

# Taking Stock of the Impact of the Rome Statute and the International Criminal Court on Victims and Affected Communities

David Tolbert

## 1. Introduction

The coming into force of the Rome Statute and International Criminal Court (ICC) has established the rights of victims as key participants and rights-holders in international criminal proceedings. These developments have generated significant demands for justice, both in countries where the ICC is investigating and in countries where it is not. This thirst for justice indicates, in part, the acceptance of the regime of the Rome Statute among victims in different parts of the world.

Victims are now direct participants in the proceedings, particularly at the trial stage, which should be viewed as a considerable advance from the practices of other international criminal tribunals. This normative framework on participation and reparations is a point of departure from which the rights of victims should be strengthened in domestic systems. The Rome Statute provides a unique opportunity to establish these rights in different legal systems around the world.

High expectations, as well as certain perceptions of the Court's actions that have emerged in different places, need to be addressed through strategic outreach. In some situations the quest for accountability generated by the Rome Statute should be complemented by other justice measures; in others, stakeholders should realistically assess whether they pursue other options. Ultimately, the success of the Court will hinge on whether it is perceived as an effective option in terms of delivering justice for the victims of the world's worst crimes.

## 2. The Challenge of Expectations

Since its establishment, expectations of the Court among victim populations have been high, particularly in situation countries. In Kenya, several public opinion polls undertaken illustrate overwhelming public support for the ICC. An annual survey that Infotrack Research carried out in November 2009 concluded that 62 percent of Kenyans would like those who committed crimes in the post-election violence to be tried at the ICC.<sup>1</sup> Likewise, the relatively high level of communications to the Court from Colombian victims and civil society may suggest that the ICC is imagined as a savior; few understand the highly specific nature of its jurisdiction and practice. These are issues that need to be managed through more targeted outreach by the ICC.<sup>2</sup> However, some of these expectations may be unrealistic, and the success of the ICC should be judged on delivering justice itself rather than on being able to deter further crimes.<sup>3</sup>

On a much larger scale, the coming into force of the Rome Statute has inspired demands for justice even in countries that are not yet State Parties. In Israel and the Occupied Palestinian Territory, for example, the ICC has been under discussion since the Statute came into force. This has contributed to widespread discussions on the substance of Rome Statute crimes and whether creative ways can be found to access the Court's jurisdiction. This is particularly true in the aftermath of Operation Cast Lead in Gaza in December 2008–January 2009, which led to the formation of the United Nations

---

<sup>1</sup> See also the section on Kenya in the OTP Weekly Briefing, Jan. 12-18, 2010, Issue 20 ([www.icc-cpi.int/NR/rdonlyres/BEDF7DF7-76FD-4116-8D08-A92E2454CC9A/281459/OTPWBJanuary\\_Issue20.pdf](http://www.icc-cpi.int/NR/rdonlyres/BEDF7DF7-76FD-4116-8D08-A92E2454CC9A/281459/OTPWBJanuary_Issue20.pdf)) and *Situation Analysis of Post-election Violence Areas*, South Consulting, May 2009, 19, 26-28.

<sup>2</sup> Reed-Hurtado, Michael, and Amanda Lyons, "Colombia: Impact of the Rome Statute and the International Criminal Court," ICTJ, May 2010.

<sup>3</sup> Mue, Njonjo, and Christine Alai, "Kenya: Impact of the Rome Statute and the International Criminal Court," ICTJ, May 2010. See also "Stocktaking: Peace and Justice," ICTJ, May 2010.

(UN) Fact Finding Mission on the Gaza Conflict and to the referral of the situation by the Palestinian Authority to the ICC Office of the Prosecutor (OTP). These developments have also had impact on both the Israeli and Palestinian authorities reporting on steps taken at the national level to implement justice measures.

In addition, the existence of the ICC has allowed Burmese activists and other supporters of human rights to raise the prospect for accountability for Rome Statute crimes particularly in eastern Burma. The prospect of a Security Council referral has been mentioned periodically also, for instance in the context of dialogue with the ILO for putting into place a complaints mechanism for forced labor, which was established.<sup>4</sup> Also, the March 2010 report by the special rapporteur on the situation of human rights in Myanmar called for the UN to consider a commission of inquiry for crimes against humanity and war crimes. These experiences demonstrate that demands for accountability, reinforced by the Rome Statute, can sometimes productively be channeled to other forms of accountability if the ICC lacks jurisdiction.

### **3. Victim Participation**

The Rome Statute does not view victims merely as vehicles for evidence but as vital participants in ICC trials and the ultimate beneficiaries of the process. In the field of transitional justice, the importance and the benefit of victim participation in different processes such as truth commissions, reparations programs, or constructing memorials is widely recognized. In the case of the ICC, there is broad consensus that victims have a right to participate in proceedings according to the statute and rules, and that this should in no way be constrained by resource-related, practical considerations. However, within that consensus the contours of this participation have proved somewhat controversial. Recent clarity has been provided both with the publication of the Court's strategy on victims in November 2009 and the Office of the Prosecutor's (OTP) strategy on victims published in April 2010.

Particularly controversial has been whether victims should have the right to participate during the investigative phase of the trial. In civil law systems, victims often have a right to participate in that phase of the proceedings and may even initiate proceedings themselves. In a number of important international cases, victims were central in initiating such proceedings.<sup>5</sup> However, the Rome Statute contemplates an independent Prosecutor to fulfill that role. The Prosecutor is called upon to do so in a victim-sensitive manner from the outset of the investigation and involve victims in the essential choices on his strategy of what cases to pursue within the contours of his or her discretion. While the process of preliminary examinations allows victims to file communications with the Court, the Appeals Chamber has ruled that victims at the ICC are generally not entitled to participate at the investigative phase, ruling that it is not part of the judicial proceedings as such.<sup>6</sup> This ruling avoids the Court having to narrow the pool of participating victims at a later stage if victims are not able to demonstrate a "personal interest" in the case. This is particularly true as trials before the ICC will always be few and will focus on those bearing the greatest responsibility for the gravest crimes.

Protection of participating victims and witnesses as well as their intermediaries in volatile contexts should remain an important priority for the Court, even during the investigative phase. In some situations such protection should also entail assessing risk to victims who may not participate or be

---

<sup>4</sup> *Impunity Prolonged: Burma and its 2008 Constitution*, ICTJ, 2009.

<sup>5</sup> Cruvellier, Thierry, *Civil Party Participation and Representation: A few other experiments at a glimpse*, ICTJ, March 2009 (unpublished manuscript).

<sup>6</sup> *Situation in Democratic Republic of the Congo*, Appeals Chamber Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of Dec. 7, 2007, and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of Dec. 24, 2007, and Dec. 19, 2008, paras. 45 and 58.

called to testify as witnesses, but who may be put at risk by being perceived as potential witnesses for the ICC.<sup>7</sup>

While involving large numbers of victims will always raise certain logistical challenges, it is important that the right to participate is rendered meaningful and is not hampered by overly bureaucratic procedures such as long, complex forms. The link of meaningful participation with effective outreach is also critical. Participation is rendered meaningful if the time is taken to explain the various stages of the process and what victims should expect, as well as ongoing, two-way communication.

In some cases, it may be important to allow victims to present evidence or conduct examinations. In other experiences around the world, occasionally this additional right has brought to light important evidence, but must be balanced against the rights of the accused. In some cases indirect victims of the crimes should be allowed to participate so participants in the trial can fully comprehend the impact of the alleged crimes. Additionally the reparations phase of trials is wholly dependent on victim participation that should be broadly facilitated, as advocated by the Prosecutor's strategy paper.

#### **4. Reparations and the Trust Fund for Victims**

For many victims, justice in the form of reparations is of paramount importance. In regard to individual reparations to victims of massive crimes, the Court will be facing two challenges: defining which principles should apply in individual cases while also responding to large numbers of victims. The Court's role will be complicated by the fact that it will not be possible to assess the harm done to each victim and to compensate for it. Restitution to the status quo ante is probably not a realistic standard to apply. It is also important to note that reparations can take different forms; a combination of material reparations and other measures such as health care, education, or pensions are more likely to assist victims in the long run than one-off lump sums. The Court has not yet ordered any reparations measures.

Its role in regard to the latter is complemented by the Trust Fund for Victims (TFV), which has more flexibility to implement programs among victims and affected communities. The TFV has given a broad interpretation to its mandate, allowing it to pursue assistance to victims in situations under investigation. This is a welcome development that enables the TFV to reach out more broadly to the universe of victims. Currently, it is active in both the DRC and northern Uganda, and by now some 40,000 people are said to be beneficiaries. There are some reports of disappointment by those who believe the TFV could be doing more, but this should not be seen as a criticism.

At the same time, the current activities of the TFV are limited to assistance. Assistance can be important and helpful in addressing the immediate needs of victims of Rome Statute crimes. Assistance can take forms that overlap with reparations, such as medical care, scholarships, housing, and financial help. But what distinguishes reparations from assistance is the acknowledgement of responsibility for what happened to the victims and the responsibility to attempt to repair its causes and consequences through various measures of accountability. In the national context, it is particularly significant if such responsibility is acknowledged by the State. The most meaningful reparations measures have been those in which the State not only tries its best to repair the physical and material harm done to the victims, but also takes steps toward ensuring the accountability of the people behind the violation and preventing its reoccurrence through reform and remembrance.

---

<sup>7</sup> This is an issue particularly in the context of Kenya for witnesses who gave evidence to the inquiries that preceded the Prosecutor's decision to open an investigation *proprio motu*, such as the Commission on Post-Election Violence.

Another issue of concern is the essentially tepid financial support from State Parties. Contributions to the TFV remain too low. From the outset of the fund's establishment, contributions from States have been small, and current resources only amount to around 5 million Euros. It is important that the TFV is seen as more than just an afterthought to the criminal justice process. For many victims, benefiting from programs instituted by the fund may ultimately have a crucial impact on transforming their lives in the future and affirming their dignity going forward. The TFV may have many valuable experiences to share with domestic counterparts and should consider developing its capacity to provide technical assistance to reparations initiatives on the domestic level.

## 5. Reparations: Lessons from National Reparations Programs

When the Court is called upon to decide its first cases on reparations, the practice of national reparations programs will be helpful in providing guidance on how to deal with certain challenges. In this regard, the Court may consider engaging the assistance of outside experts to study such experiences in more detail.

Reparations can provoke conflict among victims themselves. In addition, the Court and the TFV are operating in many situation countries where victims and non-victims alike live in poverty and have no access to basic social services. In providing both assistance and reparations, these tensions are inherent: there is a perception that fewer (or no) resources are allocated to reparations versus resources for non-victim-centered justice efforts, such as criminal courts and disarmament, demobilization and reintegration programs,<sup>8</sup> and there is competition for resources between reparations for victims and broad development efforts catering to all citizens, not just victims.

These tensions can be addressed to some extent, but often cannot be fully resolved. It is often just as important to empower victims to take action rather than simply assisting or providing them with benefits. In this way, victims helping each other can reduce issues involving how reparations institutions engage with individual victims. The most important step may be to ensure that victims can participate in the process of designing reparations programs and have the opportunity to understand how decisions are made.<sup>9</sup> Their interactions with the TFV may allow for this, but their exact involvement in shaping findings on reparations remains to be seen.

ICTJ supports wide victim participation at the reparations stage of the trial, including indirect victims. Also, consideration should be given to conducting the reparations phase of the trials in situ to facilitate the participation of more victims. It may be possible to structure the hearings on reparations to take into account the special interests of particular categories of victims, including in particular women and children.

Since the Rome Statute contemplates the possibility of collective reparations, it will be important to consider how the Court and the TFV define the collective or community intended to receive reparations and which collective or communities are prioritized whenever resources are inadequate.<sup>10</sup>

---

<sup>8</sup> For example, while the World Bank provided modest funding for an interim reparations program in Timor-Leste, that gave about \$200 each to around 700 victims considered in urgent need of medical attention or financial support. In contrast, the bank co-funded the payment of pensions to around 12,000 people who were considered veterans or beneficiaries of veterans that fought in the country's conflict.

<sup>9</sup> In Peru and Sierra Leone, civil society representatives were mandated to hold consultations with victims and affected communities. In some cases, victim groups are directly represented at the local level where decisions regarding the verification and registration of reparations beneficiaries were made. The TFV may consider inviting victims' organizations into direct dialogue on how to engage victims.

<sup>10</sup> The TVF can also rely on the work of others to help determine the universe of victims. In Peru, a conditional cash transfer program called *Juntos*—which provided cash assistance to families on the condition that they would, for instance, send their children to school—used the findings of the Peruvian truth commission identifying those provinces that were the most affected by the armed conflict in the country.

Collective—and in some cases, community—reparations are designed to benefit groups of victims sharing a location, an identity, or an experience of human rights violations specifically targeting them. This form of reparations can be useful in some situations when the number of victims is extremely high in relation to the resources available for reparations, or when they share circumstances that make it more appropriate to provide collective benefits.<sup>11</sup> The Inter-American Court of Human Rights has often ordered measures specifically designed to address large numbers of victims belonging to indigenous communities targeted or especially affected by repressive measures, based in the assessment that the violations not only caused individual harm, but also harmed the community life.<sup>12</sup> But collective reparations also have to be balanced with the expectations that some victims may have of individual reparations, particularly if they are participants in proceedings before the Court.

Funding for reparations remains a major challenge as perpetrator assets have not usually been a major source for reparation, although that avenue should still be pursued.<sup>13</sup> Governments should continue to show their commitment not just to the rhetoric of reparations, but also to its actualization. In addition, the TFV should make continued efforts to raise additional funds.

## **6. Incorporation of Victims' Rights at the Domestic Level**

Implementation of ICC standards at the domestic level has enormous potential for victims and their access to justice going forward. Victims are often eager to access justice options on the ground, even if in some cases these are of lesser quality than international justice. For instance, in a 2009 study that ICTJ conducted of five international crimes trials before Congolese military courts,<sup>14</sup> victims expressed satisfaction at seeing perpetrators on trial and in seeing the government exercise its potential to render justice to promote the rule of law.<sup>15</sup> It is interesting to note that in surveys held in Colombia, Uganda, and the Democratic Republic of Congo, victims in general expressed support for domestic justice systems over the ICC or international justice, whereas in the Darfur region of Sudan and in Kenya victims showed strong support for the Court and a lack of trust in their justice systems.

Rome Statute implementation may give rise to opportunities to expand the rights of victims at the domestic level, including to reparations and to participate in criminal trials, which is still unusual in many common law systems. It can also be used to deal more adequately with the special interests of particular categories of victims, including women and children, or may be used to inspire changes to witness protection. However, victims' rights as affirmed in the Rome Statute have not necessarily been incorporated effectively at the domestic level.<sup>16</sup> Not all States that are implementing the Rome Statute are including these rights in implementing legislation. It will be important for the Court, in developing its principles on reparations, to strengthen the framework that underpins the right to reparations, for instance in referencing the obligations of States in international law. The State continues to have the primary responsibility to ensure that reparations are provided to victims.

---

<sup>11</sup> In Morocco, in addition to individual reparations already paid, 11 regions that were deliberately passed over by development programs under a previous regime in retaliation for their resistance to repression are benefiting from a collective reparations program, which includes a fund to which organizations in those regions can submit proposals for state-funded livelihood programs and memorialization measures.

<sup>12</sup> These have included the creation of funds for community development in which the community participates in the following ways: defining the projects; hiring teachers to provide multicultural and bilingual primary, secondary, and technical education; providing health care and psychological support; building roads, communication infrastructure, and aqueducts; granting legal collective titles that recognize ancestral ownership of land by the community; creating measures for preserving the cultural identity of the community; broadcasting apologies in the community's language; and holding of reburial ceremonies.

<sup>13</sup> This has been partly the case in Peru and the Philippines.

<sup>14</sup> For an executive summary see

[www.ictj.org/static/Africa/DRC/ICTJ\\_DRC\\_Atelier\\_Recommandations\\_R2009\\_fr.pdf](http://www.ictj.org/static/Africa/DRC/ICTJ_DRC_Atelier_Recommandations_R2009_fr.pdf)

<sup>15</sup> ICTJ interviews with victims in the Songo Mboyo and Pillages de Mbandaka cases from Equateur Province conducted in October and December 2009 and March 2010.

<sup>16</sup> This is not necessarily a requirement for complementarity but should be encouraged nonetheless.

Adherence to the Rome Statute should provide an important impetus for States to assume this obligation.

## 7. Outreach and Challenges in Victims' or Affected Communities' Perceptions of the ICC

Much has been said elsewhere about the importance of outreach to victims and affected communities. One of the most significant lessons learnt at the International Criminal Tribunal for the former Yugoslavia is that outreach should be started immediately and used to shape perceptions from the moment a court is established. Outreach is about genuine, two-way communication, which may not necessarily always change minds but could at least succeed in enhanced understanding and transparency of the process. In some situations this will lead to more support or at least appreciation for the role and importance of the judicial process.

Outreach in any given situation will have to be targeted to the particular challenges in perception that victim populations have of the ICC. There are a few areas that have emerged in practice in which victims and affected populations have been troubled by the Court's actions or strategies.

For instance, some victim populations have expressed frustration and disappointment about the limited number of cases that the ICC is pursuing and about perceived inconsistencies in their selection. This is particularly evident in the DRC.<sup>17</sup> The size and complexity of the conflict in the DRC inevitably make it challenging for the ICC's targeted investigations of a handful of cases to contribute to a widespread sense that justice is being served. For instance, victims in the North and South Kivus have questioned why the ICC is limiting its actions to Ituri.<sup>18</sup> Victims have also questioned the narrow nature of the charges against Thomas Lubanga. In addition, people question why Jean-Pierre Bemba is only being prosecuted for alleged crimes committed by his troops in the Central African Republic (CAR) when all conflicts in the region have had transnational dimensions. The fact that the ICC is prosecuting Bemba, while investigations and prosecutions of serious violations committed by the government remain limited, further reinforces the perception that the current strategy is one-sided and beneficial to President Joseph Kabila.

In some situations, these perceptions may be addressed either when the Court opens additional investigations into different sides of the conflict, such as in the case of the Kivus, or by clear outreach on why certain decisions were taken. In other situations, it may be difficult to placate the views of victims that the Court should be doing more. After all, the Court faces real constraints, such as in the quality of evidence or in its temporal jurisdiction. When the Court is not able to act, other justice measures should be explored. In any case, the clamor for the Court to take on more cases should be seen as an endorsement of what it represents.

The Court has also faced concerns from victim populations that it may not be impartial.<sup>19</sup> For instance, most people in northern Uganda had not heard of the Court when the Ugandan government signed the Rome Statute. The Prosecutor's announcement of Uganda's referral in December 2003 was made at a joint press conference with President Yoweri Museveni, creating a perception that the Court was siding with the government—a perception that has proved difficult to undo. Perceptions of lack of impartiality are further fostered by the fact that no investigation was opened against the Uganda People's Defense Forces. Some of these views have changed over time with increased outreach on

---

<sup>17</sup> Adjami, Mirna, and Guy Mushiata, "Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court," ICTJ, May 2010.

<sup>18</sup> ICTJ interviews with human rights organizations operating in North and South Kivu, October and November 2009, and March 2010.

<sup>19</sup> For two opposing views on this, see Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed, 2006), and "Peace First, Justice Later," Refugee Law Project Working Paper 17, July 2005. See Otim, Michael, and Marieke Wierda, "Uganda: Impact of the Rome Statute and the International Criminal Court," ICTJ, May 2010.

why an investigation was not pursued. This has enabled the quest for accountability for government actors to be channeled into other options.

But these concerns also reveal the need for targeted and careful outreach from the beginning of an ICC intervention on issues of case selection, jurisdiction, and prosecutorial strategy. Increased outreach on the judicial processes of the Court, explained in accessible ways, will also enable victims to understand that it is not a political instrument. The opening of field presences was an important step in ensuring improved accessibility by victims and affected communities to the Court.

Another major challenge remains in “spreading the word” about a Hague-based Court in situations that are rural and isolated, located in areas with poor infrastructure and literacy. For instance, before Lubanga’s trial began, few people in the DRC were aware of the Court. According to “Living with Fear,”<sup>20</sup> a survey that ICTJ and the Berkeley-Tulane Initiative on Vulnerable Populations conducted in late 2007 in Ituri and the Kivus, fewer than 30 percent of the people in these areas had heard of the ICC or the Lubanga trial, which was about to begin. Since that time, the Court has taken several additional measures. The visits of the ICC Prosecutor and president in 2009 were also positively received by Ituri victim groups.

Also in Uganda, knowledge about the ICC increased considerably over the years. In 2005, only 27 percent of respondents had heard of the ICC, whereas in 2007 this number had increased to 60 percent. Among those who knew about the ICC, many expressed support, thereby challenging to some extent the notion that affected populations in the north were universally opposed to it. But some of the support seemed based on misperceptions: for instance, in 2007, 55 percent of respondents who had heard about the ICC (32 percent of the total) still thought that the Court had the power to make arrests. Again, these are conceptions that can in part be changed through effective outreach.<sup>21</sup>

In ongoing conflicts, victims and affected populations may feel that their options to mediate the conflict have been limited by an insistence on criminal justice.<sup>22</sup> These perceptions can to some extent be addressed by implementing a comprehensive set of justice measures to address the issue of the impunity gap.

## 8. Conclusion

One of the most significant achievements of the Rome Statute is the recognition it has given to victims as stakeholders in all aspects of the criminal justice process, and in particular in terms of participation and reparations. In so doing, the Court sets an important precedent not just for international courts in the future, but more importantly, for domestic legal systems. International justice should be experienced as reparative as well as punitive. Victims’ interactions with international justice systems should serve to acknowledge their experiences, respect their views, and to affirm their dignity. More work needs to be done, but the Rome Statute provides a strong normative framework on which to build.

---

<sup>20</sup> This survey covered 2,620 people.

<sup>21</sup> Pham, P., P. Vinck, M. Wierda, E. Stover, and A. di Giovanni, “Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda.” ICTJ and the Human Rights Center, University of California, Berkeley, July 2005. See also Pham, P., P. Vinck, E. Stover, A. Moss, M. Wierda, and R. Bailey, “When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda,” Human Rights Center, University of California, Berkeley, Payson Center for International Development, and ICTJ, December 2007.

<sup>22</sup> “Uganda: Impact of the Rome Statute and the International Criminal Court.” This was an issue in Uganda, where opinion-makers repeatedly referred to the fact that they wished to reject “Western-style” forms of justice in favor of traditional forms of justice, such as the Acholi ceremony of *Mato Oput*. As a result of the Juba peace process, victims and affected populations increasingly came to understand that these are not either/or scenarios, but that the various measures can be used in combination.