



**EXPERT CONFERENCE ON
PARTICIPATION OF VICTIMS OF INTERNATIONAL CRIMES IN
NATIONAL CRIMINAL JUSTICE SYSTEMS**

Held in Pretoria, South Africa, 8 – 9 September 2015

Organized by REDRESS and the Institute for Security Studies

CONFERENCE REPORT

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Background

Courts designed to adjudicate international crimes, such as the International Criminal Court (ICC), are only meant to be complementary to national systems and will in most cases only adjudicate a handful of persons alleged to be responsible for international crimes. The burden falls on domestic investigators, prosecutors and courts to ensure that there is no impunity gap. As a result, efforts to incorporate into the domestic legal order the provisions of the ICC Statute as well as other relevant human rights and international humanitarian law treaties in order to enhance the prospects for criminal investigations and prosecutions, have received a significant amount of attention.

At the same time, there have been noteworthy developments in international human rights law whereby victims' rights to participate in criminal proceedings have been progressively recognised. This reflects a certain shift from the traditional concept of the state's interest in punishment and deterrence to a new vision in which is included victims' interest in accessing and obtaining justice and the recognition of victims as right bearers. However, victim participation in domestic criminal proceedings concerning international crimes has received comparatively little attention.

From **8-9 September 2015**, REDRESS and the Institute for Security Studies (ISS) organised a two-day conference in Pretoria, South Africa on the ***Participation of Victims of International Crimes in National Criminal Justice Systems***. The conference brought together investigators, prosecutors, court officials and members of civil society from a range of countries in Africa. In particular, the organisers sought to involve officials engaged in the establishment or operation of domestic criminal justice mechanisms to adjudicate international crimes.

The conference also provided the opportunity to launch a comprehensive research report which analyses the legal frameworks and practices on victim participation in domestic criminal proceedings in a variety of countries worldwide. The report provided a useful frame for the conference discussions. Participants were invited to discuss and comment on the findings and recommendations, share experiences of the challenges relating to the support and assistance of victims in criminal proceedings, and agree on actions to strengthen victim participation in their respective jurisdictions.¹

¹ The agenda of the meeting is provided as Annex A.

Organizers

REDRESS is an international human rights organization founded in December 1992 and based in London, United Kingdom. Its mission is to promote justice for victims of torture and related international crimes through litigation, advocacy and victim support.

REDRESS also works globally to provide support to policymakers and governments on justice system strengthening, reparations and other related measures to account for past abuses. For more information on our work, please consult our website: www.redress.org.

The **Institute for Security Studies** is an African organization which aims to enhance human security on the continent. It does independent and authoritative research, provides expert policy advice, and delivers practical training and technical assistance.

The ISS achieves its goal through the work of the following divisions and projects:

- **Governance, crime and justice** promotes democratic governance and helps reduce corruption through better accountability and respect for human rights. It assists African governments to develop evidence-based policies that improve the performance of their criminal justice systems and reduce violence.
- **Conflict prevention and risk analysis** helps prevent conflict by improving the understanding of the latest human security developments on the continent.
- **Conflict management and peacebuilding** enhances peace operations and peacebuilding by assisting governments, as well as regional and international institutions, to improve their policy and implementation.
- **Transnational threats and international crime** helps African inter-governmental organisations, national governments and civil society to respond more effectively and appropriately to transnational threats and international crimes.
- **African Futures and Innovation** produces policy analysis on possible trajectories for human security, development, economic growth and socio-political change in Africa. The project enables decision makers to test the implications of policy choices well into the future.
- **The African Centre for Peace and Security Training** enables government officials, journalists, human rights activists and the private sector to understand and implement human security policy through in-depth training courses. An influential alumni network encourages cooperation between countries and sectors.

For more information on the work of the ISS, please visit www.issafrica.org

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Introductory Remarks

Cheryl Frank, Head of the Transnational Threats and International Crime Division at ISS, and Carla Ferstman, Director of REDRESS

Ms. Frank and Ms. Ferstman noted that when criminal proceedings are launched at the domestic level to prosecute international crimes, they do not always include the possibility for victims to be heard in their own right, aside from any role they may have as prosecution witnesses and despite the fact that victims' interests – while related – will often be distinct from those of the prosecutor. In addition, while civil law countries will often recognise a strong role for victims in the proceedings, including the right to participate as civil party, victim participation is often misunderstood in common law countries: it is perceived as a distraction from the overall goal of prosecuting criminals. Both speakers explained that this was one of the assumptions that the research report dispelled. The report demonstrates that victim participation is not only relevant for civil law countries; it is increasingly recognised to be a critical feature of the criminal procedures of many common law countries too.

The speakers acknowledged that while victim participation was important, the challenges associated with the implementation of participation processes were real, given that domestic criminal law systems were often not set up to meet the needs of victims who wish to engage with them. As a result, many victims remain invisible. Domestic legal systems may not cater adequately to the range of emotional needs victims will have. The systems may not be victim-friendly. Victims may not trust the criminal trial as an appropriate venue to talk about their victimisation. This is particularly true in relation to especially vulnerable victims such as victims of sexual and gender based crimes. Furthermore, there are additional challenges associated with criminal proceedings that concern 'international crimes'. These proceedings often deal with crimes involving state power which may make victims particularly fearful to come forward. Also, these proceedings typically involve a large numbers of victims which may pose logistical or other challenges for court staff involved in facilitating victim participation. Furthermore, victims will usually not form a homogeneous group because of the different ways in which they experienced criminality and other possible distinctions linked to race, gender, ethnicity and socio-economic conditions. Thus, victims will not always have the same views or perspectives on the criminal justice process and it will often not be possible or appropriate to expect them to speak with a single voice.

Ms. Frank and Ms. Ferstman called for a broad engagement with victims and civil society when considering ways to prosecute international crimes domestically and how to enhance the role of victims in such proceedings. They stressed the importance for courts to be creative when seeking to address, on a practical level, the multiple obstacles to effective victim participation.

Presentation of research report “Victims’ Participation in Criminal Law Proceedings”²

By Carla Ferstman, Director of REDRESS



Ms. Ferstman launched the ISS/REDRESS report on *Victim Participation in Criminal Law Proceedings, Survey of Domestic Practice for Application to International Crimes Prosecutions*. She explained that the report brings together the practice of victim participation in a variety of legal systems and analyses the extent to which a range of domestic jurisdictions provide victims with rights to play an active role in criminal proceedings. Such active rights may include, for example, the right to launch proceedings, to challenge decisions not to prosecute, or to make statements in court.

The reports also formulates recommendations to increase victim participation, taking into account the challenges that large numbers of victims may create as well as the advantages and disadvantages that group/collective approaches have in such contexts. Finally, the report touches upon victims’ right to be given access to information as well as protected during the proceedings.

Ms. Ferstman then explained that international standards had progressively recognised a role for victims in criminal cases. In 1985, the UN adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, recognising for the first time in a UN document that victims had rights and must be treated with respect during the criminal justice process. In 2005, 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 were adopted. While they focus on victims’ rights to reparation they also underscore the importance of enabling victims’ engagement in justice processes in the most human way.

At the regional level, Ms. Ferstman explained that the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples’ Rights³ contain some detail as to the treatment of victims such as ‘equality of access by women and men to judicial bodies and equality before the law in any legal proceedings’, and ‘respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused’. Also, she noted that the European Union had recently adopted a binding Directive for all Member States, which sets baseline standards for victims’ participation in criminal

² Available at <http://www.redress.org/downloads/publications/1508Victim%20Rights%20Report.pdf>.

³ Available at <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>.

justice trials.⁴ She added that the emergence of the victimology movement had also provided an impetus to the realisation of victims' right to participate in proceedings⁵ and that the creation of truth commissions had also brought to the fore the importance of giving a role to victims in justice and truth-telling processes that impact their interests. These developments have had an influence on international criminal procedure and, as a result, both the ICC and the Extraordinary Chambers in the Courts of Cambodia (ECCC) recognise victim participation in their proceedings, as does the Special Tribunal for Lebanon.

However, Ms. Ferstman underlined that enabling victims to participate in international criminal proceedings has not been without challenges. At the ECCC, domestic Cambodian Law (which allows for civil parties to participate) had to be adapted to allow for mass participation of victims. With regards to the ICC, some common law countries had strongly opposed the idea of incorporating victims' rights within the statute at the time the ICC Statute was being drafted. In contrast, for many civil law countries there could be no justice without victim participation. As a result, a hybrid system was developed in which victims could participate in the proceedings at stages where their interests are affected so long as it does not negatively impact on the rights of the defence and on a fair and impartial trial.

Turning to domestic legal systems, she acknowledged that, traditionally, victim participation was often associated with the system of "*parties civiles*", which is present in French and also in Spanish speaking systems, albeit with slight modifications. In common law systems, victim participation is not necessarily present during the trial itself. However she highlighted that victims' rights in common law systems had progressively evolved to include the right to access information and to engagement with the prosecution. Victims' ability to challenge some aspects of prosecutorial and investigatory discretion had also progressively developed.

She explained that the report argues in favour of an increased role for victims in domestic criminal trials and highlights various reasons supporting that argument. First, participation recognises that victims are not simply a source of evidence for the prosecution, but rather have an independent voice, that their views need to be taken into account, and that they need to be treated with respect. This is a shift from the view that victims are simply an object in criminal proceedings. Second, victim participation is not only about compensation; for some victims, it can be important to simply be able to set out their views and concerns. This is recognised for example in the procedures of the Special Tribunal for Lebanon, before which victims can participate in trials but cannot directly claim compensation. In her view, handled well, victim participation can enhance victim acceptance of the justice process regardless of the outcome. However, handled badly, it can potentially put victims at risk or re-victimise them through the court process itself.

Ms. Ferstman concluded by setting out various difficulties, described in the report, which states ought to address when considering how to enhance victim participation in criminal trials. First, domestic legal systems may need to consider positive measures aimed at targeting discrimination and take into account vulnerabilities which may impede victim

⁴ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0029>.

⁵ This movement, present in countries such as Australia, the United States and South Africa, has pushed the idea that victims must play an active role in the proceedings.

access to the procedures. Second, domestic legal systems should also be ready to accept that the participation of victims may not always be to support the interests of the prosecutor. In Ms. Ferstman's opinion, it will be important to consider how victims will be able to engage in such contexts and the scope of their ability to seek judicial review of, or appeal, decisions. Third, the number of victims likely to participate in any given criminal proceeding will play a part and impact on the procedures that are set up. Large numbers of participating victims will have to be managed in a creative way to ensure that their various - and sometimes divergent - views are considered while acknowledging that it will not be possible for each victim to participate individually. Fourth, the definition of who will qualify as a victim for the purpose of participation in the proceedings will need to be determined, especially when this may impact also on the person's ability to claim reparation measures as part of the outcome of the criminal trial. Ms. Ferstman underlined that the practice in that regard was not homogenous with some instruments recognising in the definition the immediate family or dependants of the victims. The question of whether 'collectives' or private corporations can be recognised as victims or participants in the proceedings (as is the case before the ICC) is another question that legal systems are likely to have to address.

Discussions

In the discussions, participants stressed that it was important to agree on the definition of who constituted a victim for the purpose of participation in the proceedings and reflected on the experience at the Extraordinary African Chambers, seated in Senegal, where civil party status had been denied to institutions. The need to put in place safeguards to prevent participation from 'fabricated' victims was also raised. In response to questions from the floor, Ms. Ferstman stressed that there were different ways in which victims could participate in proceedings and that it was important not to forget that they also benefitted from the right to be provided with information throughout proceedings as well as the right to be protected (both from any reprisals, as well as for measures to be taken to guard against re-traumatisation).

Panel 1: Strategies to deal with mass victim participation



The experience of mobilising victims around the Truth and Reconciliation Commission in South Africa, the role of victim associations and NGOs

Marjorie Jobson, Director of Khulumani Support Group, South Africa

Dr. Jobson started her presentation by drawing attention to the important role played by victims in South African proceedings. She gave the example of the fact that national prosecuting authorities had come under scrutiny as a result of allegations of political interference brought forward by victims. This has resulted in the recent appointment of a new national Director of Public Prosecutions and opened the door to the prosecution of a number of cases that previously had not been pursued.

She described the Khulumani Support Group and explained that the Group was created before the Truth and Reconciliation Commission (TRC) started its work - about 20 years ago - by people whose rights had been violated by the Apartheid regime, and whose violations the TRC was prepared to consider. It has worked to seek equitable justice for victims in South Africa and to seek a remedy for some of the shortcomings of the TRC process, including its perceived failure to bring justice to victims. She added that one of the achievements of the Khulumani Support Group had been to help bring women's voices to the attention of the TRC.

Dr. Jobson explained some of the issues Khulumani and other victims' organisations have engaged with and identified one of them as the South African government's lack of commitment to providing justice and reparation to victims. She indicated that at the time the TRC was created, the government was more focused on providing quick pay-offs. The issue of victims and their role in the process was not taken sufficiently seriously. There was no judicial process and assistance was limited to comforting victims informally. Dr. Jobson also highlighted her perception that the South African model of transitional justice presumed a

positive outcome which did not include giving justice to victims. In her opinion, South Africa is expected to come out as a democracy with a rule of law, and be accepted by the international community; Victims do not really figure in that agenda and the question of reparation is an additional challenge.

In her opinion, there was also not enough attention paid to the link between international crimes and complex post-traumatic stress disorder caused by exposure to social and interpersonal trauma and the conditions of poverty and deprivation in which victims of such atrocities live. Dr. Jobson explained that, as a result victims were very seldom ready for a judicial process at the time that such process was actually happening.

However, she indicated that the new Minister for Justice had undertaken to bring in some changes and set as his objective to balance the services given to accused persons with real assistance to victims. She welcomed the creation of a new policy unit within the department of justice.

Dr. Jobson then highlighted several measures, which originally did not adequately consider victims, which Khulumani Support Group had challenged. These include, for example, a recent decision to reinstate special dispensation/pardon measures, originally set under President Mbeki.⁶ The original procedure envisaged a committee in parliament in charge of deciding who would qualify for this special dispensation; victims were not involved. She explained that the issue was taken to the Constitutional Court by Khulumani Support Group and its partners in the South African Coalition for Transitional Justice and the Court ruled in their favour, holding that the measure was unjust as it failed to require consultation with or participation of victims in the process. As a result, the Minister who recently reactivated the scheme has shared his ambition of finding ways to involve victims within the process.

Dr. Jobson concluded by stating that the Khulumani Support Group will continue to offer help to the South African Government as policies are developed that impact on victims while also continuing to legally challenge decisions that disregard victims' views. A key upcoming battle in that regard is the decision by the Government to limit the awarding of 30,000 Rands compensation only to the relatively small number of 16,800 victims of the gross human rights violations that the Truth and Reconciliation Commission was empowered to consider. Some 100,000 victims and survivors of these violations were administratively excluded from benefiting from the state's reparation⁷ programme because their cases were not registered with the TRC by the arbitrary closing date of 14 December 1997. This meant that victims and survivors had had only 18 months to engage the TRC while offenders continued to benefit from new opportunities to be considered for the expunging of records of their crimes and for release from incarceration.

The contrasts in the treatment between political offenders and the victims of their crimes are the basis of planned legal interventions on behalf of the thousands of victims and survivors who remain trapped in poverty having lost all their assets including properties as a result of apartheid gross human rights violations. This legal intervention takes place in a context in which the state had reopened a registration process for land claims for a further five year period for those who failed to meet the deadline of 31 December 1998. No similar process

⁶ He created a presidential pardon for political offenders, to which a consequential number of people applied.

⁷ In that case, the decision to award a lump sum payment disregards some of the TRC recommendations and victims' preferences with regards to reparation and is perceived as inadequate.

has been adopted to enable victims of gross human rights violations to apply for available measures of restitution and redress.

Common legal representation of victims – lessons learnt from the ICC and the ECCC

Beini Ye, Legal Adviser at REDRESS, UK

Ms. Ye started her presentation by explaining that legal representation for victims is a right granted in all of the jurisdictions that have some form of victim participation. In fact, legal representation is often a precondition to the exercise of victim participation rights. However, with regards to international crimes, a number of challenges are likely to arise, including the large number of victims who may need to be represented. It will not be practical for each victim to be represented individually with each counsel making individual interventions as such a system would create blockages in the court proceedings. On the other hand, common legal representation by a single counsel may pose problems with regards to updating, meeting and consulting the entirety of clients. Such a system may also not adequately take into account victims' different and sometimes conflicting interests. How such representation will be funded is another issue to consider.

Ms. Ye reflected on her experience before the ECCC where a civil party system is implemented and victims may participate in the proceedings and benefit from a large set of rights. This includes the right to request investigations, to cross-examine witnesses and experts, to present and request evidence, and to claim reparation. In the early days of the operation of the ECCC, victims could choose their own lawyers which resulted in a large number of interventions in the proceedings, with each victim or group of victims presenting different positions. Thus, in order to streamline the proceedings the ECCC changed its legal framework to allow only two lawyers (Lead Co-Lawyers) to make submissions to the ECCC on behalf of all the victims in each case. Victims continue to have a relationship with their chosen lawyers but only the oral and written submissions from the court appointed Lead Co-Lawyers are accepted. The Lead Co-Lawyers must coordinate with the wider group of lawyers before making submissions. With the introduction of this joint representation also came funding from the Court to the Lead Co-Lawyers and their staff as a recognition that legal aid was necessary to ensure victim participation in the proceedings.

Ms. Ye highlighted a number of positive elements that the Cambodian model possessed. The ECCC only has to deal with one intervention per topic from a single legal team; the two Lead Co-Lawyers are able to manage the cases better as they are equipped with infrastructure provided by the Court (i.e. support staff and a strong case management structure); the system also creates a clear interlocutor (the Lead Co-Lawyers) for the Court in relation to victims issues; the fact that the system is funded by the Court allows the Lead Co-Lawyers to work full-time on the case and limits the risks associated with counsel relying on external – less reliable – sources of funding.

However, Ms. Ye stressed that the ECCC model also presented weaknesses. There are only two lawyers representing 3500 victims and there are very few avenues for victims to challenge the decisions ultimately taken by the Lead Co-Lawyers. This becomes an issue when groups of victims have different interests and do not agree with the majority's position.

Ms. Ye explained that such a situation occurred with regards to compensation in one of the cases. While the rules of the Court did not allow for individual compensation, a group of victims strongly felt that this should nevertheless be requested and that the rules should be challenged on that point. The Lead Co-Lawyers did not pursue the argument and as a result failed to represent the interests of all their clients. This prompted the victims to file a separate petition directly to the chamber. Ms. Ye added that there had been other instances where the interests of a minority of victims were not pursued because only the majority view was presented.

In addition, while the legal representation system is based on two layers, with the civil party lawyers chosen by the victims bearing a big piece of the work with regards to updating and consulting victims, only the Lead Co-Lawyers receive funding. As a result, some victim groups are not adequately updated and receive minimal information from their counsel. Finally, there is no complaint mechanism in place to allow victims to bring performance issues relating to their counsel or the Lead Co-Lawyers, to the ECCC's attention.

Ms. Ye then described the ICC framework. Before the ICC, victims are in theory allowed to choose their counsel. However, chambers may request that they group themselves and appoint a common legal representative. Chambers can also decide to appoint victims' counsel themselves. Over time, there has been a shift in the practice of the Court: While in the early cases, counsel for victims tended to be external and based in or near The Hague, in more recent cases, external counsel was based in the field to ensure regular contact with victims. Counsel from the Court's internal Office of Public Counsel for Victims has also increasingly been appointed as legal representative for victims.

While both the ECCC and the ICC have put in place a common legal representation system, Ms. Ye underlined some of the main differences between the two systems. In contrast to the ECCC, more than one common legal representation team can be appointed at the ICC, to represent different groups of victims when their interests are conflicting. For example, child soldier victims in the *Katanga* case were represented by a separate counsel from the larger group of victims, taking into account that the 'child soldier' victims may themselves have committed assaults against some of the other victims. In addition, at the ICC, lawyers appointed by the Court are also funded by the court.

Nevertheless, the ICC model also presents weaknesses. Ms. Ye highlighted that victims often do not have a real say in the choice of the lawyer(s) appointed to represent them and the complaint mechanisms at their disposal are also not adequate.

She concluded by stating that the experience at the international level shows that it is necessary and possible to have legal representation of a large number of victims, but that this needed to be incorporated in the design of the mechanism from the very start. She drew lessons which could be of use to domestic trials of international crimes. First, she stressed that while common legal representation is a necessary feature of legal representation when there are large numbers of victims, victims should be consulted as to who they want to act as their lawyer. The court should have a role in facilitating this process, and should always take into consideration victims with specific needs or interests. Second, the court (or government ministry under whose jurisdiction the court falls) should always be in charge of funding victim legal representation. Only then can long term funding be secured, allowing the necessary activities of the lawyers to be conducted with sufficient regularity. Finally, internal

regulations on the relationship between victims and their representative should be put in place, together with an adequate complaint mechanism.

Designing an admission process in light of mass applications, the example of Kenya before the ICC

Aimee Ongeso, Program Coordinator at Kituo Cha Sheria, Kenya

Ms. Ongeso began by giving a summary of what Kituo Cha Sheria's activities are. Their mission is to work with the poor and marginalised to secure access to justice. They are also involved in helping victims participate in the ICC processes following the opening of cases relating to the 2007-2008 post-election violence and the three failed attempts to set up a national tribunal.

She explained that the application process for victims in Kenya to participate in ICC proceedings, started with a standard system whereby victims would complete and submit to the ICC Registrar a standardised application form. The form would then be transmitted to the relevant Chamber together with a report by the Registry. This report would then enable the Chamber to consider whether or not the application fell within the scope of the case in which the victim wanted to participate.

However, a number of challenges were associated with the implementation of this standardised system. First, the form was lengthy and difficult to complete, especially considering the limited time available. Second, the ICC worked with intermediaries such as Kituo Cha Sheria to assist victims, who depended on external donor funding to support those activities. When funding stopped, victims who were previously assisted by Kituo Cha Sheria were left with no assistance, such as being made aware of what was happening at the ICC. Time constraints were also not adequately considered including the need to first inform victims about the ICC and their rights, to give them time to process the information and to then come back the next day to register them, sometimes hundreds of them at a time. Another point raised in her presentation was the need to be assisted by local people at the community level in the process of filling in application forms despite the drawbacks of doing so.⁸

Ms. Ongeso then turned to the admission process itself underlining that a key challenge was the lack of control victims exercised over it. She explained that the process was long, tedious and tainted by a sense of helplessness. There was also a concern that interviewing traumatised victims for the purpose of filling in their application forms may do more harm than good. Despite these challenges, 2000 forms were submitted to the Victim Participation and Reparation Section of the ICC Registry. However, the Court did not provide timely feedback to intermediaries who in turn faced pressure from victims themselves for feedback.

Ms. Ongeso added that following these difficulties, in September 2012, Kituo Cha Sheria, submitted an *amicus curiae* brief to the Court seeking a reform of the application and participation process. It stressed security concerns which had arisen as result of pressure

⁸ She explained that relying on other actors at the community level can create a sense that victims have been coached as the accounts related on the forms will often be identical or use similar wording.

and intimidation exerted on NGOs. Another issue raised in the submission was the need to provide support to the Common Legal Representative, who at that time had no proper office space or working tools. She also stressed the need to train intermediaries thoroughly on issues including the scope of the case and the appropriate security measures to be put in place to meet with victims.

Ultimately, a new model was adopted by the Court in 2012 which included some of the recommendations made in the amicus curiae submission. Victims who did not wish to appear in person before the Court did not have to submit an application form and needed only to register through a much shorter process and form. The new system also allowed the Common Legal Representative to determine on the ground whether applicants qualified as victims in the cases and to report regularly to the Court.

Despite the new application system, Ms. Ongeso stressed that the ICC still does not give timely information and feedback to civil society organisations acting as intermediaries and the Common Legal Representative. She added that a lot of confusion remained between what being a 'victim' as opposed to a 'witness' in the case signifies – many have been scared by the disappearance of witnesses and this has deterred them from participating in the case as 'victims'.

Finally, she concluded that meaningful victim participation cannot take place in a vacuum. It needs to be a supported process, which helps victims with their immediate needs. Support to intermediaries working with victims is also needed. Ms. Ongeso added that justice is a continuous process, which should translate into continuous support to victims. She called for victim participation to be an empowering process, which requires meeting the needs of the victims.

Panel 1 Discussions

During the discussions, participants added that issues regarding the registration of victims had also been observed in relation to the work of the ICC in the Democratic Republic of the Congo where the form victims had to fill in was around 20 pages. An additional point mentioned is the fact that some victims may be engaged in more than one legal process at both the international and domestic level and that this could create confusion if not adequately coordinated. Participants also stressed the need to move to a system where the victims are the starting point and their realities are adequately taken into account. In that regard, Dr. Jobson suggested that building solidarity between victims could be essential in achieving victims' rights as it could be very hard for individual victims to seek and obtain reparation on their own. Another recommendation was to ensure, when mechanisms are being set up, that victims' needs are assessed from the start and that issues of funding are adequately considered and addressed. Ms. Ye explained that looking at the ECCC victim participation was actually not very expensive in light of the huge benefits it brought. Finally, Ms. Ongeso stressed the need to acknowledge victims' various views and interests and the fact that victims did not form a homogenous group. She gave the example of the ICC cases in Kenya where the views of victims greatly differed on whether the cases should proceed or be dropped.

Panel 2: Victim participation in common law countries



The experience of South Africa

Adv. JJ Du Toit, Deputy Director of Public Prosecutions, Gauteng Local Division of the High Court, Johannesburg, South Africa

Adv. Du Toit opened his speech by sharing some aspects of his experience in the field. In the 1990s, he was lead counsel of the Goldstone Commission investigating the causes of public violence prior to the 1994 elections. This is when his perception changed of what a 'victim' is. He realised that what happened in the field was very different to what happened in court and that justice is wider than a person appearing as a victim in court; participation also happens outside of the courtroom, in other forums. As a result, Adv. Du Toit explained that he is an advocate of alternative forms of justice and believes that victims should have a platform to share their experience, though not necessarily in a courtroom.

He described the South African legal system explaining that South Africa is mainly a common law country, with some influences from the civil law system. There is no role for victims in the pre-trial and investigation stage. However, they can play a stronger role at the sentencing stage. Victims can make a victim impact statement to allow the Judges to gain a better understanding of the trauma that he/she experienced.⁹ If impact statements cannot be delivered *viva voce*, they can also be made outside the court.

Adv. Du Toit also explained another avenue through which victims are able to participate in proceedings in South Africa: the presentation of mitigating views. During the sentencing phase, or after the victim is called on the merits, victims have the ability to plead for mercy for the accused. The ability for victims to present such views underlines the principle that the views of victims cannot be overlooked when deciding what an appropriate sentence may be.

⁹ They need to request the Court's permission first.

This can be the case for example when the convicted perpetrator is the only breadwinner in his family and sending him to jail would doom the entire family.¹⁰

Adv. Du Toit then indicated that other situations can also call for consultations with victims in light of provisions contained in the Constitution. He discussed the example of presidential pardons for offenders of the Apartheid area and the question that arose as to whether the President was under an obligation to consult the victims before determining whether a pardon should be granted. A case came before the Constitutional Court, which clarified that victims ought to be consulted first.

Adv. Du Toit then explained that victims also had the right to enquire as to the status of their case, referring to a case concerning torture which had occurred in Zimbabwe and involved Zimbabwean victims that live in South Africa. In that case, the court declared that there was an obligation on South Africa to investigate the allegations. When the question arose as to whether, one year later, those victims could go back to the court to ask about progress in the proceedings, the court found that this was indeed possible and that this right could be exercised through litigation centres or NGOs.

He also stressed the importance of having a lawyer to represent victims, as is done at the ICC and the fact that such lawyer should not act as a second prosecutor.

Adv. Du Toit then considered some of the shortcoming of victim participation in the proceedings and reflected on the *Kenyatta* case before the ICC. He noted the decision to terminate the case despite victims' requests for it to continue and reflected on whether victims should be able to play a stronger role during the early investigation stage to avoid such situations.

He concluded by stressing that what victims want may be different from what the authorities want and that victims' concerns should nevertheless be taken into account. He added that other forms of justice, such as social justice or truth commissions, also played an important role for those many victims who will not be able to obtain justice through the courts.

Victim participation in the Ugandan system

Thomas Jatiko, Principal State Attorney, Uganda

Mr. Jatiko started by outlining that there is no victim participation scheme in Uganda and that Article 68 of the Rome Statute had not been domesticated in national law. However, he stressed that Uganda had started a process in order to adopt rules for the International Crimes Division (ICD), which are now before parliament.

He highlighted that while the rights of victims of crimes were increasingly being recognised internationally (including through the creation of victim protection programmes), in Uganda, the emphasis was put on the rights of the accused. At the investigation and pre-trial stages, little is done for the victims, save for the fact that they may be called as a witness. Power is vested in the Director of Public Prosecution (DPP) to investigate and prosecute crimes.

¹⁰ However such views are not always upheld by the courts.

While a private person may prosecute a case under the Magistrate Court's Act, the DPP still retains the power to overtake and discontinue the case. The victim will not always know what is happening unless he/she is present at court or is vigilant and inquires with the DPP as to the status of his/her case. Mr. Jatiko further added that there was no duty for the police to keep the victim updated on the case. In his view, this highlighted the need for victims to be represented by a lawyer who would protect their rights and interests even if, ultimately, the role of such lawyer will remain limited. Mr. Jatiko concluded that overall, victims were considered objects in the judicial system.

He then explained that victims' ability to participate in some proceedings had nevertheless been recognised as part of the adoption of sentencing guidelines two years ago. As a result, before a sentence is rendered, victim impact statements can now be received.¹¹

In Mr. Jatiko's view, the lack of victims' rights in the Ugandan legal system can be explained by the fact that such system was inherited from the colonial area, at a time where there was a growing recognition that crimes had a social impact and that therefore the state ought to lead the prosecution. This is why in his view, the role of victims is so marginal in common law systems.

He argued that lessons could be learnt from the victims' rights movements in the United Kingdom, the United States and Canada. He gave the example of the United States, a common law country, where victims benefit from the right to be treated with dignity, the right to protection from the accused, the right to information, the right to be present during criminal justice proceedings, the right to due process and to be able to consult with the prosecuting attorney, the right to financial compensation (which includes reparations), as well as the right to proceedings free from unnecessary delay. In Uganda, most victims do not enjoy such rights and, in Mr. Jatiko's view, there is still reluctance to consider a stronger role for victims.¹²

Mr. Jatiko then turned to possible steps that Uganda could take to improve victim participation. He suggested that efforts should be spent to alleviate victims' anxiety by explaining the proceedings to them. He compared the current practice in Uganda – where victims are usually warned two days before testifying of the need for them to appear at court and they do not meet with the Prosecutor beforehand – with the practice of international criminal tribunals where witnesses are met in advance by the Prosecutor who explains the process. He added that making proceedings victim-friendly would also ensure that victims are not scared of the prosecutor, and could thus decrease the risk that witnesses will not appear due to fear. He also argued that Article 68 of the ICC Statute should be incorporated into domestic law and that hybrid courts could play a positive role in encouraging victim participation. Mr. Jatiko added that a victim participation section or unit was being created in Uganda, and that the unit would likely assist the DPP in knowing better who the victims were who wanted to engage in cases before the ICD.

He concluded his presentation by raising the issue of evidence preservation, which in his view, cross-cut the topic of victim participation. He explained that in the Kwoyelo case¹³

¹¹ The guidelines allow both the defence and prosecution to provide community and impact statements.

¹² He referred to examples of judges who had stated that victims' rights would weaken the accused' right or that such rights could lead to personal or emotional vendettas that would not promote forgiveness and infringe on the prosecutor's discretion.

¹³ The only case currently pending at the International Crimes Division in Uganda.

more could have been done to preserve evidence. He suggested that the Evidence Act in Uganda needed to be reformed to reflect the new crimes that had been created over time (including international crimes).

Victim participation in Kenya

Lilian Ogwora, Principal Prosecution Counsel, Kenya

Ms. Ogwora started by presenting the work of the independent Office of the DPP (ODPP) which she represents. It was created according to the 2010 Constitution under which the DPP has the mandate to prosecute and also direct the Director of Investigations to investigate any crimes committed in Kenya. Additionally, the Director has the mandate to act as the prosecutor in all criminal matters on behalf of the state.

Ms. Ogwora gave an overview of the Kenyan system and explained that it was very rare for private prosecutions to take place in Kenya, as offences were generally understood as having been committed against the state. Unless there are valid reasons, it is also not at the discretion of the victim to drop his/her own case. Ms. Ogwora indicated that the ODPP has a national prosecution policy which contains an outline as to how prosecutions are dealt with as well as how different actors are considered. She mentioned that the DPP's office recently created divisions for victim protection¹⁴, international crimes (which has benefited from considerable training and can prosecute international crimes) and transnational crimes. Another division also deals with transnational crimes.

Ms. Ogwora explained that while the Constitution of Kenya contained a bill of rights including the right to human dignity, to access information and justice, and the right to a fair hearing, there were no victims' rights *per se* in the domestic criminal justice system. Victims can only be complainants or witnesses. However, she added that the provisions contained in the Constitution laid a good foundation on which to define what rights and freedoms victims should be granted in the proceedings and that various acts recognised specific victims' rights. For example, she explained that the Witness Protection Act had given life to the provision contained in the Constitution which recognises the right to protection. A protection agency and a witness protection fund have also been created. She added that the Victim Protection Act No. 17 of 2014 defines victims as 'any national person who suffers loss, injury or death as a consequence of an offence.'¹⁵ Under the Act, victims are classified in categories to which different rights are attached. Other Acts which recognise victims' rights include the Evidence Act¹⁶ and the Sexual Offences Act. The Kenyan International Crimes Act also provides for victim participation following the model of the ICC. But currently the above-mentioned provisions are applicable in all criminal matters.

Ms. Ogwora then discussed the establishment of an International Crimes Division to try international crimes in Kenya and described the limited role of victims before that Division. Victims can provide impact statements to help judges at the sentencing stage and be represented by a legal representative. However, the victim lawyer can only observe the trial,

¹⁴ The unit was three months old at the time of the conference.

¹⁵ It is the only act in Kenya which defines the term victim.

¹⁶ Which determines the role witnesses in court, and how they can testify.

and point out issues to the prosecutor. The prosecutor retains the right to decide whether or not to raise these issues at trial. Victims can also be heard as part of the process to decide whether to allow bail or bond for the accused person.¹⁷ Victims can participate in investigations by giving evidence and can also meet the parties and express themselves orally during pre-trial proceedings.¹⁸ They are also allowed to speak in relation to matters of capital importance and the prosecutor has to consult them in relation to plea bargaining.

She concluded by considering how victim participation could be improved in Kenya. First, she underlined the importance of collaboration with NGOs at the national level, explaining that NGOs were often friendlier to and more trusted by victims. Second, she suggested that a clearer set of criteria as to who is a victim entitled to restitution should also be considered. Restitution to communities as a whole should also be envisaged. She also recommended that criteria relating to the selection of a victim legal representative should be open and transparent and that victims should be involved in the selection process. Finally, she advocated for additional training for investigators, prosecutors and judicial officers as to the role victims can play in the proceedings and called for the creation of a reparation fund that would be linked to the proceedings.

Panel 2 Discussions

During the discussions, one participant stressed the importance of differentiating between victims and witnesses. Another participant highlighted that the law was never meant to be stagnant and that as a result, while it may be difficult, legal systems could evolve to recognise increased participatory rights to victims. He argued that the willingness of criminal justice actors was a key element in that regard. The need to ensure the full domestication of the Rome Statute, including its victims' provisions was also underlined with one participant suggesting that an initiative should start at the African level to better train professionals in international criminal justice proceedings.

¹⁷ Under the Bail and Bond Policy.

¹⁸ Ms. Ogwara stressed that victims often knew the facts of the case better than anyone else.

Panel 3: Practical examples of victim participation in international crimes cases in Africa



Example from the Democratic Republic of the Congo (DRC)

James Songa, Criminal Justice Program Officer at International Center for Transitional Justice (ICTJ), DRC

Mr. Songa opened his speech by explaining that he accompanies victims at both national and international level. He explained that at the ICC level, NGOs benefit from the status of intermediary which has allowed them to accompany victims in the cases against Thomas Lubanga, Katanga, Callixte Mbarushimana, Bosco Ntaganda, and others. At the national level, they do not benefit from this intermediary status which is not recognised by the state.

Mr. Songa went on to discuss the term 'victim' and explained that this was a problem at the national level which did not have a clear definition of the term. In comparison, at the international level, a clearer definition of what constitutes a 'victim' is provided. As a result, victims benefit from rights which are not recognised at the national level, such as participation and protection. However, he mentioned that in some instances, the gaps of the DRC's national legislation had been filled by using the Rome Statute directly in proceedings. For example, at the sentencing stage, the Rome Statute is applied directly. Therefore, for

international crimes the death sentence under national law is no longer imposed. With regards to protective measures granted to victims, the Rome Statute is also applied directly.

He deplored the fact that despite the role victims can play in unveiling the truth or in helping to carry out a sound administration of justice, he had experienced cases in which there was no victim participation at all. This was due to their fear of reprisals, ultimately leading the judges to acquit defendants. In other cases with no victim participation, the accused was still convicted of war crimes but with a very lenient sentence. In any case, at the national level, victims have no rights to participate in the proceedings during the investigations stage. They are considered as witnesses. They become civil parties when they apply and pay the fees. But in the majority of the cases of mass crimes, there are a large number of victims who are indigent. This situation is alleviated by certain organisations that provide support, such as MONUSCO, ASF, ABA, etc.

He then turned to victims' right to be informed, indicating that this right was recognised both at the national and at the international level. NGOs and MONUSCO¹⁹ are conducting outreach in this area. Victims also have the right to a fair trial. There is, however, an imbalance at the national level, as victim lawyers tend to be better trained than defence lawyer as a result of trainings they have benefitted from. Defence lawyers also do not benefit from the same funding.

Mr. Songa pointed out that victims also have the right to reparations. However, in the DRC, none of the victims he has worked with have received any reparations. This creates a lack of trust among victims towards the national justice system. He also explained that, in the DRC, the courts decide on the award of reparation only after the victim has decided to participate as a civil party. However, laws which set the amount of reparation civil parties are entitled to, are not respected. The state can be ordered to pay reparations *in solidum* with the perpetrators but in practice the state never pays. There is some hope now with the plans for the creation of a reparation fund for sexual violence victims though this will be somewhat discriminatory *vis-à-vis* the other victims.

Mr. Songa also stressed particular challenges victims face in accessing the courts. For example, the fees for civil party applications are usually not respected. Victims have to pay more as there is little national funding for military tribunals. Most victims are poor and marginalized but some organisations support them. In addition, there can be a large number of victims in one case. For example in the Minova case,²⁰ there were 1017 victims, but not all of them could be supported.²¹ It can also be a challenge to ensure that only qualifying victims participate.²² He also pointed out that there are also difficulties with the military court as there is no appeal allowed for victims and thus victims cannot contest the lack of reparation. Another challenge relates to insufficient evidence. Mr. Songa pointed out

¹⁹ MONUSCO (United Nations Organization Stabilization Mission in the DR Congo) is the peacekeeping mission in the DRC mandated by the UN Security Council, see <http://www.un.org/en/peacekeeping/missions/monusco/mandate.shtml>.

²⁰ In 2012, 72 women were raped in Minova by government soldiers who were prosecuted by a domestic military tribunal, see <http://www.bbc.co.uk/news/world-africa-27285268>.

²¹ Courts can however issue an exemption of notification (*dispense de consignation*).

²² For example, in the Minova case, there were some people pretending to be victims because they were expecting some benefits.

that the judiciary can often not access many areas because of the ongoing armed conflict. Sometimes investigations are initiated too late. There is also not enough capacity to investigate.

Mr. Songa then indicated often the Prosecutor proceeded without waiting for the conclusion of a full investigation but that in such cases, victims could still act as a motor in the proceedings. For example in the case of Kasungu, the public prosecutor was unable to meet all the victims due to practical impossibilities. However, the judge took into account the report of the NGO Avocats sans Frontières who had met the victims.

Mr. Songa concluded by stressing that often, victims' lack of understanding about their rights hinders their participation in the process. The risk of stigma and rejection from their communities also prevented some from engaging on the proceedings. Fear from reprisal was another barrier, particularly in light of the fact that the state of the prisons made it easy for criminals to escape.

Example from Mali

Moctar Mariko, President of Association malienne des droits de l'Homme (AMDH) and member of the pool of lawyers representing victims of the Malian crisis, Mali

Mr. Mariko started his presentation by introducing AMDH which is one of the first human rights associations created in 1988 in Mali.

Mr. Mariko went on to explain that in 2012, Mali was the victim of grave violations of human rights as a result of the presence of various terrorist and rebel groups creating threats to national security. Following this, many summary executions took place, many of which were documented by AMDH. However, in June 2013, in the wake of the peace negotiations many of the suspects were released. AMDH thus took action and started proceedings to ensure that justice would be achieved.

Mr. Moctar explained that the public prosecutor issued arrest warrants. However, the infractions set out in the warrants did not take into account human rights violations. Therefore, AMDH and FIDH seized the investigating judge directly with complaints joined with requests to be recognised as civil party by almost 120 victims. This is possible under Malian law in cases when the prosecutor refuses to investigate. In such cases, the judge has to hear victims who are therefore at the centre of the proceedings and, based on these statements, the judge issued (more comprehensive) arrest warrants.

He stressed however, that accompanying the victims was not an easy process as most victims were without resources. Nevertheless, AMDH, which has offices in all regions of Mali, conducted outreach to approach the victims who had agreed to be represented by them. Another obstacle related to the high fees requested by the investigating judge.²³

Mr. Moctar explained that, unlike in other countries, victim participation was not a problem in Mali, and victims assisted by AMDH and FIDH are assisted by a legal representative who

²³ AMDH threatened to go to the press and, finally, the judge agreed to decrease the fee.

accompanies them throughout the process. He then described some of the cases AMDH and FIDH have brought so far. For example, AMDH and FIDH filed a complaint relating to war crimes and crimes against humanity on behalf of 33 victims in a case against, amongst others, the leader of the Ansar Dine terrorist group. AMDH and FIDH have also filed a complaint against a group who used to order persons to be flagellated or mutilated. The organisations are also currently accompanying victims in a case against a group responsible for the amputation of victims.

He then highlighted some of the challenges AMDH was facing. He explained that AMDH, FIDH and four other organisations have supported 80 victims of sexual violence some of whom still lived in the same villages as the alleged perpetrators of the violence; some of these perpetrators have been arrested but later freed. Protection is thus a central issue and the organisations had had to find ways to bring victims discreetly to Bamako to avoid any suspicion. Strategies were also implemented in coordination with the human rights division of MINUSMA²⁴ to bring victims to the capital discreetly so they could be interviewed by the investigating judge. .

Finally, Mr. Moctar highlighted some concerns. First, he referred to the creation of an anti-terrorist unit. He explained that the Mali Government intended to transfer to this unit some cases filed before the tribunal covering the third district of Bamako²⁵, despite the fact that human rights violations did not fall under the remit of anti-terrorist laws. He also added that the move from the government to transfer back the jurisdiction of such cases to the judicial system in the North of the country was also problematic considering the fact that courts in the North were not functioning in a satisfying way and that the prevailing insecurity in the area could affect both victims and judicial staff. In his view, the creation of specialised chamber for international crimes would be beneficial and ensure judges adequately understand the key elements relating to prosecuting grave violations of human rights as international crimes. This would also give more prominence to some the crimes that were committed, in particular sexual crimes.

Panel 3 Discussions:

In the discussion, Mr. Songa clarified that the DRC has not adopted any legislation to domesticate the Rome Statute so far (legislation has since been adopted in November 2015). But as the DRC is a monist system, international law trumps domestic law. Therefore, Congolese judges are already applying the Rome Statute. For example, there are no protection measures for witnesses and victims in internal DRC legislation but nevertheless, the ICC rules are already applied.

Mr. Songa also added that those victims he has been in contact with prefer individual reparation as opposed to collective reparation, especially when they are poor. Collective reparation does not meet directly their needs.

²⁴ MINUSMA (United Nations Multidimensional Integrated Stabilization Mission in Mali) is the peacekeeping mission in the DRC mandated by the UN Security Council, see <http://www.un.org/en/peacekeeping/missions/minusma/>.

²⁵ This is the 'Tribunal de Grande Instance' of the 'Commune III de Bamako'.

Panel 4: Strategies to improve victim participation in Africa



Reflections from Uganda

Sarah Kasande Kihika, Program Associate at ICTJ, Uganda

Ms. Kihika opened her presentation by defining the concept of ‘victim’ according to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, adding that this is the most inclusive definition. She recalled that the concept of victim is fairly new in Uganda: victims are usually referred to as “complainants” because crime is understood as being committed against the state. However, with the increasing awareness that victims must have a central role in the proceedings, Uganda has developed sentencing guidelines which contain a definition of who a victim is at the national level. Another more elaborate definition of who constitutes a victim under national law can be found in the draft national transitional justice policy developed by the Justice Law and Order Sector, which provides for a broad range of mechanisms to respond to violations that occurred during the different conflicts in Uganda.

She added that some substantive rights have been recognized in Article 50 of the Ugandan Constitution, such as the right to an effective remedy and the right to reparation, which the

UN Guidelines define broadly. She also referred to victims' right to truth, which had gained prominence internationally, as well as the corresponding duty to inform the victims of the circumstances under which the violations occurred. She mentioned that while Article 127 of the Ugandan Constitution recognises the right of victims to participate in the administration of justice, parliament had not enacted the necessary law yet.

Ms. Kihika pointed out that transitional justice had an active role to play in bringing victims to the centre of judicial and non-judicial accountability mechanisms, adding that without victims, the proceedings would not be effective and would lack legitimacy.

She then underlined some of the reason why victim participation was important. First the legitimacy of the criminal justice process is intrinsically linked to the participation of victims. Second, victim participation can have a restorative effect as it provides acknowledgment for the harm suffered, promotes healing and provides empowerment and closure for victims who are able to participate and share their experiences on how the crimes have violated their rights. Most importantly, it also offers a personal dimension to a judicial process, which is often considered detached and abstract. This brings justice closer to victims and brings them empowerment.

Turning to specific participatory rights, Ms. Kihika called for victims to be informed and consulted by prosecutors if their personal interests are affected. She added that victims should also have the right to make submissions during the main proceedings when their personal interests are at stake and not just at the sentencing stage. Victims should also have access to reparations on conviction of the accused. She explained that in Uganda, victims do not benefit from such rights; they are invisible to the justice system, except in so far as they may serve the interests of the prosecutor. The right to compensation in criminal proceedings is purely discretionary.

Ms. Kihika then discussed the creation of the Ugandan International Crimes Division (ICD) and the opportunities for victim participation within international crimes proceedings in Uganda.²⁶ The Practice Directions establishing the ICD stated that the court shall apply ordinary criminal procedure laws, however, it was also acknowledged that given the specialised jurisdiction of the ICD, there could be gaps in the applicable legislation. This was indeed the case, for example in relation to the protection of witnesses. Ms. Kihika indicated that the ICD had been developing its Rules of Procedure and Evidence with a view of filling some of these gaps, providing an opportunity to reinforce victims' rights. She pointed out that the draft Rules of Procedure and Evidence of the ICD called for the division to take into account the best interests, rights and needs of witnesses. This general provision offers room for the judges to exercise their discretion, whilst at the same time taking into account victim's interests and the rights of the accused. The Draft Rules further provide for a broad range of protective measures that the court may order, during the pre-trial phase and later on. These include logistical support, accommodation and other measures, which guarantee the safety and dignity of the person. The draft rules also include that a victim or his counsel may apply for protective measures. The draft rules also provide that victims may have an independent

²⁶ The ICD was established in 2011 and originates from the Juba peace talks during which the government undertook to establish a special mechanism to prosecute perpetrators of war crimes. It is a division of the High Court and has the jurisdiction to try international crimes, war crimes, crimes against humanity, genocide, and other transnational crimes.

representative who can act on his/her behalf. Ms. Kihika added that the draft rules on sentencing provide specifically for the participation of victims at the sentencing phase in accordance with the Sentencing guidelines. This includes the provision of impact statements on how the crime has affected victims psychologically, physically and economically.

Ms. Kihika then moved onto what could be done to further victim participation in criminal proceedings. She called for a review of the legislative regime, adding that it was too restrictive. In particular, she called for legislation to clearly define who a victim is, to set out eligibility criteria and to state their procedural rights, including the provision of legal representation for victims. The right to reparation should also be recognised through legislation in her view and equality of arms should be reinforced. Ms. Kihika also called for adequate witness protection measures, including in relation to gender-based violence victims, noting that Uganda is drafting a Witness Protection Act which had not been presented to the cabinet yet. Additional measures necessary to reinforce the role of victims in the proceeding included the need for legal aid, access to legal counsel, legal advice and translation services. Ms. Kihika was also of the view that the powers of the prosecutor to take over private prosecutions should be restricted and closed her presentation by emphasising the importance of logistic support and outreach.

Reflections on the Extraordinary African Chambers in Senegal

Carla Ferstman, Director of REDRESS, UK

Ms. Ferstman began her presentation by stating that the role of victims and civil society groups in Chad had been on-going for decades, and recalled that victim participation does not only happen in the courtroom.

Ms. Ferstman explained that the proceedings relating to Chad began in Belgium where Chadian victims filed a complaint under Belgium legislation encouraging the Belgium state to initiate an investigation. As a result, Belgium started an investigation. When Belgium laws changed, Belgium decided to retain jurisdiction in relation to that particular case in light of its investment in the case. It then filed an extradition request to Senegal in relation to the alleged perpetrator. There was also a lot of pressure on Senegal for it not to comply with the request. The wish to have the case heard in Africa was also an issue.

Ms. Ferstman explained that, concerned at the lack of progress in the case, victims then brought a complaint to the UN Committee Against Torture arguing that Senegal was in breach of its obligations to investigate or extradite alleged perpetrators of torture. Belgium also filed a complaint against Senegal before the International Court of Justice though victims played little role there as this court only deals with state to state disputes. The International Court of Justice determined that Senegal had violated the Convention Against Torture and was obligated to either prosecute or extradite.

Following the ruling, it became clear that while Senegal was able to assert jurisdiction, it wanted the political backing of the rest of the continent to do so; a view mirrored by other

States in Africa and the African Union as a whole. As a result the Extraordinary African Chambers were established.

Ms. Ferstman then turned to the role victims in Chad played in setting up the Chambers. She indicated that victims in Chad became a key lobby actor in designing the structure of the proceedings that were to take place before the new court. As the trial of Hissène Habré started (earlier this year), victims felt proud of what they had achieved. Senegal too now sees itself as a leader of international justice. Ms. Ferstman added that the Chambers had a large outreach function and that a lot had been done in order to inform the victims.

However, Ms. Ferstman noted that reparation was still an issue. She explained that it is not the place of the Senegalese government to provide reparations in this case – the crimes were committed in Chad, by a Chadian and the victims are also in Chad. She stressed that the Senegalese government understood its role as one of establishing a regulatory framework that will set up a trust fund for victims but did not envisage to be necessarily providing the funds. Not much progress has been made in relation to setting up the fund though.

Ms. Ferstman concluded by describing the system of victim participation in the tribunal, which follows the domestic criminal law system in Senegal. She added that civil society groups were well organised and that a system of common legal representation had been set up. However with the trial only just started, it is too early to say the extent to which the practical implementation of victim participation has taken place in that case.

Panel 4 Discussions:

During the discussions, Ms. Kihika added that issues of victim participation were prominent in the transitional justice framework currently proposed in Uganda and was one of its key features. She explained however that political will was lacking for the adoption of the framework and that the Ministry of Interior had not committed to it, in contrast with the Ministry of Justice which originally spearheaded the process. She expressed her hope that discussions on this issue would resume after the 2016 elections. It is also envisaged that upon adoption of the transitional justice policy and enactment of the implementing legislation, a Transitional Justice Commission will be established. Such a body, in her view, could play a coordinating role, for example, between proceedings at the ICD and alternative justice approaches, provided for in the draft policy.

Ms. Ferstman also noted that a lesson learnt from the Senegal case was the fact that countries with a strong sense of the rule of law were more likely to succeed in establishing bodies such as the Extraordinary African Chambers. She indicated that Senegal was perhaps embarrassed to have been hosting a refugee of justice, which played in favour of its engagement to set up the Chambers. This however is not the case for every country. Another point she noted was the fact that Belgium played an enabling role in pushing for the case to proceed. The fact that the African Union was also engaged in discussions around issues of universal jurisdiction and in asserting a stronger role for the continent also facilitated this outcome with an impetus to show that African countries were capable of

dealing with such scenarios. Finally, she stressed the important role played by the fact that victims were well connected between themselves, and had a shared wish to seek justice.

Ms. Ferstman also pointed to the impetus the ICC could give in such instances, explaining that the ICC can motivate states to deal with cases on the national level by instigating preliminary examinations. She expressed her conviction that the best place for justice was at the domestic level and her hope that ultimately all states would create mechanisms at the national level to bring justice for such international crimes.



Panel 5: Victim participation in African regional mechanisms and complementary national mechanisms

The African regional framework

Allan Ngari, Researcher at ISS, South Africa

Mr. Ngari gave an overview of the African normative framework on victims' rights. He prefaced his presentation by stating that the African Union (AU) has mastered the art of setting up legal frameworks and adopted a large number of instruments with respect to international criminal justice. However, there is no mention of victim participation despite the provision by the AU of participatory rights for victims. He continued by briefly explaining the normative and institutional framework of the AU and in particular the provisions contained in Article 4 (h) of the Constitutive Act which authorises the AU to intervene in any member state in respect of international crimes. Mr. Ngari also referred to the African Charter on Human and Peoples' rights (African Charter) which provides for rather progressive rights. For example, Article 5, 6, 7, and 26 of the African Charter contains provisions on the right to a fair trial. The right to an effective remedy is also reflected, which must include access to justice, reparation for the harm suffered and access to the factual information concerning the violation. Mr. Ngari stressed that access to justice should mean more than redress for victims and also involve a process in which victims must have a say.

Mr. Ngari then turned to the mechanisms created under the African Charter and in particular the Protocol on the Statute of the African Court on Justice and Human Rights, which expands the jurisdiction of the yet to be established African Court, to international crimes. Mr. Ngari explains that the Malabo Protocol established the court with three jurisdictions: The human and peoples' jurisdiction, the general affairs jurisdiction, and the new international criminal jurisdiction. Fourteen crimes can be considered though the court's criminal jurisdiction which would only be activated when states are unable or unwilling to exercise jurisdiction over the crimes. He added that there were only few signatories to the Protocol which needed 15 signatures to enter into force. Mr. Ngari deplored the fact that there is no mention of victims in the Protocol though noted that other instruments, such as the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance adopted in 2001 did provide a definition of what a victim is, in a comprehensive and broad way, and include relatives of victims.

Mr. Ngari also described other frameworks with an impact on victims' rights including a planned African Transitional Justice Framework which is aimed at nurturing sustainable peace and development and preventing impunity. He explained that the framework is meant to help the promotion of social justice, human and peoples' rights and governance; and that it is articulated in a way so as to constitute a reference for peace agreements and transitional justice institutions across the continent. Whilst this policy has yet to be adopted, Mr. Ngari voiced his hope that African states will address the concerns of victims through transitional justice institutions in the future.

Mr. Ngari reflected that while a number of norms had been adopted, it was time for African states to move from norm making to implementation. He stressed that the AU and member states had not done enough to implement the treaties and norms they had adopted with regards to international criminal proceedings. Nevertheless, he indicated that in order to address victims' right to participate in the proceedings the Malabo Protocol would need to be amended. He also recommended that there should be a greater degree of interaction between civil society and the African Union.

Framework of the Special Criminal Court of the Central African Republic (CAR)

Sylvain Makangu, Judicial Affairs Officer at MINUSCA, CAR

Mr. Makangu began by explaining that CAR has gone through a number of crises characterised by human rights violations and impunity. In order to end the cycles of violence, a memorandum of understanding has been signed in which the CAR Government committed to the creation of a special court that would achieve justice for the crimes committed during these crises. In June 2015, the Special Criminal Court was created. Contrary to the Special Court for Sierra Leone, the CAR Special Criminal Court is a national jurisdiction created by domestic law and it uses CAR law. However, it is nonetheless a hybrid court: international judges will work alongside national ones and in case of uncertainty or ambiguity or when the matter is not dealt with by the national law, international law may also be applied.

Mr. Makangu then explained that in addition to the special court, participants in the forum of Bangui²⁷ also recommended the creation of the Central African Commission for Justice, Truth, Reconciliation and Reparation. This Commission will have the mandate to investigate crimes committed in CAR as well as to divide those crimes into two categories. The first will consist of crimes for which the accused persons will face prosecution, in light of the gravity of the offence. The second will concern all other crimes, for which the Commission may simply recommend that reparation be made. The Commission is not yet established and Mr. Makangu noted that while it would have to cooperate with the CAR Special Criminal Court, their missions were different: one focusing on judging accused persons, the other on peace and reconciliation.

With regards to victims' rights in the proceedings of the Special Criminal Court, Mr. Makangu noted that there was not much clarity as the Rules of Procedure and Evidence of the Special Court had not yet been enacted. However, under CAR law, claims for reparations can normally be treated simultaneously with the criminal proceedings and victims have the right to participate in the criminal procedure. He described the role that is currently envisaged for victims stressing that they do not have a particular status at the investigation stage though they will benefit from certain rights at the pre-trial phase, including the right to request to join proceedings as civil parties. Mr. Makangu underlined the fact that contrary to the domestic procedure, there are no fees for victims to become a civil party at the CAR Special Criminal Court. Victims can also request to participate in proceedings during the court hearing whenever their interests are at stake. The civil party or the victim has the right to be assisted by legal counsel and can also invoke the nullity of the proceedings when there is any

²⁷ Which was organized in order to reach peace and reconciliation.

obstruction or refusal to exercise this right. Finally, once the investigating judge terminates the investigative stage, the victim has the right to submit a memorandum or simple observations regarding his/her personal concerns. The victim can also appeal orders of the investigating judge including for example when the charges against the accused are not taken forward. Other rights will include the possibility to benefit from closed hearings,²⁸ the ability to challenge the choice of witnesses and to appeal the Court's decision to the Court of Appeal. Finally, the victim has the power to enforce the execution of a judgment in his/her favour as far as it concerns the civil interest, but not in relation to the conviction.

Mr. Makangu then highlighted some of the challenges that the special court is likely to face in relation to safeguarding victims' rights. For example, while the law recognises that victims should benefit from free legal assistance, it will not be likely for victims to find a legal representative willing to represent them for the modest amount of funding provided for by the government. In addition, there is no reparation fund envisioned at present. Therefore, victims may find themselves in a situation in which they must resort to the general law to obtain reparation. This creates additional issues as the current domestic legal framework does not for example allow for collective civil party claims.

Mr. Makangu then went back to the future interaction between the Special Criminal Court and the yet to be created Commission for Justice, Truth, Reconciliation and Reparation. Noting that the Commission's mandate was not yet fixed, he stressed that the Court should nevertheless be seen as part of the transitional justice system that the Commission will set up and that both institutions should seek to complement each other. For example, he noted that it would not be appropriate for the Commission to grant amnesty to accused persons subject to the jurisdiction of the court. Another field where coordination will be advisable is reparation as should a reparation fund be created, both institutions are likely to rely on it. Finally, he expressed his view that victims participating before the Court should still be able to interact with the Commission. Referring to examples of similar frameworks in East Timor and Sierra Leone he stressed that the coexistence of these two institutions will likely be complex and necessitate clear rules and protocols so that they can complement each other.

²⁸ In CAR, the criminal proceedings do not provide for the protection of victims. However, provisions in that regard can be made through the Special Criminal Court's own rules and regulations.

Annex A: Agenda of the conference

EXPERT CONFERENCE ON PARTICIPATION OF VICTIMS OF INTERNATIONAL CRIMES IN NATIONAL CRIMINAL JUSTICE SYSTEMS

Pretoria, South Africa, 8 – 9 September 2015,

Organized by the ISS and REDRESS

DAY 1

8:30 – 9:00 **Arrival and Registration of participants**

9:00 – 9:30 **Welcome and Introduction**

Speakers:

Ms Cheryl Frank, Head, Transnational Threats and International Crime
Division, ISS

Ms Carla Ferstman, Director, REDRESS

9:30 – 10:30 **Presentation of research report “Victims’ Rights in Criminal Justice”**

Speaker:

Ms Carla Ferstman, Director, REDRESS

10:30 – 11:00 **Group Photo and Tea/Coffee break**

11:00 – 13:00 **Panel 1: Strategies of dealing with mass victim participation**

Chair:

Ms Uyo Salifu, Researcher Transnational Threats and International Crime
Division, ISS

Speakers:

Ms Marjorie Jobson, National Director, Khulumani Support Group, South
Africa, on role of victim associations and NGOs

Ms Beini Ye, Legal Adviser, REDRESS, on common legal representation of
victims

Ms Aimee Ongeso, Project Coordinator, Kituo Cha Sheria, on admission
process for mass applications

13:00 – 14:00 **Lunch break**

14:00 – 16:00 **Panel 2: Victim participation in common law countries**

Chair:

Ms. Jemima Njeri Kariri, Senior Researcher, Transnational Threats and
International Crime Division, ISS

Speakers:

Mr Thomas Jatiko, Principal State Attorney, Uganda
Ms Lilian Ogwora, Principal Prosecution Counsel, Kenya
Adv. JJ Du Toit Prosecutor, South Africa

16:00 **Announcements and Closure of day 1 and Tea/Coffee**

DAY 2

8:30 – 9:00 **Arrival**

9:00 – 10:30 **Panel 3: Practical examples of victim participation in international crimes cases in Africa**

Chair:

Mr Allan Ngari, Researcher Transnational Threats and International Crime Division, ISS

Speakers:

Mr James Songa, Criminal Justice Program Officer ICTJ, DRC
Mr Moctar Mariko, President, Association malienne des droits de l'Homme, Mali

10:30 – 11:00 **Tea/Coffee break**

11:00 – 12:30 **Panel 4: Strategies to improve victim participation in Africa**

Speakers:

Ms Carla Ferstman, Director, REDRESS
Ms Sarah Kasande Kihika, Program Associate, ICTJ Uganda

12:30 – 14:00 **Lunch break**

14:00 – 15:00 **Panel 5: Victim participation in African regional mechanisms and complementary national mechanisms**

Chair:

Ms Beini Ye, Legal Adviser, REDRESS

Speakers:

Mr Allan Ngari, Researcher, ISS
Mr Sylvain Makangu, Judicial Affairs Officer, MINUSCA

15:00 – 15:30 **Closing and Vote of Thanks**
Ms Carla Ferstman and Mr Allan Ngari

Annex B: Key recommendations of *Victim Participation in Criminal Law Proceedings*

1. UNDERSTANDING OF “VICTIM”

- 1.1. Any individual who suffered harm (including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights) as a result of a crime under international law should be considered a “victim” with certain rights, although the extent of rights may depend on their proximity to the crime.
- 1.2. Where a victim has died as a result of the crime, the rights that would have been accorded to them pass to their immediate family members or successor.
- 1.3. Access to an effective judicial remedy requires effective legal representation, including where there are a large number of victims.
- 1.4. Territorial limitations should not apply to who is considered a “victim” with rights in criminal proceedings. Given that victims of international crimes are often forced to flee the jurisdiction or flee to other parts of a country, special measures should be taken to ensure that such victims are not unduly disadvantaged in their access to information, their ability to receive assistance and to participate actively in proceedings.

General Strategies: Domestic Criminal Justice System

- 1.5. States should undertake a mapping of rights and assistance available to victims in the domestic criminal justice system, and the definitions (if any) of different statuses accorded those rights.
- 1.6. Where necessary, States should introduce specific amendments to their law to allow for victims of international crimes to participate in criminal proceedings, to claim reparation, and to obtain information and support. In this regard:
 - a. Legislation should define the category of victims who are entitled to participatory and information rights in criminal proceedings: this should at least include those who were directly targeted by the crime and the family members or successor of a direct victim who is deceased. The definition should not be subject to territorial limitations in respect of the victim.
 - b. Legislation should define who is *prima facie* entitled to act as the family member or successor of a direct victim who is deceased, and how any disputes in this regard are to be determined. In this, domestic criminal or civil procedure will usually provide ready-made standards.
 - c. Legislation should determine the category of victims who are entitled to seek reparation for international crimes: this should include any person who has suffered harm as a result of an international crime, and should not be subject to territorial limitations. The definition should specifically include witnesses, those intervening to prevent or respond to the crime, and immediate family members of the direct victim, who suffered harm

as a result of the criminal act.

The precise line between harm that is “as a result of” a criminal act, and harm that is seen to be too remote from it may be a matter of domestic jurisprudence and interpretation. However, in that interpretation it is important to take into account the specific nature of the international crimes alleged, and it may be helpful for domestic bodies to consider the jurisprudence of the International Criminal Court in this regard.

- d. States should consider on the basis of their own law and the nature of the crimes committed, whether legal persons, including companies, are included in the definition of victim.
- 1.7. States should provide specific support to immediate family members and dependents of victims of crime under international law, who suffer harm as a result of the crime, and define in legislation who falls into this category. This may include the right to counselling and explicit reference to the right to claim for emotional injury caused as a result of hearing about or witnessing the crime.
- 1.8. States should consider introducing provisions to allow associations to represent collective interests under criminal procedure law, including to initiate and participate in criminal proceedings, where their objects are directly related to the crime alleged. While organisations filling such a role may be required to meet certain criteria these should not be so restrictive so as to present a barrier to participation. Victims should retain the right to participate in their own capacity.

General Strategies: Specialised Chambers or Tribunals

- 1.9. The Rules of a Specialised Chamber or Tribunal should incorporate at least the definitions set out in 1.6, above and define rights afforded to each category of victim.
- 1.10. The Chamber or Tribunal may consider introducing different modes of victim status in the proceeding, with different participatory rights and different registration requirements attached.
- 1.11. Consideration should be given to whether institutions and organisations who suffer direct harm as a result of crimes within the jurisdiction of the Court or Tribunal will be given “victim” status.
- 1.12. Evidentiary standards for proving victim status in proceedings concerning international crimes should take into account the particular challenges victims may face in providing such proof, and pragmatic solutions should be adopted.
- 1.13. The State should provide specific support to immediate family members and dependents of victims of crimes under the jurisdiction of the Specialised Chamber or Tribunal.
- 1.14. The State may consider how to develop partnerships with donors and UN agencies to provide support and assistance to victims and family members.
- 1.15. The Rules should address the potential for victims to be represented by common legal representatives, and should ensure that in the selection of such representatives victims are given the opportunity to provide input, the distinct

interests of the victims are represented, and that any conflict of interest is avoided. In addition transparent systems of oversight should be in place to assess the conduct of common legal representatives. Consideration should also be given to retaining a role for previously engaged victims' lawyers as a link between groups of victims and common legal representatives.

2. INITIATION OF PROCEEDINGS

- 2.1. Victims of international crimes must have equal access to an effective judicial remedy. Complaints procedures should therefore be accessible to them, regardless of economic status, gender, geographic location, language, or other factors.
- 2.2. Victims of international crimes have the right to an effective judicial remedy, which includes a prompt, effective and impartial investigation into their complaint. They must therefore have a way to ensure that decisions not to investigate their complaint are reviewed.

General strategies

- 2.3. States should establish specialised investigation and prosecution units for international crimes, which should adopt prosecutorial strategies appropriate to the domestic context and the State's international legal obligations.
- 2.4. Where international crimes have been committed on a wide scale within a state's jurisdiction:
 - a. States should establish a special unit responsible for providing information and assistance to victims of international crimes;
 - b. a comprehensive mapping of crimes and victim groups should be carried out before determining a prosecutorial strategy;
 - c. outreach to victims' groups should be conducted at an early stage to ensure they are aware of mechanisms of justice and are able to provide input into the prosecutorial strategy; and
 - d. once a prosecutorial strategy is determined, outreach should be conducted to victims' groups and the wider public to ensure that they are aware of the strategy and any objective criteria for prioritising cases.

Victims' active rights in the normal criminal justice system

- 2.5. Victims of international crimes should be able to complain to the police or other authorities in the normal way. Crimes involving mass victimisation should be investigated by specialised investigation teams, or such a team should be established.
- 2.6. States should consider introducing provisions to allow victims of international crimes to file a complaint before a wider range of public servants, who then have the duty to forward it to the competent authorities.
- 2.7. Victims should have the right to review of a decision not to investigate their complaint or an unreasonable delay in opening an investigation. This may be administrative review at first instance (by a higher officer or an independent statutory body), but should allow for further review to a judicial officer if the first

review upholds the original decision.

- 2.8. If there is no judicial oversight of decisions not to investigate it is essential that victims have the right to bring a private prosecution or to otherwise initiate a criminal proceeding directly before a judge.

Victims' active rights in a specialised chamber or tribunal

- 2.9. There should be procedures by which victims can complain of their alleged victimisation, and significant outreach should be undertaken to ensure that victims know of the procedure and are able to use it. Outreach to victims should be a required component of the proceedings from the outset until the final judgment and beyond.
- 2.10. Special chambers and tribunals should adopt a pragmatic approach to proof of victim status, appropriate to the context.
- 2.11. The rules should provide for oversight of decisions on the opening/closing of investigations, and allow for broad victim input into the process. The category of victims able to make representations should extend to all victims of crimes under the Chamber's jurisdiction.

3. PRE-TRIAL STAGE

- 3.1. Victims of international crimes have the right to a prompt, effective and impartial investigation, and the effectiveness of investigations can be enhanced by early engagement with victims.
- 3.2. Victims of international crimes have the right to the truth and the right to reparation, including measures of satisfaction such as, the effective investigation of the suspected perpetrator and, where sufficient evidence exists, prosecution and punishment of the persons responsible for the crimes committed against them. Victims therefore have a direct interest in decisions taken on whether or not an alleged perpetrator should be prosecuted, and on what charges, and have the right to seek review of such decisions.
- 3.3. Victims have the right to be protected from further victimisation . In some circumstances, the conditional release of the accused may put victims at risk, and may jeopardise the investigation and prosecution. Victims should therefore have the right to be heard in relation to such decisions.

General strategies

- 3.4. Police and prosecutors should carry out extensive outreach to engage with victims and wider communities, including, for example, town hall meetings, radio interviews, and distribution of information leaflets.
- 3.5. Police or prosecutors investigating international crimes should seek to engage with victims and victims' groups at the earliest stage of proceedings to ensure that information that victims can provide to the investigation is available to investigators, and to ensure that victims' views are taken into account in developing the investigative strategy.

- 3.6. Police or prosecutors investigating international crimes, including those committed on a large scale, should develop a strategy for communicating updates on steps taken in the investigation to victims of the crimes being investigated, and the wider public, to the extent that such communication will not endanger the investigation or prejudice the rights of the accused.

Victims' active rights in the normal criminal justice system

- 3.7. States should review their general criminal procedure law to ensure that victims can participate in pre-trial proceedings in some manner that allows them to:
- a. Provide written or oral representations to the court in relation to any hearing on pre-trial detention of the accused;
 - b. Request review of decisions not to prosecute following an investigation into a complaint they have made or proceedings they have joined as a party (where applicable). This may be administrative review at first instance, but given the gravity of the crimes alleged and the potential for entrenched impunity, should be subject to judicial appeal.
- 3.8. Regardless of the legal tradition, states should consider introducing a procedure for automatic judicial review of indictments issued in relation to international crimes, prior to proceeding to trial, with provision for victims and the defence to make observations on the scope of the indictment prior to its confirmation.
- 3.9. States should ensure that legislation prohibits cases of alleged international crimes from being diverted to restorative justice processes under general domestic criminal law.

Victims' active rights in a specialised chamber or tribunal

- 3.10. The Rules of Procedure of the Chamber should provide victims who have contacted the Chamber concerning a particular investigation the right to:
- a. Provide representations to any hearing on pre-trial detention of the accused;
 - b. Provide representations on any pre-trial hearings concerning jurisdiction or admissibility.
- 3.11. The Rules of Procedure of the Chamber should provide victims who have contacted the Chamber in respect of an investigation with the right to appeal any prosecutorial decision to close that investigation without a prosecution.
- 3.12. The Rules of Procedure of the Chamber should make any indictment subject to confirmation by a Pre-Trial Chamber, and provide victims who have contacted the Chamber in respect of an investigation with the right to make representations as to the scope of the indictment.

4. TRIAL STAGE

- 4.1. Victims of international crimes have a direct interest in the conduct of the trial proceedings and such proceedings should allow the opportunity for their views and concerns to be taken into account.

General strategies

- 4.2. Steps should be taken to ensure that victims have physical access to the trial proceedings, including by the use of “mobile courts” where appropriate.

Victims’ active rights in international crimes cases

- 4.3. States should provide victims of international crimes with at least the same rights to participate in trial proceedings as those applicable to victims of other serious crimes in their jurisdiction (although this may be subject to provisions on common legal representation).
- 4.4. States should always provide victims with the right to make observations, for example in the form of victim impact statements, in relation to sentencing.
- 4.5. Where the state’s domestic criminal law does not allow victims to take part in the trial stage as a party to the proceedings, legislators should consider introducing (i) provisions specific to international crimes which give the trial court the possibility to “permit victims’ views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court, in such a way that is not prejudicial to the rights of the accused and a fair and impartial trial”, or (ii) other specific provisions for victim participation in trials of international crimes such as the ability to provide opening or closing statements, to request the introduction of new evidence, and to question witnesses.
- a.
- 4.6. When developing the Rules of Procedure for a specialised tribunal or chamber, consideration should be given to introducing more specific and detailed rights for victims to participate in the proceedings, including:
- a. Making opening and/or closing statements;
 - b. Requesting the introduction of particular evidence;
 - c. Questioning witnesses;
 - d. Raising objections;
 - e. Making other written or oral submissions on points of fact and/or law.

Such rights may be subject to specific provisions on common legal representation.

5. POST-TRIAL STAGE

- 5.1. Victims’ have a direct interest in the conduct of appeal proceedings. Such proceedings should allow the opportunity for their views and concerns to be taken into account.

- 5.2. States' obligation to prosecute and punish perpetrators of international crimes requires that sentences are enforced.
- 5.3. Victims' right to an effective remedy and reparation requires that sentences and reparation orders are enforced.

General strategies

- 5.4. Prosecutors should ensure that victims are provided with information as to existing rights they have to file any appeal, and information as to any appeals filed by the convicted person or prosecution.

Victims' active rights in criminal proceedings

- 5.5. Victims should be afforded the opportunity to present their views and concerns in any appeal proceedings initiated by the convicted person or prosecution.
- 5.6. States should provide victims of international crimes with the at least the same rights to appeal and to participate in appeal proceedings as those applicable to victims of other serious crimes in their jurisdiction.
- 5.7. States should ensure that reparation awards are automatically enforced, without the victim being required to undertake a separate procedure or pay additional fees.
- 5.8. States should ensure that there is a procedural mechanism by which victims can seize the court or tribunal directly on issues of non-enforcement of a reparation award.