Human and Peoples' Rights and the Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime (EU Victims Directive). The latter enumerates rights of victims in detail but is only applicable in EU member states.

The rights of victims explicitly referenced in these international and regional treaties include:

- **Right to an effective remedy**<sup>2</sup> (which includes right to legal representation and right to be heard)
- **Right to protection**<sup>3</sup>
- **Right to information**<sup>4</sup>
- **Right to reparation**<sup>5</sup>
- **Right to participate in criminal process**<sup>6</sup>

## b) Declaratory instruments and jurisprudence

In addition, Ms Ye highlighted several declaratory instruments which elaborate on the rights of victims enshrined in these treaties and thereby assist States in their implementation. These include the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), 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 (2005) (UN Basic Principles and Guidelines), the UN Committee Against Torture's General Comment No. 3 on Article 14 of the Convention Against Torture (Right to Redress) and the African Commission on Human and Peoples' Rights Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. These declaratory instruments contain more detail on the rights of victims in criminal proceedings and as such provide important guidance to the ICD to facilitate meaningful participation and protection of victims.

In addition, various human rights bodies such as the UN Treaty Bodies, African Commission and Court on Human and Peoples' Rights, European Court of Human Rights, Inter-American Commission and Court of Human Rights, and International Criminal Court, have interpreted the rights of victims, thereby setting out how relevant treaty provisions should be implemented.

Together, declaratory instruments and jurisprudence have contributed to the international framework on victims' rights, providing further clarification and specification, including on:

- **Definition of victim:** It is universally acknowledged that individuals who have suffered some form of harm as a direct consequence of a crime are considered victims. This is reflected in the definition used in the ICD Rules of Procedure which follows the UN Basic

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<sup>2</sup> See for example Art. 2 International Covenant on Civil and Political Rights (ICCPR), Art. 6 Convention for the Protection of All Persons from Enforced Disappearance (CERD), Art. 14 Convention against Torture (CAT), Art. 39 Convention of the Rights of the Child (CRC), Art. 68 Rome Statute, Art. 7 African Charter on Human and Peoples' Rights (ACHPR).

<sup>3</sup> See for example Art. 13 CAT, Art. 12 CED.

<sup>4</sup> See for example Art. 24 CED.

<sup>5</sup> See for example Art. 14 CAT, Art. 24 CED, Art. 75 Rome Statute.

<sup>6</sup> See for example Art. 68 Rome Statute.

Principles and Guidelines and extends the scope to immediate family members and dependants.

- **Right to truth:** In the context of criminal proceedings, the ICC found that this right is understood to encompass “the determination of the facts, the identification of those responsible and the declaration of their responsibility”.<sup>7</sup> The ICC has linked the right to participate in criminal proceedings to this right by stating that “the issue of guilt or innocence of persons prosecuted by this Court is not only relevant but [...] is inherently linked to the satisfaction of their right to the truth.”<sup>8</sup>
- **Right to investigation, prosecution and punishment:** This is an expression of the right to an effective remedy and forms part of the overall right to redress. The ICC has made it clear that victims’ interests in the outcome of a criminal process go beyond the interest of receiving reparation.
- **Right to expeditious, fair, inexpensive and accessible remedy:** Often these rights are seen as a prerogative of the defendant only, but according to international law victims are also entitled them.<sup>9</sup>
- **Right to non-discrimination and to be treated with dignity and respect:** International standards make clear that the redress process should be non-discriminatory and empowering for victim. Victims should not be re-victimised by the process.
- **Right to assistance:** This includes a range of services, in particular legal aid, psycho-social support, and logistical support.
- **Right to give evidence:** Some victims would like to address the court but they may not necessarily be witnesses for the prosecution. At the ICC, after the prosecution has finished presenting its case, victims’ lawyers can apply to call victims to testify subject to specific conditions, including the respect of the rights of the accused and avoidance of repetition.
- **Right to understand and be understood:** This includes interpretation and translation but also general outreach on the process.

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<sup>7</sup> ICC Pre-Trial Chamber I, The Prosecutor v. Germain Katanga and Mthieu Ngudjolo Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, No. ICC-01/04-01/07-474, 13 May 2008, para. 32.

<sup>8</sup> Ibid, para. 35.

<sup>9</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 20 November 1985, available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>, para. 5.

### c) Victim participation in practice

Ms Ye went on to present the findings of REDRESS' report on Victim Participation in Criminal Proceedings which analysed victims' rights in 22 countries.<sup>10</sup>

At the **investigation stage and pre-trial stage**, most countries follow certain common practices:

- Victims have a right to file a criminal complaint.
- Victims can challenge decision not to investigate or not to prosecute through different procedures.
- The Prosecution should involve victims at the indictment stage by taking into account the views of victims on a potential prosecution and give a reasoned answer about a decision not to investigate or prosecute certain alleged offences.
- Victims should be heard on decisions concerning pre-trial detention because releasing a suspect may affect victims' safety and well-being.

Victim participation at the **trial stage** varies widely between countries with a distinct difference between common law and civil law traditions. Some examples from different jurisdictions include:

- Victims can make opening and closing statements.
- Victims can adduce evidence in addition to evidence submitted by the Prosecution. For example, the Kenyan Victim Protection Act 2014 allows victims to adduce evidence left out by the prosecutor. At the ICC, victims' lawyers may present evidence subject to approval from the Chamber.
- Victims can challenge the admissibility of evidence.
- Some jurisdictions provide for the examination and cross-examination of witnesses by victims' lawyers. At international level, the ICC's Rules of Procedure for instance provide for a specific procedure to allow this. Legal representative for victims have to present the list of questions they intend to ask the witness to the judge, the judge will review and consider admissibility of the questions.
- Victims may raise objections during the trial in some jurisdictions, mainly civil law countries.
- Victims can make written and oral submission on facts and law. At the ICC this is allowed with prior approval of the Chamber.
- Victims can make victim impact statements for the determination of the sentence.
- Victims can request reparations.

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<sup>10</sup> Available at: <http://www.redress.org/downloads/publications/1508victim-rights-report.pdf>.

At the **post-trial stage**, there are certain rights that victims are entitled to in most jurisdictions:

- Victims have the right to enforce a reparation award.
- Victims should be informed if there are changes in the custodial regime. For example, when there is early release of the perpetrator.
- The right to appeal varies in different jurisdictions. Some jurisdictions only allow it on the issue of reparations whereas others allow victims to join an appeal lodged by the prosecution.

#### **d) Discussion**

In the plenary discussion, Ms Ye reiterated that victims are expressly entitled to protection in certain treaties, including article 13 of the Convention Against Torture and article 12 of the Convention for the Protection of All Persons from Enforced Disappearance. This right applies to victims regardless of whether they are witnesses.

Participants raised the question if victims are entitled to interim assistance during the trial. Ms Ye pointed out that the right to assistance is specifically listed in the declaratory instruments. Such assistance can include psychosocial or medical support and legal aid. At the ICC the Trust Fund for Victims has a mandate to provide assistance to the wider victim communities independent of the outcome of the trial. In Uganda, under the ICD Rules, the registrar has the mandate to provide assistance to victims, including assisting the victims to obtain legal advice, helping to organise legal representation, arranging accommodation, and obtaining medical and psychosocial support.<sup>11</sup>

However, it is often a question of the available resources to pay for such services. For example, the Extraordinary Chambers in the Courts of Cambodia would sign Memoranda of Understanding with NGOs to provide assistance services to victims using their own resources. Such agreements would ensure that such services would be available to the Court free of charge and thereby allow the Court to provide assistance despite the lack of dedicated funding within the Court's budget for it.

The issue of limited resources was seen as the biggest obstacle to fulfil the assistance and protection mandate of the ICD. As an example, participants mentioned that the Prevention of Trafficking in Persons Act (2009) also provides for assistance. However, due to lack of resources no measures have been put in place to implement these provisions. Some participants suggested that in order to overcome this, assistance provided should be linked to existing structures that are already providing social services, including governmental agencies and NGOs. It was suggested that the ICD should have a mechanism to coordinate with existing assistance structures and to set up workable referrals. Others suggested to lobby the Ministry of Finance to allocate the necessary budget to the ICD and engage with the Ministry of Health

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<sup>11</sup> The Judicature (High Court) (International Crimes Division) Rules, 2016 Statutory Instruments 2016 No. 40, Rule 51(1) and 34(3)(a)-(b).

and other institutions to afford support to victims. For example, the Ministry of Health is providing medical and legal services to victims of sexual violence.

Some participants were of the view that assistance should be limited to the legal process. The view was expressed that it is unrealistic to expect the ICD to afford assistance, such as medical care, to victims well beyond the trial. However, others were of the view that the Court should not take up victim participation if it cannot take up victim support, which includes measures to ensure victims' well-being. This is closely connected to the question of managing expectations of victims who engage with the court because victims might have the expectation to receive assistance when they decide to participate in a case. There might be disillusionment among victims when the state is eventually unable to deliver any benefits for victims' daily lives.

A participant provided an example of how victims in Uganda withdrew from proceedings because they were disappointed by the outcome of the process. In the 2010 'World Cup' bombings case, a civil court awarded compensation. However, the compensation was paid to people who were not victims of the crimes because the state did not consult with the Director of Public Prosecution (DPP) about the identities of the victims. When the victims of the bombings were asked to testify, they refused as they felt defrauded.

With regard to participation during appeals, it was explained that in the United States victims cannot lodge an appeal but can participate if the prosecutor has lodged it, through motions and briefing on the legal issue on appeal. However the scope of intervention is very narrow. Some participants were of the view that in Uganda victims should have the right to lodge an appeal because prosecutors might put in a notice of appeal for the record but not pursue it. The possibility for victims to lodge an appeal is not currently provided for in the ICD's Rules of Procedure.

#### **IV.2. Victim Participation at the International Criminal Court (ICC)**

Ms **Jane Adong**, counsel at the Office of the Public Counsel for Victims at the ICC, opened the session on victim participation at the ICC.

Ms Adong pointed out that for the first time in the history of international criminal justice, the negotiators of the Rome Statute placed victims at the heart of proceedings. The Rome Statute sets the possibility for victims to be heard and to submit observations within the framework of specific procedures.

The Rome Statute, especially Article 68(3), enables victims of crimes falling under the jurisdiction of the ICC to make representations, to submit observations and to have their views and concerns presented and considered at all phases of the proceedings when their personal interest is affected.<sup>12</sup> The timing and manner of victim participation are determined by the

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<sup>12</sup> Article 68 (3) of the Rome Statute provides: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

judges depending on the stage of the proceedings. Victims' lawyers may be notified of submissions made in the relevant case, may attend hearings and make oral and file written submissions, and be allowed to question witnesses. In addition, victims can seek reparations for the harm suffered as a result of these crimes pursuant to Article 75 of the Rome Statute.

### a) Modalities of victim participation

According to Ms Adong, the legal instruments of the Court are not explicit in detailing the modalities for victim participation in the proceedings. According to Rule 89(1) of the Rules of Procedure and Evidence, "[t]he Chamber shall [...] specify the proceedings and manner in which participation is considered appropriate". Participation of victims in specific procedures may also be inferred from other provisions of the Rome Statute which do not explicitly confer a role to victims, but when read in conjunction with Article 68(3) of the Rome Statute, may allow victims to present their views and concerns when their personal interests are affected. For example, Rule 92(2) the Rules of Procedure and Evidence requires the Court to inform victims of a decision not to prosecute. It can be inferred from this Rule that where the Prosecution decides not to continue investigations or end a case, victims may be heard.

Ms Adong advised that when dealing with victims, it is recommended to ask what victims want. The question is how the ICD Rules can be interpreted so that the victims' needs are addressed. Ms Adong recommended to resort to international law to interpret the ICD Rules in a victim-sensitive manner.

The legal framework of the ICC contains several provisions on victim participation. Victims through their legal representatives may:

- **Attend and participate in the hearings** before the court pursuant to Rule 91(2) of the Rules of procedure and Evidence;
- **Make opening and closing statements** in accordance with Rule 89(1) of the Rules of Procedure and Evidence;
- **Present their views and concerns** pursuant to Article 68(3) of the Rome Statute and Rule 89 of the Rules of Procedure and Evidence;
- Make representations in writing to a Pre-Trial Chamber in relation to a request for authorisation of an investigation pursuant to Article 15(3) of the Rome Statute and Rule 50(3) of the Rules of Procedure and Evidence;
- Submit observations in the proceedings dealing with a challenge to the jurisdiction of the court or the admissibility of a case in accordance with Article 19(3) of the Rome Statute;

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Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."

- Request a Chamber to order measures to **protect victims' safety, psychological well-being, dignity and privacy** in accordance with Article 68(1) of the Rome Statute and Rule 87(1) and Rule 88(1) of the Rules of Procedure and Evidence;
- Give views in accordance with Rule 119 of the Rules of Procedure and Evidence, before a Pre-Trial Chamber imposes or amends conditions restricting the liberty of the person in the custody of the ICC.

Ms Adong raised the fact that victims often do not speak the language of the Court. For this reason, they might need someone to represent them in the proceedings. In order to assist victims in exercising their rights under the Rome Statute, Rule 90(1) of the Rules of Procedure and Evidence provides that “victim[s] shall be free to choose a legal representative”.

Outside of these stipulations, Article 68(3) of the Rome Statute does not list explicitly what type of interventions victims can make. The ICC has ruled that decisions about participation should be made on a case-by-case basis upon request by victims' counsel because Article 68 of the Rome Statute vests the Chamber with the power to determine the modalities of participation.

## **b) Jurisprudence on victim participation**

Ms Adong also highlighted the ICC's jurisprudence on victim participation at different stages of the proceedings.

The **pre-trial stage** covers the time when investigations are still underway. In the Katanga case, the Pre-Trial Chamber determined that the interests of victims are engaged also during the pre-trial stage since during this stage of the proceedings the Court is concerned with whether there is sufficient evidence to believe that the suspect is responsible for the crimes included in the Prosecution's Charging Document. According to the Pre-Trial Chamber, this is therefore an appropriate stage of the proceedings for victim participation in all cases before the Court. The Chamber also ruled that there is no need to review this finding each time a new case is initiated before the Court. Thus, a procedural status of victim exists at the pre-trial stage of any case before the Court.

The specific procedural rights of victims in the pre-trial stage include:

- **Right to have access to the records of the case** kept by the registry, including access to public and confidential evidence by prosecution and defence upon application. However, it does not include *ex parte* documents which are limited to certain parties. For access to non-public filings and decisions, there may be a need for redactions.
- **Right to be notified** in the same manner as the prosecution and defence of all decisions, request, motions, responses and other procedural documents which are filed and not *ex parte*.

- **Right to have access to the transcripts** of hearings, public or in camera, except for *ex parte* hearings.
- Right to be notified of all proceedings of the court, including public or *in camera*, and postponements and dates of decisions.
- **Right to make submissions** on all issues of admissibility and to examine the probative value of the evidence which the prosecution and defence intend to rely upon during the confirmation of charges.
- Right to respond where interest of victims are affected.
- **Right to examine witnesses** which should take place after examination by the prosecution. At times judges want to know what questions victim's counsel intends to ask to assess if they are relevant and not repetitive.
- **Right to attend all public and closed hearings** leading to the confirmation hearing, except for *ex parte* hearings.
- **Right to participate by way of oral motion, responses, or submissions** in all hearings where victims are allowed to attend, except when it is not allowed by the statute or rules, e.g. *inter-parte* disclosure.
- **Right to file written motions, responses, or replies** other than those where this has been excluded by statute and rules.
- **Right to make opening and closing statements** in the confirmation of charges hearing. Victims' counsel may address any point of law, including legal characterisation and mode of liability.
- **Right to make objections** in the confirmation of charges hearing.

All these rights need a prior decision by a judge. If victims' counsel wants to move the Court, they need to explain why. When making the decision, the Court will take into account the nature of the case, rights of accused, fairness and expeditiousness of the trial.

There are times where victims do not want to disclose their identity because of security concerns, e.g. in the Ongwen case. It is not fair for the defence to allow someone who remains anonymous to bring issues against the defendant who has the right to know who is accusing them. Thus, as long as victims are anonymous they cannot make submissions.

This raises the need for protection, and at the Court, there is the possibility to protect victims' identities. When information relating to victims who do not wish to disclose their identity is brought before the Court, the victims are only referred to by a number instead of their names. Only the victims' counsel will know the particulars.

At **trial stage**, it is critical to emphasise and repeat that for victims to participate in the trial their interests must relate to the evidence and the issues the Trial Chamber will be considering in its determination of the charges brought against the accused. Interests of victims are very wide-ranging and include an interest in:

- receiving reparations;
- being allowed to express their views and concerns
- verifying particular facts and establishing the truth;

- protecting their dignity during the trial and ensuring their safety; or
- being recognised as victims in the case, among others.

It is important to emphasize that the participation of victims in the proceedings is not limited to their potential interest to receive reparations.

Ms Adong explained that the right to introduce evidence at trial is not limited to the parties. Victims may be permitted to tender and examine evidence if it assists the Court in the determination of the truth. Rule 91(1) of the Rules of Procedure and Evidence enables participating victims to question witnesses, including experts and defendants with leave of the Chamber whenever their personal interest is engaged. Questioning will not be limited to reparation issues. In appropriate circumstances, victims' counsel may also challenge evidence.

### **IV.3. Victim Participation in the Kenya Cases at the ICC**

Ms **Lydia Muthiani** who is currently an independent expert presented a case study of victim participation at the ICC by describing the process in the Kenyatta case.

#### **a) Post-election violence in Kenya**

Ms Muthiani gave an overview of the post-election violence that erupted in Kenya after the general elections in 2007. After the election results were announced, the incumbent President Mwai Kibaki was inaugurated within a very short period. This sparked violent unrest which resulted in more than 1,300 people being killed, more than 3,000 cases of sexual violence and the displacement of more than 650,000 people. With the Kenya National Accord on 28 February 2008 a ceasefire was agreed and a number of measures to deal with the post-election violence were introduced. One of them was the establishment of the Commission of Inquiry on Post-Election Violence (so-called Waki Commission) which looked into the responsibility for this violence. The Waki Commission set a deadline for the establishment of a domestic tribunal to prosecute those responsible. After this deadline had passed without the establishment of the tribunal, the Waki Commission in July 2009 handed over a list of suspects to the ICC.

In March 2011, the ICC issued indictments against a number of individuals grouped into two cases. They included Uhuru Kenyatta, the sitting President, and William Ruto, the sitting Deputy President. Throughout the process, the cases collapsed against each of the initial suspects. The Court found that witnesses were interfered with and that the prosecution did not have enough evidence because of lack of cooperation by Kenya.

#### **b) Victim participation in the Kenyatta case**

Ms Muthiani went on to analyse victim participation in the Kenyatta cases. Victims intervened on a number of issues until the proceedings were terminated before the case went to trial.

During the preliminary analysis stage, the Victim Protection and Reparation Section (VPRS) of the ICC sought to present views and concerns by victims on the commencement of

investigations to the Pre-Trial Chamber. The Common Legal Representative of Victims (CLR) requested to make submissions on the **amendment of the indictment** which was granted in part. The CLR's requests to amend the indictment to include destruction of property, the expansion of the temporal and geographical scope of case, and the re-characterization of facts on forced circumcision were not granted.

During the **confirmation of charges hearing**, victims were not able to submit any evidence but they gave a narrative about the crimes, the context, their situation and experiences. This provided important contextual information and clarity. The CLR made opening and closing statements on the expectations victim had towards the justice process. The CLR was also allowed cross-examination during the confirmation hearing.

Before the start of the hearings, judges considered **whether the case should be heard in Kenya** or in The Hague. Several victims made submissions to keep the proceedings in The Hague, and the judges eventually decided to keep the process in The Hague.

In preparation of the hearings, the CLR participated in all **status conferences**. The Chamber would invite the CLR on its own initiative. During these conferences, the CLR was allowed to comment on the modalities of the trial, e.g. opening and closing statements, video screenings, etc.

Victims' **access to confidential filings and evidence** was limited in the Kenyatta case. Judges had to consider every single piece of evidence first.

At this point, some participants intervened to express their support for victims' counsel to access case documents subject to certain considerations of fairness of the proceedings. Other participants expressed the concern about disclosing confidential information to victims' counsel given the difficulties of enforcing confidentiality obligations. There has been some experience before with leaking of confidential information. This could jeopardize the entire trial. Some participants pointed out that there are possible sanctions for breaching confidentiality.

Ms Muthiani pointed out that the CLR are not allowed to share confidential information with the larger community of victims because they are bound by the code of conduct and there would be sanctions.

For **offences against the administration of justice**, only the prosecution can move the Court. There was a lot of witness tampering in the case. Victims requested leave to submit observations on these offences. The information provided by victims eventually led to the issuance of arrest warrants against suspects accused of witness interference as an offence against the administration of justice under Art. 70 of the Rome Statute. However, Kenya refused to transfer the suspects to the ICC.

In the Kenyatta case, the ICC **referred Kenya to the Assembly of State Parties** for failure to cooperate with the Court. Victims were allowed to participate in the discussions on this referral.

Following the withdrawal of charges against Mr Kenyatta, a **review of the prosecution's decision** not to continue proceedings was initiated by victims who were given leave to make submissions. But eventually the Trial Chamber decided that it was no longer seized with the matter as the case was terminated.

### c) Victim participation in the Ruto and Sang case

Ms Muthiani added some explanations on the case against Mr Ruto and Mr Sang, which had also been discontinued.

In that case, victims were allowed to file observations on the **withdrawal of charges** and on the termination of the case. The CLR was given time to consult with victims.

Victims were also allowed to make observations on the **freezing of assets** as it is closely linked to the reparation claim.

After the case was terminated, victims requested the **release of the pre-trial brief** in redacted form which contained information on the investigations that was not known to victims before. This satisfied to some extent their interest in the truth and constituted a form of justice for some of them.

Despite the termination of the case against Mr Ruto and Mr Sang, the Court invited the CLR to make submissions on **reparation**. The victims wanted a pronouncement on the government's obligation to provide reparation and an order against the Trust Fund for Victims to provide assistance. The Chamber ruled that it was no longer seized of the matter so could not rule on these issues. Kenyan victims have not received any assistance from the Trust Fund for Victims so far.

### d) Recommendations for the ICD

Ms Muthiani made a number of recommendations for victim participation at the ICD.

- **The ICD needs to agree on a model for victim application and representation:**

Given the experience in the Kenyatta case, Ms Muthiani recommends the use of a simple and short registration form which victims can complete and which will document information required to determine victim status in the case without recording victims' entire experience.

In the Kenyatta case, every victim application was seven pages long and had to be assessed individually by a judge. This led to immense back-logs because there were thousands of applications. In addition, there was a large redaction requirement. Later, the application model was simplified. This allowed the CLR's team to register 800 victims a year. The CLR first made an initial assessment, then the application was transferred to the Registrar for verification and the determination was done by the Pre-Trial Chamber.

On victim representation, the ICC required the CLR to be in country and OPCV represented victims in the courtroom. The CLR was obliged to submit bi-monthly reports on his meetings with victims. This allowed the Chamber to exercise an oversight role over the field activities. The Chamber wanted to know about the situation of victims, including their livelihood and security.

- **The ICD needs to clarify the roles of prosecutor, defence and victim counsel:**

The prosecution in the Kenyatta case did not pursue all possible charges. In the Kenyatta case, certain victims who were registered in the beginning as victims were subsequently denied the ability to participate when the crimes set out in the indictment were narrowed.

Special protocols should be put in place for dual-status victims who are recognised participants and at the same time witnesses to be called to testify. The ICC established such a protocol which required the prosecution to inform the CLR if dual-status victims were contacted and allowed the CLR to be present during interviews. The CLR also had the right to receive a copy of the statement at the end.

#### **IV.4. Victim Participation in the United States**

Ms **Meg Garvin**, Director of the National Crime Victim Law Institute in the United States, presented on the victim participation model in her home country. At the outset, Ms Garvin pointed out that in the early years of the United States, crimes were prosecuted by victims rather than professional prosecutors. This gradually changed, however, by the 1970s the victims' role had changed substantially as was evidenced by the adoption of the Federal Rules of Evidence in 1975 which allowed for the exclusion of witnesses, including victims from the courtroom.

##### **a) History of victim rights**

In 1982, the President's Task Force issued a report following national research that asked crime victims about their perception and experience with the justice system. Among the results reported was that victims were reluctant to report crimes and participate in criminal justice processes because the process could lead to more distress and PTSD symptoms. The report recommended a number of ways to improve victims' participation in criminal justice proceedings.

While much work was done between 1982 and 2004, a significant step in advancing victims' participatory rights came in 2004 with the adoption of the Crime Victims' Rights Act which provided for a series of victims' rights, including:

- 1) The right to be reasonably protected from the accused.
- 2) The right to reasonable, accurate & timely notice of public court proceedings.
- 3) The right not to be excluded from the proceedings.

- 4) The right to full and timely restitution.
- 5) The right to confer with the attorney for the government.
- 6) The right to be reasonably heard during any public hearing.
- 7) The right to proceedings free from unreasonable delay.
- 8) The right to be treated with fairness and with respect for their dignity and privacy.

These rights mirror international norms.

Ms Garvin continued to explain that the crime victim or the crime victim's lawful representative, and the attorney for the Government may assert these rights in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. Ideally, the victim should have his or her own representative because it might be difficult for the prosecution to represent the victim's interest as well as the prosecution's interest.

The law also provides for remedies where victims are of the view that their rights were violated. Victims can first seek redress for such a violation at the trial court. If redress at trial is denied, victims can ask for remedies at the appellate court. The court of appeals must decide on such an application within 72 hours and issue a clear reasoning for the denial of such applications.

The Crime Victims' Rights Act imposes obligations both on the court and the government. The court is required to ensure that the victim is afforded the rights in the Act. The court can only reject submissions if they are not related victim's right or to matter before court at that time. On the government's part, officers and employees of the Department of Justice and other departments and agencies engaged in the detection, investigation, or prosecution of crime are required to ensure that crime victims are notified of, and accorded, the rights.

## **b) Jurisprudence on victim participation**

Ms Garvin continued by giving examples of how victims were allowed to participate in criminal proceedings. She emphasized that in the United States, victims exercise their rights mostly at pre-trial and post-conviction stages.

At the **pre-trial stage**, the victims should be informed of the ongoing proceedings. It is important to disclose the same information to victim's counsel as others in the process to enable them represent their clients. In the case of *Doe No. 1 v. United States*, 749 F.3d 999 (11th Cir. 2014), the appellate court decided that victims have the right to information in the prosecution's case file that implicates their rights.

The right to information and confer with the prosecutor also apply for **plea acceptance**. In the case of *In re Dean*, 527 F.3d 392 (5th Cir. 2008), it was found that the victims should have been notified of the ongoing plea discussions and should have been allowed to communicate meaningfully with the government. The plea bargain was rejected by the appellate court

because the prosecution had failed to consult the victim on it. The victims cannot dictate the plea bargain but need to be consulted.

Victims also have the right to **privacy and protection** at pre-trial stage. These tools can be used to make submissions on bail and release conditions. Victims can request the use of pseudonyms, at least in public documents, from the beginning of the proceedings. Up to a certain point, their identity can even be protected from the defendant.

Victims' rights even afford them a say in the **nature of the charges**. They can speak to whether they encompass the full scale of harm. This means that dismissing charges without due regard to victims' rights is a dereliction of duty. In the case of *U.S. v. Heaton*, 458 F. Supp. 2d 1271 (D. Utah 2006), the prosecutor's motion to dismiss half of the charges was denied because the victim had not been heard by the prosecution on this matter.

Concerning the **trial stage**, the law is silent on the scope of victim participation. In practice, victims' advocates have taken small progressive steps but the jurisprudence remains unsettled. For example, if a certain action in the hearing affects the privacy or safety of the victim, victims' counsel will try to object but the process for such objections often needs to be negotiated with the judge and the parties before the hearing. Some judges have denied any objections by victims' lawyers. Each action taken by victims' counsels during trial are currently negotiated on a case-by-case basis. This caution is necessary to avoid prejudicing the jury or to creating grounds for appeal against the conviction. Victims' counsels do not have the right to present evidence, and examine or cross-examine witnesses during trial.

At **sentencing stage**, victims can give an impact statement, make oral arguments or file a sentencing memo. These three actions can all address the issue of restitution. In the case of *Kenna v. United States Dist. Court*, 435 F.3d 1011, 1013 (9th Cir. 2006), the appellate court invalidated the sentence because the victim was only heard on the sentencing for one out of two defendants. This did not lead to a particular sentence but to a do-over of the sentencing hearing so that the victim could be heard before sentence was determined and imposed.

In conclusion, Ms Garvin listed the on-going matters that have not been fully settled by the law and jurisprudence, including the scope of the definition of victims and the role of victim counsel at trial. She also pointed out that there is a lack of lawyers representing victims in the United States.

#### IV.5. Plenary Discussion

The participants discussed the question of **plea bargaining** in cases of international crimes. Some raised that such practice is not possible at international tribunals but on the national level some countries have more lenient rules on early release. In the United States, there is no jurisprudence on plea bargaining for international crimes proceedings yet because there have been no cases prosecuted so far. For ordinary crimes, however, victims have the right to be heard and informed by the prosecution when plea bargaining discussions are taken up with the defense.

During the plenary, participants also discussed the **victim registration process** at the ICD. Participants clarified that when the current case before the ICD started, there was no registration system for victims in place. The current process is to present victim applications to the pre-trial judge who will decide on each of them. There is already an order for victims' counsels to file victim applications by motion and affidavit. At this stage, it is unclear when the hearing to determine these applications will be scheduled.

The current practice of registration and verification can be time consuming and is a significant burden on the pre-trial judge. Valuable lessons could be learned from the experiences at the ICC where a similar procedure led to a bottle neck where victims' applications took a long time to be decided including for instance in the Kenyatta case. It was proposed that victims' counsels should conduct the initial verification of applications and the court would only need to confirm the verification by looking at sample applications. Others raised that the verification should be done by the registrar. The registrar should create a report with unredacted information about victims and submit it to the court and prosecution. The defense should receive a redacted version to enable them to make objections.

During the discussions, some participants raised concerns about requiring victims to file their application through affidavits. It was proposed to use a 2-page form instead to simply show the link between the victim and the charged crimes. Others mentioned that the Criminal Procedure Act requires affidavits.

Participants also pointed out that there is need for a final indictment before victim registration can begin. If the indictment is amended before trial, it can affect who can participate. If the indictment is amended after trial, the factual basis cannot be changed so that it will not affect victim participation. However, if participation is not possible prior to the final indictment, victims will not be in a position to make submissions on the charges as identified by the prosecution.

The participants went on to discuss the question of **reparation** for victims. Some participants questioned whether the right to reparation should be connected to the success of a criminal case. Others pointed out that at the ICC, reparation require a conviction because it is a criminal proceeding. However, in national jurisdictions there is the possibility of a separate civil suit. In Kenya, for example, there are two public interest litigation cases pending which seek reparation from the government outside of any criminal proceedings. Participants pointed out that according to the UN Basic Principles and Guidelines, the state has the obligation to step in when the individual convicted person is unable to pay compensation.

Participants reiterated the challenge of **limited funds and human resources** to cater for victims and their rights. There are attempts to work with NGOs to facilitate counsel for victims but there was concern that this might result in the court losing control over the funds.

The group discussed the issue of **disclosure of information** by the prosecution to the victims. Some participants questioned what information should be disclosed and if there can be any limitations to such disclosure. Participants pointed out that the Ugandan law allows

prosecutors to keep certain material. Whatever should be disclosed to the defense, should also be disclosed to victims. This was confirmed to be the practice in the United States.

Some participants raised the concern about how to deal with **dual status victims** who are witnesses to be called to testify. Participants confirmed that they are also represented by victims' lawyers. It was reiterated that at the ICC, there is a special procedure in place on how prosecution can communicate with dual status victims. This requires coordination and a protocol for communication between the prosecution and victims' counsel.