

**fidh**



# **The victims' mandate of the International Criminal Court: disappointments, concerns and options for the way forward**

## **Observations and recommendations for the Independent Expert Review**



Ministry of Foreign Affairs of the  
Netherlands

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# Foreword

The International Criminal Court is in trouble. The very foundations contributing to its establishment in 1998 – namely multilateralism and a firm belief in international law – are being undermined by an increasing number of populists and despots. Faced with political attacks, a budget which does not allow the Court to adequately fulfil its mandate and an overall lack of political support or cooperation from many States parties, it is impossible to imagine an institution like the ICC being established today. As such, its mere existence is something to fight for and to defend by all of us who seek an end to impunity and the delivery of justice for victims of the worst crimes. Our movement continues to acknowledge the importance of an institution like the Court and to support its mandate, substantively, operationally and politically.

Recognising the critical role of the Court in the global fight against impunity, and considering the volatile political situation over the past years, have perhaps made some of us reluctant to openly criticise an institution which many of us have fought hard to see established.

However, for us, it was never about the Court itself, but always about what it represents, namely, a firm belief that genocide, crimes against humanity and war crimes cannot go unpunished, and that victims of these crimes have a right to justice, truth and reparation. This is what we and our constituents expect from a permanent international criminal court, bearing in mind the complementary nature of the Court and its jurisdictional limitations.

Without minimising the external factors contributing to the current situation of the Court, we are finding that serious internal and institutional shortcomings are leading to the Court underperforming in several aspects. The successes yielded over the years no longer balance out the growing number of concerns and disappointments. Of even more concern is the sentiment that the Court's relevance and reach to victims in multiple situations is slowly diminishing or non-existent.

A reflection on the Court's overall performance has thus become necessary and timely, if not overdue. Our mandate towards victims and affected communities, whose voices we often brought to the Court in urging it into action, requires that we do not continue with 'business as usual'. It is our responsibility to contribute to moving the Court's tides to an institution which can truly complement, influence and inspire the fight against impunity at national level, to a Court which can play an effective role in delivering meaningful justice.

This is what motivated our organisations to call for and engage with a review of the performance of the ICC and the Rome Statute system. Our key objective was to share the narratives of those most affected by the Court's performance, those who experienced its delays, set-backs and failures to deliver. Some might find these voices to be too harsh, disagree with them, or conclude that they are unfair as they do not give sufficient credit to some of the changes made by the Court in response to past criticism. Some may argue that criticism at this time fails to recognise that the Court is functioning in a challenging external environment, including with lukewarm support where support is most needed. That, we also acknowledge - change is needed across the board, externally, through an equally honest reflection by States, but also from within the Court.

So how do we move towards change and a stronger, better performing ICC? The views reflected in this report demonstrate that change is not, and will not be, easy. Significant changes need to be made, changes which will be challenging, outside the relevant stakeholders' comfort zone and might even entail risks.

Some find that we perhaps expect too much or even the impossible from the Court. Some may believe that to avoid future disappointments in the Court we should be more modest in our ambitions, including in regards to its mandate towards victims. We cannot disagree more. In our view, an honest and comprehensive review of the Court's performance requires us all to recall why the Court was established and not lose sight of why it is there.

Our organisations stand ready to assist the Court and relevant stakeholders in this process. We will continue to call on States' parties to remedy their shortcomings in supporting the Court's performance, particularly in the areas of cooperation, complementarity, elections and oversight, including the Court's annual budget. We will not, however, stand idly by while the Court is moving ever further away from realising the ambitions the international community shared two decades ago, namely that the most serious crimes of concern to the international community as a whole must not go unpunished, and that victims have a right to obtain justice.

Alice Mogwe  
President, FIDH

George Kegoro  
Executive Director, KHRC

# I. Introduction

1. In January 2020, a group of nine independent experts commenced its work to review the performance of the International Criminal Court (ICC or Court). The “Group of Independent Experts” was mandated by the Assembly of States Parties (ASP) in December 2019 to make “concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system at a whole.”<sup>1</sup> More than twenty years after the adoption of the Rome Statute in 1998, there was broad agreement among all stakeholders, including States, civil society organisations, international organisations and Court officials themselves, that something needed to be done. While criticism had been levelled at the Court since its inception, this could, for a long time, be mainly attributed to those seeking to do away with multilateralism and notions of accountability and justice, and wishing to continue benefiting from impunity. However, in recent years, criticism about the Court grew louder, including from supporters of the Court. Controversial developments that called into question the performance of the Court included the 2018 acquittal of Jean-Pierre Bemba on appeal, the 2019 acquittal of Laurent Gbagbo and Charles Ble Goude on first instance, and the denial of an investigation into the Afghanistan situation in April 2019 (since overturned). These decisions could be viewed as symptoms of broader frustrations experienced by victims in the Rome Statute system, where a sentiment of being removed from the centre to the margins of the criminal justice system has been felt for years.
2. The “Independent Expert Review” (IER) is therefore a welcome opportunity for reflection and reform. Experts will examine issues relevant to the institutional, judicial and prosecutorial functioning of the ICC the Rome Statute’s entry to force in 2002, through consultation with States, Court officials, civil society and other stakeholders. The Group of Experts invited all stakeholders to make written submissions and on 15 April 2020, the International Federation for Human Rights (FIDH) and the Kenya Human Rights Commission (KHRC) made a joint (confidential) submission. The submission was aimed at contributing to the IER by highlighting the views and concerns of a number of civil society organisations and other experts from or engaged in ICC situation countries.

## Methodology

3. The submission was based on the experience of FIDH and KHRC in working with victims of core international crimes in promoting and supporting their access to truth, justice and reparation, including before the ICC.<sup>2</sup> The submission was also based on a stakeholder consultation organised by both Organisations specifically on the IER, which took place in Nairobi, Kenya, from 3-4 March 2020 (KHRC-FIDH Nairobi Consultation or Consultation), bringing together 25 civil society and victim legal representatives from 12 countries under ICC investigation or preliminary examination. The participants discussed and exchanged experiences on issues including ICC preliminary examinations; ICC investigations; ICC prosecutions; priorities for meaningful engagement with victims; the ICC’s reparation mandate; and completion strategies.<sup>3</sup> Participants had substantial and diverse experiences in working with the ICC, with some having acted as intermediaries in specific situations, others acting as legal representatives of victims or working for national and international human rights organisations with a mandate to support victims of core international crimes.

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1. ASP Resolution ICC-ASP/18/Res.7, 6 December 2019.

2. FIDH has a permanent representation to the ICC in The Hague since 2004 that facilitates interaction between grassroots organisations working in partnership with FIDH and organs of the Court. FIDH represents victims of international crimes in Mali, Côte d’Ivoire, Central African Republic and Guinea in national proceedings, and has commented on numerous policies and strategies affecting victims at the ICC. KHRC, within its Transformative Justice (TJ) Programme, works with victims of gross human rights violations and crimes at national and international levels, and has been supporting victims during the ‘Kenya cases’ at the International Criminal Court.

3. Participants included civil society representatives and other experts from or working on Côte d’Ivoire, Central African Republic, Sudan, Guinea, Burundi, Democratic Republic of Congo, Palestine, Afghanistan, Uganda, Libya, Georgia and Kenya.

4. The Consultation focused on the performance of the Court specifically from a victims' rights perspective in light of the Court's mandate to achieve accountability and justice for victims, including justice, truth and reparation, and the novel provisions under the Rome statute that grant victims a central position at the ICC justice process. The perspectives and experiences of the Consultation's participants in engaging with ICC processes and organs for the benefit of victims of Rome Statute crimes were at the centre of the discussions. As such, the identified recommendations were aimed at contributing to a more meaningful implementation of victims' rights at the ICC and a more meaningful justice process.

### **Overview of consultation's scope and objectives**

5. The Consultation was not designed to identify good practices, but rather share common experiences with a view to make concrete, achievable and actionable recommendations to improve the Court's overall performance generally, and in regards to victims specifically. The nature of the exchange during the Consultation was therefore to focus on areas of priority to victims and where the ICC could and should perform better. As a result, the discussions over two days were overall very critical of the ICC's performance, and may portray a skewed picture of the Court that does not sufficiently take into account and highlight the positive contributions of the ICC for victims around the world.
6. The discussions throughout the two-day Consultation painted a deeply troubling picture of a Court that continues to fail in fulfilling its victims mandate. Participants raised concerns that the ICC has become an institution where shortcomings cannot be remedied by a few tweaks here and there. Instead, what seems to be required is nothing short of an institutional overhaul. This seems to apply to the Court's recruitment process, staff management and appraisal system and the lack of accountability for low performance, fostering an inability to change and an aversion to take risks. This threatens to turn the Court into an institution where questions of salaries and job security are more prominent than being able to contribute to the Court's vision of a world without impunity and justice for victims.
7. It also goes to the heart of how key organs of the Court view their role in supporting victims' quest for justice, their ability to learn from past mistakes and to take on board or identify lessons learned. Discussions repeatedly brought up references to the Court's complex and bureaucratic structures dealing with victims and the place of victims in the Court's work overall, referring to the Court's failure to reduce the distance between the Court and situation countries to make sure that victims and affected communities are fully informed about what is happening in The Hague and about their rights, and are empowered and able to meaningfully participate in ICC processes.
8. These unsettling view points have also been partially caused by the absence of sufficient State support to the Court, including in regards to providing the Court with the appropriate and needed budget, and a level of cooperation that would allow the Court to fully meet its mandate. The spirit of Rome seems to have vanished long ago, raising questions as to what Court States Parties want today. It would therefore be remiss to place the entire fault for the shortcomings only on the Court. State parties have a crucial role to play in turning the Court into the institution it was established to be in 1998.
9. There seems much that can be done, however, by the Court itself to tackle, if not overcome, current challenges and to stop the Court's trajectory to irrelevance for the majority of victims. From the Organisations' experience in working with the Court, and based on the discussions of participants during the Nairobi Consultation, it appears that if the Court is serious about affording victims a central role in the justice process, all sections of the Court will need to rethink their engagement with victims. This should entail putting an emphasis on issues such as reducing the distance between the Court and the situation countries, improving an understanding of local contexts and prioritising victims' narratives, perspectives and empowerment. The Court should significantly increase effective outreach and communication activities tailored specifically for victims and affected communities,

develop consistency in approaches to victim participation and reparation, and overall, reduce the challenges and obstacles that currently prevent more victims from benefiting from the Court.

10. It will also be important for the Court to consider and be frank about its limitations so as to avoid creating unrealistic expectations, and then consider how limitations can be addressed. The Court should develop a strategy of how to realise its victims' mandate, taking into account the setbacks and also positive progress made over the years. Structural changes will help make the Court more transparent and accountable, more visible to its key constituency and help increase its performance.
11. What added value can the IER have in the present context and environment? Participants of the consultation raised questions regarding the process of establishing the IER, seeing it as yet another example of how the views of those outside The Hague and New York are not sufficiently sought or taken into account. Participants were concerned that the review as a whole, including the component that will be carried out by the ASP and its working groups, will take place in the corridors of the ICC and Ministries of States Parties in the North, far away from situation countries, from those most affected by the underperformance of the ICC.
12. Notwithstanding the Court's limited success in its promise to victims to date, there was a consensus that the ICC remains a central agent in the fight against impunity and the pursuit of justice for victims, and that improvement in its performance is not only needed but also possible. In that vein, participants underlined that a holistic Review of the ICC's performance was to be welcomed and long overdue. The IER itself cannot turn the ICC around, yet a comprehensive, independent and inclusive review has the potential to provide an important impetus for change, identify why change is necessary and present a roadmap of urgently needed reform for the Court's incoming leadership and for States Parties.
13. FIDH and KHRC are publishing this report with a heavy heart, and it has not come lightly to issue a report that is at times extremely critical of various Court organs and their approach taken, in particular in regards to victims. We want and support the Court to succeed. We do not underestimate the significant challenges for the Court as a result of resource constraints, political pressures and a lack of cooperation. However, it is clear from our engagement with the Court over the past years, and, even more so, as a result of our work with victims and affected communities, that something is seriously amiss. This impression was confirmed by all participants at the Nairobi Consultation. As we continue to believe in the mandate and need of the Court, we hope that the findings of the IER and its recommendations will be the first steps towards much needed reform. We also hope that States Parties will similarly look themselves in the mirror and frankly acknowledge and address their individual and collective shortcomings towards realising the Rome Statute system.
14. This report is divided into four main parts: (i) preliminary examinations; (ii) investigations, case selection and prioritisation; (iii) right to victim participation; and (iv) the role of the Trust Fund for Victims in realising the Court's reparation mandate. As the Group of Experts is divided into three Clusters, focusing on governance, judiciary, and investigations and prosecutions, the report identifies specific recommendations for each relevant cluster in regards to these different issues.



## Acknowledgements

15. This report was written by Amal Nassar, Permanent Representative of FIDH to the ICC, Jürgen Schurr, Interim Head of International Justice of FIDH, and Nada Kiswanson, Consultant with the international justice programme of FIDH. It was reviewed by George Kegoro, Executive Director of KHRC and Patricia Huyghebaert, Deputy Director of Programmes. FIDH and KHRC would like to thank all participants in the Nairobi Consultation for their participation and their contribution to this report, and Dorine Llanta, Programme Officer with the international justice programme of FIDH, for her input and her assistance with the translation into French.

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## II. Preliminary Examinations

*“Preliminary examinations are like an iron door that is very difficult to get through” (civil society representative consulted by FIDH for an assessment of the Court’s performance)*

16. Preliminary examinations are an important phase of the justice process at the ICC: it is where the Office of the Prosecutor (OTP) decides whether the opening of an investigation into a given situation is warranted. The Prosecutor can only open an investigation if the following criteria are met:<sup>4</sup>
  - i. The Court has temporal, personal, and territorial jurisdiction over the situation;<sup>5</sup>
  - ii. The potential case is admissible because the State which has jurisdiction over it is unwilling or unable to genuinely investigate or prosecute, or because the case has been investigated by the State but it has decided not to prosecute, and that decision resulted from the unwillingness or inability to genuinely prosecute (this criteria is known as complementarity);<sup>6</sup>
  - iii. The potential case is admissible because it is of sufficient gravity to justify action by the Court;<sup>7</sup> and
  - iv. There is no substantial reason to believe that an investigation would not serve the interests of justice.
17. Beyond setting out the criteria that need to be met for a preliminary examination to lead to the opening of an investigation, this stage of the ICC process is not regulated in much detail in the Court’s relevant legal instruments. This has led some commentators to highlight that the Court appears to have “virtually carved out a new type of procedure that was neglected by the drafters of the Statute.”<sup>8</sup> As a result, it is almost entirely left to the discretion of the Prosecution how to carry out preliminary examinations.
18. What seems clear, however, is that the Rome Statute presumes that the preliminary examination is carried out at the seat of the Court, and that the OTP is confined to examine the criteria against material that it receives, as opposed to pro-actively carrying out investigations away from the seat of the Court.<sup>9</sup> Investigative powers are triggered once an investigation is formally opened.
19. In 2013, the OTP issued a “Policy Paper on Preliminary Examinations” which elaborates on the legal criteria and sets out the general principles followed during the preliminary examination stage and the conduct of the examination. According to the Policy Paper the Prosecution will filter preliminary examinations in four phases:
  - **Phase 1** consists of an initial assessment of all communications received under Article 15 of the Statute. During this stage the Prosecution will filter out situations that the Prosecution considers “manifestly outside the jurisdiction of the Court.”<sup>10</sup>

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4. Article 53(1) Rome Statute; Pre-Trial Chambers have interpreted the “reasonable basis” to proceed standard as “a sensible and reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed”. It is “construed and applied against the underlying purpose of the procedure in Article 15 (4) which is to prevent the Court from proceeding with unwarranted, frivolous or politically motivated investigations that could have a negative effect on its credibility”, Pre-Trial Chamber II, *Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, para.32.

5. Articles 11 and 12 Rome Statute.

6. Article 17 Rome Statute.

7. Article 53(1)(c) Rome Statute.

8. Carsten Stahn, *Damned if you do, damned if you don’t: Challenges and Critiques of ICC Preliminary Examination*, in: *Journal of International Criminal Law*, Vol 15, No. 3, 2017, p. 429 (Stahn, 2017).

9. See Article 15(2) Rome Statute.

10. ICC, OTP, *Policy Paper on Preliminary Examinations*, November 2013 (OTP, Policy Paper on Preliminary Examinations), para. 78, at [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf).

With the exception of information over a number of phase 1 preliminary examinations published for the first time in 2019 in the OTP's annual report on preliminary examination activities, this phase is not public.

- **Phase 2** constitutes the formal and public commencement of the preliminary examination according to the Prosecution, and seeks to establish whether the Court has subject matter jurisdiction over the situation and includes a thorough and factual legal assessment of the crimes alleged to have been committed with a view to identify potential cases.
- **Phase 3** examines the admissibility criteria (point 2 and 3 of the legal criteria highlighted above);
- **Phase 4** addresses the interests of justice point.

20. Civil society organisations and grassroots movements have submitted information to the Prosecutor under Article 15 of the Rome Statute (Article 15 communications) for the purpose of spurring preliminary examinations that could result in investigative action by the Court. This is an important mechanism to seize the Court in cases where domestic authorities have failed to genuinely provide justice. FIDH is aware of discussions among some States Parties on whether preliminary examinations should remain a public process, or be conducted entirely confidentially. Participants of the KHRC - FIDH Nairobi Consultation underlined that for reasons of transparency and greater effectiveness, it is essential that preliminary examinations are conducted publicly once the examination moved into Phase 2 (see above). The OTP depends in its preliminary examinations on receiving information from a range of stakeholders, including civil society. Only a public process can allow all stakeholders to submit valuable information to, and to constructively interact with, the OTP. Such information would also include information on the existence and genuineness of any domestic proceedings.<sup>11</sup> Public preliminary examinations can also help foster a climate of accountability and justice in the country under examination, and contribute to deterring and preventing the commission of serious international crimes.
21. The OTP has opened 26 preliminary examinations to date, ten of which were ongoing at the time of Submission (April 2020).<sup>12</sup> The preliminary examinations carried out to date give rise to several concerns, including in particular (i) the length of time it takes the Prosecutor to conclude preliminary examinations, and the consequences of delays; (ii) external environment factors that contribute to delays and unclarity over the preliminary examination process; (iii) the absence of outreach and public information by the Court during the preliminary examination phase. These concerns will be examined in turn.

## II.1. Length of preliminary examinations

22. The instruments of the Court do not impose any time limits on the Prosecution for the conclusion of a preliminary examination. The OTP made clear that it "takes the time it needs to complete a thorough analysis."<sup>13</sup> This has led to situations where a preliminary examination can last more than a decade. For example, the preliminary examination into the situation in **Colombia** was opened in 2004, the one in **Guinea** in 2009 and the one in **Nigeria** in 2010. All were ongoing at the time of this report. Other examples include the preliminary examination into the situation in **Georgia** which took around 7 years to complete, and the preliminary examination into the situation in **Afghanistan** which was concluded after 10 years, both with a decision to investigate.

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11. See for instance ICC, OTP, *Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq*, 13 May 2014, in which the Prosecutor refers to information received from civil society through an Article 15 communication which had convinced the Prosecutor of the merit of conducting a preliminary examination, at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014>.

12. ICC, *Preliminary Examinations*, at <https://www.icc-cpi.int/pages/pe.aspx>.

13. ICC, OTP, *Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation*, 26 November 2019, p.13, at <https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf>.

23. According to the OTP, preliminary examinations have a value *per se*, and should not be considered merely as a phase in which a decision needs to be made whether or not to open an investigation. In its 2016-2018 strategic plan the Prosecution expressed that preliminary examinations have the potential to “obviate ICC intervention through prevention and complementarity” and that “the office will perform an early warning function [...]”<sup>14</sup> Preliminary examinations have a potential to broaden the fight against impunity beyond the ICC by engaging and supporting national jurisdiction to investigate and prosecute human rights crimes through the principle of positive complementarity.<sup>15</sup>
24. However, the practice to date suggests that States are not responding to the “early warning” in a timely fashion, if at all. To the contrary, past and ongoing examinations suggest that the significant delays in concluding a preliminary examination can be attributed to a large extent to States’ failure to carry out prompt and independent investigations, and the challenges for the Prosecutor to assess genuine State action. As there is no time limit for States to demonstrate that their domestic accountability efforts are genuine, States can significantly prolong preliminary examinations.<sup>16</sup>
25. Recognising this challenge, the OTP in the 2019-2020 Strategic Plan indicated that “it is likely that the understanding and practice around complementarity and the assessment of ‘genuineness’ will evolve over the course of the current strategic plan.”<sup>17</sup> It remains to be seen what measures the Prosecutor will take to assess domestic accountability efforts, and to what extent these measures will impact on preliminary examinations. While the Prosecutor’s emphasis on positive complementarity is important, and within her mandate, this should not unduly delay the conclusion of preliminary examinations. Introducing clear criteria, benchmarks and time limits within which domestic authorities must show progress with their domestic efforts would be important to ensure that States do not abuse the complementarity principle with a view to avoiding ICC investigations. Parallel proceedings at national level and the ICC might be one way of mutually reinforcing investigations, and preventing delays. .
26. In the meantime, delays in progressing preliminary examinations come at great cost: they can undermine confidence in the OTP as it can contribute to impunity and a denial of justice to victims. In some instances, the situation on the ground worsened and crimes continued being committed while the OTP was assessing the genuine nature of domestic accountability efforts among other legal criteria.
27. In the situation in **Guinea**, a preliminary examination has been ongoing since 2009 to examine crimes against humanity allegedly committed in the national stadium in Conakry in the context of the country’s September 2009 presidential elections. Currently, the preliminary examination focuses on the existence and genuineness of national proceedings in relation to these crimes.<sup>18</sup> FIDH and Guinean member organisations have been following, and representing victims in, the domestic investigation in Guinea which was initiated in 2010 and concluded in 2017. Date(s) set by the government for the commencement of a trial are repeatedly postponed, with the government assuring the OTP in October 2019 that

14. ICC, OTP, *Strategic Plan 2016-2018*, November 2015, para. 55, at [https://www.icc-cpi.int/iccdocs/otp/EN-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf) (OTP, Strategic Plan 2016-2018).

15. ICC, OTP, *Policy Paper on Preliminary Examinations*, para.100; see also, Human Rights Watch, *Pressure Point: The ICC’s Impact on National Justice – Lessons from Colombia, Georgia, Guinea and the United Kingdom*, May 2018, at [https://www.hrw.org/sites/default/files/report\\_pdf/ij0418\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf).

16. FIDH and its member organisations called on the ICC Prosecutor to open an investigation into Colombia in 2019, citing a lack of willingness to prosecute crimes against humanity, see FIDH, *Colombia: State’s lack of will to prosecute crimes against humanity should trigger ICC’s jurisdiction*, 23 May 2019, at <https://www.fidh.org/en/region/americas/colombia/colombia-state-s-lack-of-will-to-prosecute-crimes-against-humanity>.

17. ICC, OTP, *Strategic Plan 2019-2021*, 17 July 2019 (OTP, Strategic Plan 2019 -2021), p.18, suggesting that this may require “an explanatory paper or adding to existing policies in practice to provide further clarifications,” at <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>.

18. ICC, OTP, *Report on Preliminary Examination Activities*, 2019, para.140, at <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>; the OTP has carried out 18 missions to Conakry to meet with relevant stakeholders to support and assess the efforts of national authorities to organise a fair and impartial trial.

the trial should open in June 2020.<sup>19</sup> The length of the preliminary examination and the positive complementarity approach by the OTP has successfully contributed to concluding investigations at national level. However, it has yet to trigger domestic prosecutions. In the meantime, victims are denied justice, more than ten years after the massacre. A number of suspects reportedly held in detention in Conakry since several years are waiting for a trial that continues to be postponed, with the time-limit on pre-trial detention under Guinean law having expired for a number of these suspects. A number of developments seriously undermine the government stated intention to genuinely proceed to a trial. These include the resignation of the Guinean Minister of Justice in 2019, a key interlocutor for civil society in the fight against impunity<sup>20</sup>; the President's efforts (who is in power since 2010) to reform the constitution to enable him to run for additional presidential terms, which materialised following the 22 March 2020 constitutional referendum, in granting him the ability to run for two additional terms; and the renewed cycle of violence and tensions that have been observed recently in the lead up to the upcoming presidential elections.

28. In the situation in **Colombia**, where the preliminary examination has been ongoing for the past 16 years, FIDH and its member organisations urged the OTP already in 2008 to proceed with an investigation.<sup>21</sup> This was in the context of the peace and justice law where leaders of paramilitary groups spoke openly about their ties with the government, leading to their extradition to the US where they faced drug trafficking charges. Attempts to contribute to the truth from afar had little to no success and the victims of the crimes committed by these paramilitary groups have not had their day in Court.
29. In the situation in **Palestine**, where the OTP opened a preliminary examination in January 2015, illegal settlements in the West Bank have expanded and mass demonstrations have been met with violence against civilians that could constitute crimes under the Rome Statute.<sup>22</sup>
30. It might be too much to expect from the OTP to be able to stop the continuation of crimes or prevent the worsening of situations simply through the conclusion of preliminary examinations. However, where crimes continue being committed while the OTP is considering the opening of an investigation, this should, at a minimum, serve as a strong indication that domestic efforts towards accountability are confronted with too many challenges to bear any prospect of success in the nearer future, or are simply not genuine. In the **Afghanistan** situation, FIDH and its member and partner organisations submitted in 2019 the views of victims to the Pre-Trial Chamber in *amicus curiae* observations that find an investigation to be at the very least a deterrent to parties engaged in the ongoing violence in the situation.<sup>23</sup>

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19. Ibid, para.151.

20. RFI, *Guinée: le ministre de la Justice Cheick Sako démissionne*, 28 May 2019, (in French) at <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>.

21. See, FIDH, *Gobierno colombia consolida la impunidad de los crímenes de lesa humanidad y crimenes de guerra cometidos en Colombia*, 14 May 2008, (in Spanish), at <https://www.fidh.org/es/region/americas/colombia/colombia-cpi/Gobierno-colombiano-consolida-la->.

22. ICC, OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening situation in Gaza*, 8 April 2018, at <https://www.icc-cpi.int/pages/item.aspx?name=180408-otp-stat>.

23. Afghanistan-Transitional Justice Coordination Group (TJCG), Armanshahr/OPEN ASIA, FIDH, *Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence*, 11 July 2019, para. 65, at <https://www.icc-cpi.int/CourtRecords/CR201903650.PDF>.

## II.2. External factors with an impact on preliminary examinations

31. The OTP's approach to preliminary examinations to date has furthermore suffered from a lack of transparency and consistency in terms of the process followed, suggesting that the OTP is at times guided by its budgetary constraints as well as political considerations, rather than the criteria outlined in the 2013 Policy Paper.
32. FIDH and its Mexican member organisations have been advocating with the OTP for several years to initiate a preliminary examination into alleged crimes against humanity in the situation in **Mexico**, where tens of thousands of civilians have been killed and subjected to torture, enforced disappearances, extra judicial killings and sexual and gender based crimes (SGBC).<sup>24</sup> FIDH submitted that the material provided thus far meets the low threshold for opening a preliminary examination. A preliminary examination would enable an open process where documentation such as the one submitted would be formally analysed and reported on by the OTP. When making these submissions to the OTP, the OTP argued that domestic authorities were already examining these allegations, and expressed uncertainty as to whether these crimes amounted to crimes within the jurisdiction of the Court. These responses suggest that the OTP has already made a subject matter and/or admissibility determination, *without* formally opening a preliminary examination. This would mean that the different phases during the preliminary examination (as outlined above, para.19) and the criteria identified by the OTP therein, are not applied consistently. In the absence of any other explanation from the OTP, this gives rise to speculation, in particular amongst civil society organisations engaged in the fight against impunity in Mexico, that a preliminary examination in this case, is not formally initiated because the OTP does not have the resources, or because the OTP is hesitant to examine a situation that might be too sensitive or challenging.
33. The financial resources made available to the OTP as a whole also impact the progress of preliminary examinations and decisions on when they can be initiated, and when ongoing ones can be concluded. The nearly zero-nominal growth to the OTP's annual budget, despite the increase in its workload, suggests that a number of preliminary examinations are still ongoing, rather than proceeding to the investigation stage, because of a lack of funding that would allow the Prosecutor to conduct a higher number of investigations. This impression is also confirmed by the Prosecutor in her 2019-2021 Strategic Plan in which she made it clear that:

Absent a significant increase in resources, the Office will need to exercise its prosecutorial discretion even more stringently to prioritise amongst the different cases identified within all the situations under investigation and in view of other situations that may progress into the investigation phase, applying the strategic and operational considerations set out in the Office's Policy Paper on Case Selection and Prioritisation (2016). This will inevitably result in the delay of some investigations and prosecutions. However, without additional resources, the Office considers that it cannot realistically build viable cases without making difficult decisions regarding prioritisation.<sup>25</sup>

34. Another real concern is the link between the dependence of the Court, including the OTP, on State contributions to fund its work, and some States' attempts to avoid ICC investigations and/or exert influence over the OTP. A number of States, notably major contributors to the Court's budget, have initiated discussions among a select group of States Parties on the

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24. FIDH, *Human Rights Groups Call on the ICC to Proceed with the Preliminary Examination into the Situation in Mexico*, 12 September 2014, at <https://www.fidh.org/en/region/americas/mexico/human-rights-groups-call-on-the-icc-to-proceed-with-the-preliminary>; FIDH, *Press Conference in The Hague: Mexico: Murders, disappearances and torture in Coahuila constitute crimes against humanity*, 3 July 2017, at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/press-conference-in-the-hague-fidh-report-mexico-murders>.

25. ICC, OTP, *Strategic Plan 2019-2021*, para. 22.

performance of the OTP.<sup>26</sup> Common to the proposals discussed is the idea of giving the ASP a bigger role in determining policies that drive the work of the OTP (including in the area of complementarity) and the use of interpretive declarations by States Parties on the mandate of the Prosecutor, including for instance setting a timescale for the Prosecutor to carry out the complementarity assessment in the preliminary examination phase. Another proposal was to consider shifting the burden of demonstrating the existence of genuine domestic proceedings to the Prosecutor, as opposed to the State in question. The discussed proposals, if realised, raise serious concerns over infringing the independence of the OTP and the Court as a whole and risk exposing the Court to allegations of political interference and bias. As highlighted above, any time limit regarding the complementarity assessment should be placed upon the relevant State to demonstrate it is carrying out genuine domestic proceedings, and not upon the Prosecutor, who at this early stage depends in her assessment on information received.

35. Some States have proposed completion strategies (focused on “exit strategies”) in response to lengthy preliminary examinations. Participants of the KHRC – FIDH Nairobi Consultation expressed their concern that these proposals are not made to necessarily address the length of preliminary examinations, but might rather be driven by budgetary and political considerations. There was a consensus among consulted organisations and experts that a strategy is needed to facilitate the conduct of transparent and timely preliminary examinations, and that allows the Prosecution to discharge its duties under the Statute in a meaningful manner. Any completion strategy specifically for preliminary examinations must be aimed at progressing the situations on the Prosecution’s docket, irrespective of any budgetary and political considerations.

### **II.3. Outreach and public information during preliminary examinations**

*“A meeting with the OTP was like meeting a king. All this for a 30 minutes meeting on why the ICC should investigate a situation. Meanwhile, people are being killed and displaced.” (civil society representative participating in the KHRC – FIDH Nairobi consultation)*

36. The OTP can take many years to conclude preliminary examinations, including in particular preliminary examinations initiated *proprio motu*. However, outreach and public information activities to victims and affected communities are not currently part and parcel of the Court’s approach to preliminary examinations.
37. The main public document providing some information about the progress and conduct of preliminary examinations is the annual report on preliminary examinations activities issued by the OTP since 2011. These annual reports, and the translation of its sections to the relevant languages, are a positive development. However, the communication around the report itself is limited to presenting it at the ASP and uploading it to the website. Better communication around the publication of the reports, including for instance press releases tailored to each context and using language accessible to the public, would be of great interest to affected communities in the situations, who may not otherwise consult or have access to material the OTP puts on the Court’s website or presents in international fora.
38. Civil society organisations were informed by the OTP that beyond this report, the OTP does not regularly carry out any other outreach and communication activities for the benefit of victims and affected communities at the preliminary examinations stage. Engagement with the Registry also indicated that this organ’s outreach and communication mandate at the preliminary examination phase is only triggered by a judicial decision. This happened for the first time when Pre-Trial Chamber I issued its decision on Information and

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26. Informal Meeting on the International Criminal Court, Lancaster House, London, 16-17 May 2019. The papers discussed at the meeting were “intended to provide food for thought for an informal meeting. These papers do not purport to cover everything that might be discussed in a subject area...” Copy on file with FIDH.

Outreach in the **Palestine** situation in 2018.<sup>27</sup> The decision acknowledged that “victims play an important role in the Court’s proceedings,”<sup>28</sup> and that their rights are not limited to the judicial proceedings.<sup>29</sup> The Chamber reasoned that for victims to be able to exercise their rights, they should be provided with sufficient and accurate information.<sup>30</sup> However, notwithstanding the Chamber’s emphasis on victims and their rights, Palestinian civil society organisations consulted highlighted that, to date, the Registry has not undertaken any specific outreach or information activities for victims and affected communities. This is reinforced by information available on the Court’s website. The Registry’s first report on relevant outreach activities for instance simply stated that “pending the finalisation of the security assessment, the Registry considers that it cannot start engaging with external actors without exposing them to unnecessary risks.”<sup>31</sup> To date, the Registry only added basic and general information about the preliminary examination on the Court’s website. This does not seem to meet the Chamber’s request, nor the needs on the grounds, as it does not provide sufficient information nor put victims in a position to exercise their rights.

39. The Registry’s limited interpretation notwithstanding, the Pre-Trial Chamber’s decision – the first of its kind – is important as it acknowledges the need for outreach from an early stage, as soon as a situation is assigned to a Pre-Trial Chamber. This should become the standard approach in all currently ongoing and future preliminary examinations.
40. The current absence of outreach and communication activities during the preliminary examination phase puts the entire onus on civil society to keep victims and affected communities informed about relevant developments before the Court. This is exacerbated in situations where victims and affected communities are the main source of information for preliminary examinations, which is the case for many of the examinations opened *proprio motu*. Throughout the **Afghanistan** preliminary examination victims and civil society engaged significantly with the OTP and the Registry to provide information, traveled to The Hague, and attended Assembly of State Parties sessions to meet with Court officials to obtain information and with States Parties representatives to advocate for resources for the Court. Similar engagement was reported from civil society organisations in other situations.
41. However, civil society organisations participating in the KHRC – FIDH Nairobi Consultation have reported their challenges in obtaining even the most basic information from Court officials, describing the process as a “one way street” where only civil society provides information to the Court, often at the Court’s request. Court officials have been described as gatekeepers, and seem to enjoy complete discretion as to whether, when and whom they inform about developments, or about reasons for a lack of any development. It is also mostly international organisations who can afford to travel to The Hague, and to attend ASPs who can therefore engage with the Court during preliminary examinations. This only contributes to increasing the distance between the Court and those most affected, and is frustrating for those who have turned to the Court as the institution to obtain some measure of justice. It limits the potential participation of victims at the pre-authorisation stage, and deprives them from a sense of ownership over and an engagement with the ICC process.<sup>32</sup>
42. The absence of outreach and information activities at the preliminary examination stage, in combination with the difficulties in accessing information from the Court, also enables the spread of misinformation aimed at undermining the Court and its processes. Misinformation will be believed in the absence of accurate information. For instance, FIDH has observed a misinformation campaign in the **Philippines** by groups closely linked to

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27. ICC, Pre-Trial Chamber I, *Situation in the State of Palestine, Decision on Information and Outreach for the Victims of the Situation*, ICC-01/18-2, 13 July 2018, at [https://www.icc-cpi.int/CourtRecords/CR2018\\_03690.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_03690.PDF).

28. *Ibid.*, para. 8.

29. *Ibid.*, para. 10.

30. *Ibid.*, para. 11.

31. Pre-Trial Chamber I, *Public redacted version of “Registry’s Initial Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation”*, 12 November 2018, ICC-01/18-3-Conf, 19 November 2018, para.12, at [https://www.icc-cpi.int/CourtRecords/CR2018\\_05441.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_05441.PDF).

32. See also further below, Chapter V on Victim Participation.



the government of President Rodrigo Duterte on the consequence of withdrawing from the Rome Statute on the preliminary examination after the government's withdrawal from the ICC came into effect. It would have been appropriate to communicate and disseminate information, including in local languages, that would counter misinformation suggesting that the country escaped an investigation by withdrawing from the ICC's founding treaty.

43. The lack of engagement with victims and affected communities also deprives Court staff of opportunities to learn about the context in which the crimes were/are committed, to understand the situation of victims, their perspectives and experiences and to respond directly to their needs. This is exacerbated by the fact that the Court has a tendency to assign and recruit staff members that are not from the relevant country, and who do not speak the local language(s).

44. A representative of a Georgian civil society organisation highlighted:

The preliminary examination stage is not formalised for victims. Everything was confidential, and there was no strategy in place on how to communicate with victims. Many victims live in remote areas and villages, they don't have access to internet. Communication means were not realistic.

Victims were not informed regarding their rights. This could have motivated the victims and ensured that they were actively engaged. It was very important for them to receive information about their rights. The OTP was not carrying out outreach. It was made clear to us that OTP did not do much, and they would point to missions and that their role was not to carry out outreach. So the pre-authorisation phase was done without outreach.

45. The Court's approach to outreach and communication during the preliminary examinations phase seems counterproductive to the OTP's stated ambition that these examinations should contribute to the triggering of domestic accountability efforts. It is also contrary to the Court's mandate to provide justice to victims, as it fails to take into account their right to information, a pre-condition to exercise their rights under the Statute. It also contributes to the empowerment of victims as agents of justice, another stated objective of the Court.

## II.4. Recommendations

### Cluster 1 – Governance:

- ❖ The Court as a whole should commence systematic and sustainable public outreach activities to raise awareness about and increase the understanding of the Court's mandate and work in a given situation, starting at the preliminary examination phase. Public awareness activities should be undertaken jointly by the OTP and the Registry, and commence no later than a situation is assigned to a pre-trial chamber, or when the Prosecutor indicates in the annual report on preliminary examinations that a decision is forthcoming.
- ❖ The Court should also undertake tailored and targeted outreach campaigns to respond, in a timely manner and in the relevant languages, to exceptional circumstances including situations of withdrawals of States Parties affected by a preliminary examination from the Court's membership, threats against the Court and misinformation about the Court's jurisdiction or operations.
- ❖ As part of its outreach activities, relevant Organs, when carrying out visits to the situation under preliminary examination, should systematically include meetings with civil society, affected communities and victims.

- ❖ The OTP should systematically submit a needs-based budget proposal that ensures adequate human resources in the section responsible for preliminary examinations analysis. The OTP should review its human resources structures to ensure linguistic and geographical diversity and a gender balance in relevant teams. Where it is not possible to hire relevant experts as staff, this could be done for instance through: secondments, remunerated visiting professional opportunities, and temporary or short term assignments to fill specific temporary gaps.<sup>33</sup>

## **Cluster 2 – Judiciary and judicial processes**

- ❖ The judiciary should instruct the Registry's Public Information and Outreach Section (PIOS) to commence engaging in the situation by implementing public information and outreach programmes as soon as a situation is assigned to a pre-trial Chamber. Any outreach conducted by PIOS should be tailored to the specific situation, take into account domestic civil society views and perspectives and should focus on providing adequate information on the ICC process and on how victims and affected communities can engage with it, including the rights of victims, as relevant. PIOS should report regularly on its relevant outreach activities.
- ❖ The judiciary should clarify the role of the Registry's Victim Participation and Reparations section at the pre-authorisation stage, and direct the section to assist victims and affected communities in accessing information on proceedings at the Court and in participating in these proceedings when their interests are affected.
- ❖ The judiciary should strive to make key decisions accessible to the situation and affected communities by ensuring that: key decisions are translated or provided in a summary form in the local languages at the time of issuing the decision, and that key decisions are not pronounced on public or religious holidays in countries affected by the decision.

## **Cluster 3 – Preliminary examinations, investigations and prosecutions**

- ❖ The OTP should introduce 'soft' time-limits on States during which the States should demonstrate, against specific benchmarks set by the OTP, the willingness and genuineness of domestic proceedings in situations before preliminary examinations at the Court. These time-limits can be reviewed by the OTP on an exceptional basis and be guided by victims' rights and interests, notably the right to access justice with no delay.
- ❖ The OTP, when assessing a State's efforts to secure accountability at domestic level, should take into account the existence / continued perpetration of Rome Statute crimes and serious human rights violations as an indication that domestic processes do not bear any imminent prospect of success, and, provided that all other criteria are met, proceed promptly to request the opening of an investigation.
- ❖ The preliminary examination phase as a whole, whether short or long, should be optimised so that it properly lays a solid foundation for an investigation should the Prosecutor decide to proceed. This includes: engaging the investigation and prosecution teams in a preliminary examination phase, conducting risk assessments to evidence, and preserving evidence at the preliminary examination phase.

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33. According to the OTP, the OTP has engaged the OTP has engaged experts from the roster of Justice Rapid Response to increase its capacity or for special skills, see ICC, OTP, Response of the ICC Office of the Prosecutor to an Outcome Report and Recommendations from Open Society Justice Initiative (OSJI) and Amsterdam Law School (University of Amsterdam) based on a workshop held on 25-26 March 2020 on Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms and Practices, 8 May 2020 (ICC, OTP Response, May 2020), p.8, at <https://www.icc-cpi.int/itemsDocuments/200508-OTP-response-to-OSJI-UoA-report.pdf>.

### III. Investigations, Case Selection and Prioritisation

46. Investigations carried out by the OTP are critical to understanding the facts in a situation, the shaping of cases and ultimately, for the establishment of truth, justice and reparations for victims. The Prosecutor is obligated to equally investigate exculpatory and incriminating circumstances in assessing whether crimes have been committed and identifying those responsible. The challenges at this phase do not only pertain to the collection of evidence but also extend to succeeding in setting such evidence, *accurately*, into context.<sup>34</sup>
47. There are currently, thirteen situations under investigation, initiated through the different triggering mechanisms set out in the Rome Statute: (i) State referrals (Uganda, the Democratic Republic of Congo (DRC), Central African Republic I (CAR I), Mali, Central African Republic II (CAR II)); (ii) Security Council referrals (Darfur/Sudan, Libya); and (iii) *proprio motu*, following judicial authorisation (Kenya, Côte d'Ivoire, Georgia, Burundi, Bangladesh/Myanmar, Afghanistan).
48. The OTP has submitted twenty-eight cases to the Court's Chambers. Among these cases, three concluded with convictions for Rome Statute crimes: Al Mahdi (Mali), Katanga (DRC) and Lubanga (DRC); one with a conviction for offences against the administration of justice: Bemba et al (CAR I); two concluded with acquittals: Bemba (CAR I main case), Ngudjolo Chui (DRC); three charges were not confirmed or withdrawn: Abu Garda (Darfur), Kenyatta (Kenya) and Mbarushimana (DRC), and one case was terminated after trial had begun: Ruto and Sang (Kenya). Eighteen cases are still open, out of which six have ongoing proceedings: Al-Hassan (Mali), Ongwen (Uganda), Yekatom and Ngaisonna (CAR II), Abd-Al-Rahman (Darfur); and appeals proceedings in Gbagbo and Blé Goudé (Côte d'Ivoire) and in Ntaganda (DRC). The remaining cases are pending because the accused remain at large.
49. Civil society organisations participating in the KHRC – FIDH Nairobi Consultation underlined how they are working towards and waiting for the investigation phase, as it is there that the OTP is finally equipped with its investigative powers. Once an investigation is opened, there is an expectation that the OTP will spend time in the relevant country and interact with the relevant stakeholders to learn more about the context in which the crimes were committed, while maintaining its independence. However, participants from different situation countries shared a perception that the OTP seems “to do the bare minimum” at this stage. Concerns expressed over OTP investigations go beyond the failure of cases due to insufficient evidence and include frustrations over superficial investigations more broadly, in particular in regards to limitations to charges, cases and impact of the selected cases and charges in situations before the Court.
50. When examining the OTP's investigative record it is important to acknowledge the external factors that have significantly impacted the Prosecutor's performance and success. Particularly, the significant financial constraints and near micro-management of the Prosecution's budgetary lines by States Parties have impacted the depth and effectiveness of ICC investigations, and the team's ability to have a robust presence on the ground.<sup>35</sup> Additionally, the OTP is almost left alone with the task of dealing with non-cooperation by States Parties and States under cooperation obligations pursuant to UN Security Council (UNSC) resolutions. To date, the ASP and the UNSC have taken

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34. Carsten Stahn, *A Critical Introduction to International Criminal Law*, in: Cambridge University Press, 2019, p. 332 (Stahn, 2019).

35. FIDH has been concerned by the fact that the Court does not submit need-based budget proposals, a consequence of States' pressure on the Court not to request increases in its annual budget, and about the manner in which States Parties are negotiating with the Court in the context of the annual budget proposal, which seems to amount to micro-management of the Court's operations by dictating which budgetary lines can stay and which ones must go, see for instance, FIDH, *Recommendations for the 18<sup>th</sup> Session of the ICC Assembly of States Parties*, 2-7 December 2019 (FIDH, Recommendations for 18<sup>th</sup> Session of the ASP, 2019), pp.12-14, at <https://www.fidh.org/IMG/pdf/asp743aweb.pdf>.

insufficient and inadequate measures in response to non-cooperation that have showed no impact or success in compelling States to cooperate with the ICC.<sup>36</sup>

51. However, aside from external constraints, investigations conducted by the OTP to date have given rise to a number of concerns. These include: (i) the OTP's investigative methods and strategies; and (ii) a failure to adequately consider and engage the local context. These will be examined in turn.

### III.1. Investigative methods and strategies

*“Civil society was informed by the OTP early on in the investigation that the Prosecution intends to pursue three persons from each camp. We thought then: how could you already know?” (Civil society representative from Côte d'Ivoire participating in the KHRC – FIDH Nairobi Consultation)*

52. Insufficient investigations have resulted in what is referred to as the OTP's “evidence problem.”<sup>37</sup> This problem manifests itself in two consequent problems: the dropping or non-confirmation of charges in whole or in part due to insufficient investigations,<sup>38</sup> and the total collapse or failure of cases. For example, in the Laurent Gbagbo and Charles Ble Goude case in the situation in **Côte d'Ivoire**, the Pre-Trial Chamber conducting the confirmation of charges hearing adjourned the hearing due to insufficient evidence and asked the Prosecutor to provide further evidence or to conduct further investigations. The Trial Chamber then acquitted both defendants without the defense presenting their case, finding the Prosecution's case and evidence exceptionally weak.<sup>39</sup>
53. Among the reasons attributed to the inadequacy of investigations, civil society consulted for this highlighted concerns over the OTP's methods to carry out investigations. From interactions with the OTP in The Hague and in situation countries, it appears that ICC investigations have thus far been conducted through few, short missions to situations under investigation or to neighbouring countries when access (due to security or non-cooperation) is a challenge. Despite having no legal restrictions on placing investigators for longer periods of time in a situation, it appears that the OTP has thus far opted for a mission-based approach to its investigations. Longer posting periods of investigators (beyond the 10-14 days investigative missions) seem not to be among the methods used by the OTP.
54. Participants in the KHRC - FIDH Nairobi Consultation expressed their concern that such an approach will not produce robust results. A participant from the **DRC** who had frequent interactions with investigators visiting Ituri observed that these limited missions, and the small-sized teams conducting them, were insufficient to develop an in depth understanding of the context in which the crimes were committed. In their view, this prevented the OTP from going up higher in the chain of command, which in turn had an impact on the charges and identified cases which fail to reflect the scale and gravity of the conflict, and the victimisation experienced by the local population.

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36. The sessions of the ASP and its resolutions emphasise States Parties' obligation to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction, including with regard to the execution of arrest warrants and surrender requests, as well as other forms of cooperation set out in article 93 of the Rome Statute cooperation obligation (See for example : Resolution ICC-ASP/18/Res.3). Further, the ASP has adopted procedures relating to non-cooperation (see Annex II to Resolution ICC-ASP/17/Res.5), a tool kit on non-cooperation, and has active focal points on non-cooperation.

37. Christian M. De Vos, *Investigating from Afar: The ICC's Evidence Problem*, in: *Leiden Journal of International Law*, 26, pp. 1009-1024, 2013, p. 1009 (De Vos, 2013).

38. FIDH has also paid particular attention to the impact of the OTP's investigative practices on the inadequate investigation of SGBC, leading to SGBC charges being either withdrawn or dropped by the Prosecution, unconfirmed by the pre-trial chambers in the confirmation of charges phase, and the low conviction rate for SGBC crimes to date. For more information, see: FIDH, *Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond, November 2018*, p. 14-20, at [https://www.fidh.org/IMG/pdf/sgbv\\_721a\\_eng\\_au\\_20\\_nov\\_2018\\_13h\\_web.pdf](https://www.fidh.org/IMG/pdf/sgbv_721a_eng_au_20_nov_2018_13h_web.pdf).

39. See transcript of the hearing of Pre-Trial Chamber I, with the oral decision acquitting Laurent Gbagbo and Charles Blé Goudé, 2019 : *Transcript of the hearing, 15 January 2019*, p. 4.

55. Among other examples, local actors in the case against Thomas Lubanga were dismayed by the fact that after two years of investigating, the Prosecutor only pursued one case with the single charge of conscripting child soldiers.<sup>40</sup> Similar concerns were expressed in the situation in **Mali**, after the OTP pursued a single war crime charge for the destruction of cultural sites in Timbuktu in its case against Al-Mahdi, with civil society calling upon the prosecution to pursue additional and more representative charges.<sup>41</sup>
56. A civil society representative from the **Central African Republic** also commented on the logistical impact of these short missions on the engagement with stakeholders in the situation which did not provide sufficient time for local stakeholders, including civil society organisations, to provide information to the OTP. Investigators would repeatedly only contact local stakeholders after their arrival to the country for information or assistance. However, due to the short notice, these actors struggled to prepare their input in time, often only to realise that the investigators had left.
57. Other observations over the OTP's investigatory methods include a perception that investigators did not come with an open mind but a pre-conceived idea on who they would like to see prosecuted, including at early stages of the investigation. A participant from the **Côte d'Ivoire** situation stated that "civil society was informed by the OTP early on in the investigation that the Prosecution intends to pursue three persons from each camp. We thought then: how could you already know?" The same observation was made in relation to the situation in **Kenya**, where participants stated that the Prosecution planned to target three suspects from each side. The participant added: "in principle not a bad idea to charge suspects from each side, if it was led and supported by evidence".
58. As put by one of the legal representatives of victims in the Kenya situation: "victims do not want to see cases fail". In other words, pursuing those most responsible, or all parties to a crisis or a conflict, is important, but it must be led by evidence.
59. While some of the investigations referred to above pre-date 2012 (at least in their early stages) and were commenced under the first prosecutor who focused on a specific set of suspects or incidents to investigate in an accelerated manner, civil society consulted expressed that these methods can still, to an extent, be observed in more recent investigations. A participant from the **Central African Republic** shared that investigators in the CAR II situation seem to be determined to investigate a specific set of locations, where evidence is not necessarily available and where the extent of victimisation in the situation is not adequately reflected. They also mentioned that the OTP failed to consider input from civil society on other sources of information, as well as on leads on other incidents and geographical focus. A participant from **Georgia** added that investigators seemed to come informed as opposed to coming to investigate.
60. A shift in strategy under the current Prosecutor can be observed in the strategic plans from 2012 onwards, as the OTP is committed to conducting more holistic, in-depth investigations. This is a positive development and cases pursued since have been broader and more representative in terms of charges. Additionally, and as observed in the most recent strategic plan for 2019-2021, the OTP no longer assumes that evidence against those at the top of the command chain is, or will eventually be, available. This is evidenced by the increased willingness from the OTP to pursue, when appropriate, narrower, consequential cases against mid-level or notorious perpetrators rather than build towards successful cases against high level perpetrators. Such an approach may indeed contribute to visible accountability and increase the speed and efficiency of investigations and prosecutions. However, the inability to predict resource requirements for such an approach places at risk the feasibility of eventually bringing cases against those most responsible, a concern also shared by the OTP.<sup>42</sup>

40. Pascal Kambale, *The ICC and Lubanga: Missed Opportunities*, in: SSRIC Forums: African Futures, 2013.

41. Joint press release by FIDH and AMDH (Association Maliennne des Droits de l'Homme) and 16 other human rights organisations, *Mali: The hearing of Al Mahdi before the ICC is a victory, but charges must be expanded*, 30 September 2015, at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/mali-the-hearing-of-abou-tourab-before-the-icc-is-a-victory-but>.

42. FIDH, *Comments on the 2019-2021 Draft Strategic Plan of the Office of the Prosecutor*, 10 June 2019, para. 14, at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/fidh-comments-on-the-2019-2021-proposed-strategy-of-the-icc>.

61. Conducting holistic, in-depth investigations in an environment of limited resources (thereby, making it longer to complete) is a concern particularly after a lengthy period of preliminary examination. A civil society representative from the situation in **Georgia** stated that after seven years of preliminary examination, the investigation is now in its fourth year. Over a decade has passed since the 2008 war in and around South Ossetia and victims are starting to lose hope in the prospects of justice. Elderly victims of the conflict might simply not live to see the day when cases against those allegedly responsible will materialise. This is exacerbated by the limited information available on the progress of the Court's investigation, and with what is perceived as inadequate outreach to victims and affected communities despite the presence of a field office in the country.
62. Outreach and public information seem to also be limited at the investigations as well as subsequent stages, despite the triggering of the Registry's outreach mandate. In some cases, outreach was done too late, including around key judicial decisions. This was the case following the acquittal of Bemba on appeals, where FIDH learned from victims and affected communities weeks after the judgment that they did not understand what happened.<sup>43</sup> Similar concerns were expressed about the acquittal decision in the case against Gbagbo and Ble Goude, with the full written judgment being provided only in English, and six months after the acquittal. The lack of adequate outreach and communication in particular around decisions viewed as negative by victims easily causes resentment and can lead to misinformation and misconception over the Court and its work. This complicates an already difficult job for the OTP where in these two situations, investigations are still ongoing.
63. Moreover, investigations conducted more recently are taking place in parallel to domestic efforts, making close coordination between the ICC and domestic actors crucially important. The situations of **Mali**, **CAR II** and **Côte d'Ivoire**, where FIDH and member organisations work on victim representation domestically, are relevant examples. The cases pursued by the ICC, where the same incidents and sometimes the same suspects are investigated by both the ICC and the domestic authorities, suggests an absence of a strategy for complementarity, and a strategy on what cases the ICC should prioritise. For instance, in the **Mali** situation, while FIDH and its Malian member organisations welcomed the transfer of Al-Hassan to the ICC, civil society organisations highlighted then that Al-Hassan could have been tried before domestic courts.<sup>44</sup> In addition, the Islamic Judge who issued decisions subsequently carried out by Al-Hassan and for which the latter is facing trial is walking around freely in Timbuktu with complete impunity. As such, it was unclear why that judge, who is superior to Al-Hassan, was not also pursued by the OTP.<sup>45</sup>
64. Finally, civil society participating in the Nairobi Consultation raised a number of concerns over situations where the OTP is investigating multiple parties to a conflict or a crisis simultaneously. These include perception issues in the -to date- one-sided prosecutions in the **Côte d'Ivoire** and **CAR II** situations. In Côte d'Ivoire, dissatisfaction over delays in cases against the pro-Ouattara side of the conflict is exacerbated by the "too close" relationship and cooperation the OTP is perceived to have exercised with the government in the situation, a party to the crisis itself. In the CAR II situation, civil society expressed concerns over the manner in which the case against Yekatom and Ngaissona was presented in the Courtroom. It was felt that the case presentation might incite religious violence in an already delicate situation by *overly* portraying the conflict as religious, and the impact that such a portrayal may have on the ongoing investigation against the seleka, the other party to the crisis.

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43. FIDH, *The Bemba Case: Heavily criticised, the ICC must maintain victims' legal representation as the establishment of assistance programmes for victims is awaited*, 1 October 2018, at <https://www.fidh.org/en/region/Africa/central-african-republic/the-bemba-case-heavily-criticised-the-icc-must-maintain-victims-legal>.

44. According to information available to FIDH, Malian authorities also investigated him, and a complaint against him was pending at the time he was transferred to the ICC.

45. FIDH, *Mali – Al Hassan to the ICC: a milestone for justice*, 3 April 2018, at <https://www.fidh.org/en/region/Africa/mali/mali-al-hassan-to-the-icc-a-milestone-for-justice>.

## III.2. Understanding and Engaging the Local Context

*“ICC investigators needed crash courses on the situation. They did not know who hates whom, did not understand speaking in codes, were not familiar with ancient hatreds.” (civil society representative from Kenya participating in the KHRC – FIDH Nairobi Consultation)*

65. Geographical distance between where crimes were committed and where prosecutions are conducted creates complex, challenging work dynamics. The challenges often pertain to accessing and collecting evidence, particularly when time has lapsed between the commission of crimes and the initiation of an investigation. Conducting sensitive, and confidential, investigative activities in unfamiliar, and often hostile, environments, without compromising the security of victims, witnesses or staff of the ICC or those cooperating with it is another significant challenge.
66. All participants from situation countries in the Nairobi consultation agreed that the ICC is still perceived as a distant institution that has not succeeded in bridging the gap between The Hague and the situations before it. This goes hand in hand with a perception that the Court has limited knowledge, appreciation of and interest in the local dynamics and actors within a situation, which contributes to the marginal success, and impact, the Court has yielded in a number of situations.
67. Given its nature as a Court of last resort, the ICC is most likely to start investigating several years after the commission of crimes. Even if investigations were carried out promptly (which occurred exceptionally in the situations in **Darfur/Sudan, Libya** and **Burundi**), the situations before the Court are often embedded in deep historical contexts or earlier conflicts that necessitate in-depth understanding and appreciation of local dynamics and actors.
68. In contrast to the ICC being a late responder, numerous actors are nearly immediately active on the ground either as first responders in providing material or legal assistance to victims and affected communities, or in the documentation and investigation of these crimes. These actors include civil society (local and international), UN bodies, and other international or regional mechanisms. Due to their presence in the situation for years, these actors are intimately familiar with the situation’s demands for and failures in accountability.<sup>46</sup>
69. The OTP’s investigations have often been conducted by what is described as “international teams” that carry out short missions in and out of the country. The investigation teams (in all known examples to FIDH) do not include nationals of the situation. Mostly, team members are not from the same region of the situation, do not speak the local language, and have limited to no first hand knowledge of the geographical, historical and cultural background to the situation. Beyond the composition of the team, the ICC practices a distancing act in seemingly preferring to isolate itself from the domestic realm and local actors for purposes of neutrality and impartiality.<sup>47</sup>
70. This lack of engagement with the situation country is problematic for several reasons: 1. the ICC teams do not sufficiently exchange with and learn from local stakeholders (including civil society, community leaders, international bodies) and their experiences, and risk making the same mistakes already made by these actors; 2. the ICC understanding of the context in which the crimes investigated were committed remains rather superficial, or flawed, which impacts on the (presentation of) the evidence; and 3. the lack of engagement prevents the OTP from developing an understanding of the views, perspectives and experiences of victims, which can also have negative impacts on the presentation and collection of evidence, and the realisation of victims rights enshrined in the Rome Statute.

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46. See, for example, Elena Baylis, *Outsourcing Investigations*, in: University of Pittsburg, Legal Studies Research Paper Series, 2009, p. 139-140 (Baylis, 2009), highlighting the Special Investigation Unit developed by MONUC in coordination with UNHCR, for the purposes of investigating war crimes and crimes against humanity.

47. Phil Clark, *Distant Justice : The Impact of the International Criminal Court in African Politics*, Cambridge University Press, 2019, p. 13, pp. 21-50 (Clark, 2018).

71. In the view of a participant in the Nairobi Consultation from the situation in Kenya: “International investigators needed crash courses on the situation. They did not know who hates whom, did not understand speaking in codes, were not familiar with ancient hatreds.” The impact of a limited understanding of the context was observed by one of the legal representatives of victims in the situation: “[T]he Prosecution completely underestimated the sophistication, manipulation and ruthlessness of the Kenyan elite.” This opinion is shared by the external expert review and lessons learned from the Kenya situation.<sup>48</sup> Had more weight and consideration been given to the local context, including what such context produced in terms of intimidation, obstruction and inaction,<sup>49</sup> the Prosecution may have relied on other types of evidence than insider witnesses that would not have succumbed to intimidation and threats by local authorities.
72. Crucial to understanding and giving due weight to the local context is hiring nationals from the situation itself to work for the OTP on the situation. One participant highlighted: “it is essential that ICC investigation teams include team members from the situation. They can be temporary staff, short-term staff or whatever is possible in terms of recruitment to ensure that type of knowledge and expertise is reflected in the team.” Where serious concerns might arise, including potentially security risks, participants stated that the OTP could at the very least hire from a neighbouring country, where knowledge of the situation and language skills could be shared<sup>50</sup>.
73. A participant in the Nairobi Consultation with prosecutorial work experience in the International Criminal Tribunal for the former Yugoslavia highlighted the positive impact of hiring investigators who were nationals from the situation in the success of investigations. More recent examples also include the strategy of hiring Arabic-speaking staffers at the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (the IIIM or the Syria Mechanism). This recognises and gives effect to the importance of having linguistic and geographical backgrounds as close as possible to the situation of investigations, and to the future of accountability work in this region including through building capacities of persons from these regions.<sup>51</sup>
74. Also highlighted was the importance of having local investigators for the collection of linkage evidence, an area the ICC has so far struggled with, leading to the collapse of cases or the withdrawal of charges. Simply put, international investigators are more visible, and thereby more identifiable, within a situation than national ones.<sup>52</sup> They may also be less capable of reconstructing information necessary for the collection of linkage evidence, including information pertaining to chains of command and decision making processes in a given situation. Mixed investigation teams could be one factor that would strengthen the performance and the impact of the Court and its work.<sup>53</sup>
75. It is worth stating that nothing in the statutory framework prevents the Court from hiring staff from situation countries. The current approach of the OTP to not hire nationals from situation countries seems to be based on a concern over safeguarding the impartiality and

48. ICC,OPT, *Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation*, 2019, p. 4 (Expert report on Kenya, 2019), at <https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf>.

49. Fergal Gaynor and Anushka Sehmi, *The Perfect Storm: Obstruction, Intimidation and Inaction in the Kenya Situation*, in FIDH: Victims at the Center of Justice From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC, 2018 (Gaynor & Sehmi, 2018).

50. See, ICC, OTP Response, May 2020 : according to the OTP, it is currently engaging locally recruited Situation Specific Investigation Assistants in four situations and is pursuing it further, pp.9-10 The organisations and the participants consulted were not aware of this practice and did not have any interaction with such assistants. While more engagement of local experts is a positive development, the OTP has not provided information on the precise role of the investigation assistants and the duration of their engagement.

51. See for more on this: [IIIM report to the UNGA](#), August 2018, para. 54; [IIIM report to the UNGA](#), February 2018, para. 32 and [IIIM report to the UNGA](#), February 2019, para. 47.

52. Stahn, 2019, p. 335.

53. *Ibid.*



neutrality of an investigation. It might also be a consequence of a rigid human resources structure that the Court as a whole is embedded in, where staff of the Court can spend more than 15 years working on different situations even when their skill set no longer correspond to work requirements, for linguistic or other reasons.

76. Civil society consulted dismissed arguments of neutrality as a reason not to hire local staff. "Locals are not monsters; professional persons do exist and can work at the OTP impartially and independently". The impartiality argument seems also carrying little weight considering that local stakeholders are often the same persons the ICC entrusts/relies on in fulfilling the complementary scheme that underpins the work of the Court, in particular where initiating investigations and prosecutions is driven and implemented by local actors. The OTP should not appear selective in assuming when and where these persons can be impartial.
77. Further, it is important to note that it is impossible for the OTP to avoid the recruitment of local staff. Locals are inevitably recruited, for instance, as interpreters or to provide logistical assistance. A civil society representative from the **DRC** stated that given the international character of the investigating team in Ituri, interpreters had to be hired and they were hired from the community itself. In an ethnic, tribal conflict, hiring interpreters from the community to assist investigators might have been a less strategically wise choice than hiring, for instance, a P-level staff as an investigator from (elsewhere in) the Congo who could have worked without the need for interpretation.
78. In addressing the gaps in resources, accessibility, cultures and languages, the OTP (and the ICC as a whole) has relied and continues to heavily rely in its work on intermediaries who facilitate its field activities. The relationship between the ICC and intermediaries is complex, and the framework governing it has not been subjected to a public review (which was due in 2019). That said, in a consultation carried out by FIDH in 2019, civil society largely found that while acknowledging the advantages of groups working with the OTP as intermediaries, this relationship in its nature is not reciprocal and cannot be viewed as a measure that would fill the gap in the OTP's investigation teams.
79. The absence of local staff in relevant OTP teams may also be part of a larger concern regarding staffing at the Court. While there are many hard working and highly qualified individuals working at the Court, positions rarely become available as staff holds on to positions in headquarters for periods spanning over a decade, including when their professional backgrounds no longer correspond to the needs of the Court, or where their performances have not been satisfactory. This not only prevents the Court from renewing the set of expertise available to it based on the situations before it, it also creates a situation where poor-performance has nearly no consequence as staff are "protected" against removal from their positions. In this respect, participants of the Nairobi Consultation recommended that ICC staff at the professional category and above is subjected to term limits similar to those in OPCW or the OSCE, or that staff would have to reapply for their positions as in UNHCR or be required to reapply to positions in different duty stations every five years as done in some UN agencies. The overall message is that ICC staff should only be allowed to stay on for longer periods in truly exceptional circumstances.

### III.3. Recommendations

#### Cluster 1

- ❖ The OTP should develop, and propose budgets for, robust investigation teams, that are adequate in size, gender-balanced and reflective of the necessary experience for investigating a situation. A needs-driven budget should envision resources sufficient for carrying out in-depth investigations in a timely manner, so that investigations are not stretched out over years due to lack of resources<sup>54</sup>.
- ❖ The ASP should propose a serious, robust strategy, including concrete measures, to enforce cooperation and address instances of non-cooperation by States Parties.
- ❖ The ASP should request the UNSC to develop a framework based on which the UNSC would play an active role in promoting cooperation with the ICC in situations it referred to the Court, and in the execution of arrest warrants.
- ❖ The Court, and the OTP in particular, should introduce term limits to staff at the professional category, similar to structures in place in other institutions such as the OPCW and the OSCE. Other measures that should also be considered include processes where staff members are periodically requested to re-apply for their positions or to rotate to other departments or duty stations.

#### Cluster 2

- ❖ The judiciary should strive to make key judicial decisions available in writing at the time of their pronouncement, allowing adequate public information and outreach to be conducted in a timely manner.

#### Cluster 3

- ❖ The OTP should opt for increased field-based investigations, including, where possible, having situation-based investigators, or having investigators deployed to the situation in question for longer periods as opposed to carrying out short investigative missions.
- ❖ The OTP should be more open to the hiring of nationals of situation countries in the investigation teams. Where this is not possible, the OTP should strive to hire persons from neighbouring countries or from the same region or sub-region with similar cultural, geographical, historical and/or linguistic skills.
- ❖ Early on, the OTP should develop and communicate with the relevant stakeholders an investigation strategy that sets out what the Prosecution seeks to achieve in its intervention in a situation, what legacy it envisions to leave behind, and where relevant, its strategy for complementarity. This strategy should be updated regularly in consultation with the same stakeholders and aim to clarify the Prosecution's investigative focus and its prosecution's case selection and prioritisation. It should also set out the resources needed for implementing the strategy, which would in turn contribute to transparent budgeting.
- ❖ The OTP should be led in its prosecutions by evidence only. Despite pressure on the OTP to prosecute all parties to a crisis to avoid one-sided prosecutions, and a desire to go up the chain of command, cases pursued should be based solely on evidence available to the OTP. Issuing arrest warrants for deterring a perpetrator or a group for committing crimes should not be a criterion for selecting cases.

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54. See further, ICC, OTP Response, May 2020 : according to the OTP, the Basic Size Document developed by the OTP (where a standard composition and size of an investigation team is developed) cannot be consistently implemented due to budgetary constraints. FIDH and KHRC duly acknowledge said constraints in this report but nonetheless believe that the OTP's budgetary proposals have not been needs-based, and do not capture the standards reflected in this document.

## IV. Rights of victims before the ICC

80. This chapter focuses on key aspects of how the Court has sought to facilitate victim participation, namely the victim participation application process, the institutional support offered to victims and their legal representatives, and victims' right to choose counsel.<sup>55</sup>
81. The Rome Statute grants victims a central role in the justice process and remedies the earlier exclusion of victims before ad-hoc tribunals, where victims' main way to interact with the justice process was as witnesses. In Article 68(3), the Statute enshrines the right of victims to participate in proceedings where their personal interests are affected. With the help of legal representatives, victims may present their views and concerns to the Court, examine witnesses and experts during trial, and under certain circumstances, present evidence.<sup>56</sup> Victims can also seek reparation for the harm they have suffered under Article 75 of the Statute (see next Chapter).
82. The right to victim participation has long been considered innovative given its novelty in international criminal justice processes. It was therefore to be expected that it will take the Court time to identify modalities for effective participation, and to ensure that it is a process meaningful for victims, recognising victims as rights holders, empowering them, and contributing to their healing.<sup>57</sup> Victim participation can also strengthen the work of the Court, as victims provide important factual and cultural context regarding the crimes committed and their impact. It can help the Court to gain legitimacy and support.<sup>58</sup>
83. However, consultations with civil society organisations working with victims and with lawyers representing victims before the Court show that after nearly two decades, the contours of victims' procedural rights and modalities for their participation have yet to be determined. Overall, victim participation was characterised as overly complex, bureaucratic, inconsistent, and far removed from the reality many victims find themselves in. Additionally, misconceptions over the scheme of victim participation and its contribution to the criminal justice process can still be observed years on after the Court began its work.<sup>59</sup> Several experts consulted severely criticised the entities within the Court who are specifically mandated to work with and for victims as lacking the basic required skills in working with vulnerable victims and understanding of a "do no harm approach". The consultation overall painted an image of a Court that has to instil significant institutional change, and that needs to develop a vision of how it views victims' rights enshrined in the Statute, including participation, and what needs to be put in place to enable meaningful participation.

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55. For a more comprehensive account of the practice of victim participation, see FIDH, *Victims at the centre of justice: Reflections on the Promises and the Reality of Victim Participation at the ICC (1998 – 2018)*, 11 December 2018, at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/victims-at-the-center-of-justice-reflections-on-the-promises-and-the-reality>; see also FIDH, *Enhancing Victims' Rights before the ICC: A view from Situation Countries on Victims' Rights at the International Criminal Court*, November 2013, at [https://www.fidh.org/IMG/pdf/fidh\\_victimsrights\\_621a\\_nov2013\\_id.pdf](https://www.fidh.org/IMG/pdf/fidh_victimsrights_621a_nov2013_id.pdf).

56. Trial Chamber IX, *Prosecutor v. Dominic Ongwen, Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests*, ICC-02/04-01/15, 6 March 2018.

57. See Independent Panel of experts report on victim participation at the International Criminal Court, July 2013 (Independent Panel on Victim Participation, 2013), para.4, at <https://redress.org/wp-content/uploads/2017/12/July-Independent-Panel-of-experts-report-on-victim-participation-at-the.pdf>

58. See further FIDH, *Five myths about victim participation in ICC proceedings*, December 2014, at <https://www.fidh.org/IMG/pdf/cpi649a.pdf>.

59. Ibid.

## IV.1. Outreach to victims and affected communities

*“The Court does not listen sufficiently to the victims” (participant in KHRC - FIDH consultation)*

84. According to victims’ lawyers consulted, the Court’s own organs are not clear on how to best make participation work and what a meaningful process should look like. This has resulted in inconsistent approaches and made it difficult for victims’ lawyers and civil society working with victims to predict and explain to victims what participation will entail. The absence of an outreach strategy that would coordinate outreach between the different organs of the Court has exacerbated this situation. Indeed, outreach does not appear to be a priority area for all relevant organs of the Court.
85. Regular and targeted outreach to victims and affected communities at all stages of the proceedings however is vital to ensure adequate information among victims with a view to advancing meaningful participation.<sup>60</sup> This seems particularly evident in light of the Court’s location, the complexities of the participation procedure, and the challenging situation most victims will be in when participation in ICC proceedings might be an option.
86. The situation of **Libya** underlines the challenges of realising the Court’s participation mandate in the absence of effective outreach by all Court entities: while the UNSC referred the situation to the ICC in February 2011, and the OTP opened an investigation a week later, only nine victims have filed applications for participation in the proceedings to date. There exists a “huge lack of knowledge about the ICC”, with the only somehow known organ of the Court being the OTP, and no knowledge about the type of support victims might be able to obtain from entities within the Registry. The absence of an ICC presence in Libya, or neighbouring Tunisia, furthermore complicates victims’ engagement with the Court. This is exacerbated by the fact that relatively little information about the situation specifically, and about victims’ rights before the Court generally, is available in Arabic. In addition, victims and affected communities have found it difficult to access information and navigate the English or French website, to reach the relevant sections were information might be provided in Arabic translations. As victims are particularly concerned about reprisals should they approach the ICC, they are interested in better understanding what can be done to assist them in the present security context. However, such information is not forthcoming from the ICC, and it appears the Victim Participation and Reparation Section (VPRS, see below) is not active in the Libya situation. This not only results in a low number of victims participating, but also leads to misunderstandings, for instance, that if you apply as a victim to participate in proceedings, you are also a witness and that therefore your identity will need to be disclosed.
87. In the **Darfur/ Sudan** situation thousands of victims are residing in refugee camps in neighbouring Chad. Based on missions conducted by FIDH and its Sudanese member organisations in 2018 and 2019 to these camps, the affected population, including victims, have not seen Court staff in years or at all.<sup>61</sup> According to refugees interviewed, “many – in particular the women interviewed – were not aware of the existence of the ICC, nor of the issuance of arrest warrants against Sudanese officials for crimes committed in Darfur. Refugees thus felt that their fate had been completely forgotten by the international community.”<sup>62</sup> With cases before the ICC getting a ‘second chance’, the Court and its staff will have to face victims who for longer than a decade felt abandoned by the entire international community, including the ICC. To date, and despite cautious indications for willingness to cooperate with the Court from the Sudanese transitional government, it does not appear that the Court’s organs are readying themselves to re-engage with victims and the affected population in this situation.

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60. Kenyans for Peace with Truth and Justice, Ulster University – Transitional Justice Institute, *The Nairobi Principles on Accountability*, Principles 29-30.

61. African Centre for Justice and Peace Studies and FIDH, *Will There Be Justice For Darfur? Persisting impunity in the face of political change. Fact finding mission report*, December 2019, at [https://www.fidh.org/IMG/pdf/sudan\\_darfur\\_pdf.pdf](https://www.fidh.org/IMG/pdf/sudan_darfur_pdf.pdf).

62. *Ibid.*, p.79.

88. The Kenya situation further highlights the importance of having outreach programmes that adequately tackle the particular circumstances of victims that led to their victimisation. For instance, consultation participants expressed that the Court did not deploy efficient programmes to deal with the significant intra-victim competition and intolerance between victims of opposing sides where victims of one group were not prepared to accept the victimhood of those on the other, something that would have left an ever-lasting value for reconciliation in Kenya society.

## IV.2. Complex and unclear application forms and processes

89. Complicated and divergent application processes have also undermined meaningful victim participation before the Court. According to Rule 89, victims must make written applications to the Registrar if they wish to participate in proceedings at the Court.<sup>63</sup> Victims have been required to fill in different types of application forms for participation which are not always adapted to the specific situation. In one of the first cases (Thomas Lubanga) for instance, victims needed to fill in a form for participation that was 17 pages long (and later reduced to 7 pages). The form needed to be translated from French into Swahili and other languages spoken by victims, presenting significant challenges for the Registry, but also for NGOs working with victims.<sup>64</sup> In addition, completed forms had to be redacted to protect the identity of the applicants and shared with the parties, leading to further litigation, delays and requiring additional resources.
90. In the **Kenya** cases, the Court moved away from the strict adherence to application forms and requested the Registry to instead “register” victims. The Chamber also envisioned a different victim representation model, one where the victim representatives are based in the situation. Given their field presence, the victim representatives focused on organising regular sessions with groups of victims and to meet with and speak to victims in their language on the Court’s proceedings where instructions from participating victims were registered. Over the course of two years, one victim representative’s team held approximately 60 meetings with their clients. During the meetings, victims would be updated in Swahili or other local languages. Overall, these efforts helped to significantly shrink the distance between the victims and the Court in The Hague. No application forms were transmitted to the parties and therefore no redactions were needed, no litigation around applications ensued, preventing additional delays and use of resources.
91. It appears that the approach taken in the Kenya cases was, however, an exception, and the application forms for participation are maintained. In May 2013, a shorter form of only one page was introduced in the case of *The Prosecutor v Bosco Ntaganda*, where the Single Judge decided that a one-page individual application form “containing only such information which is strictly required by law for the Chamber to determine whether an applicant satisfies the requirements set forth in Rule 85 of the Rules.” While this is much easier for victims to complete, and for relevant stakeholders to process, the application form should also provide an opportunity for victims to submit any information they feel relevant to their application (e.g. protection concerns; information about their preferences of legal representation, their views on reparation).<sup>65</sup>
92. Following further decisions in subsequent cases, at present, victims are required to fill in a four pages application form, with the Court providing some guidelines on how to complete the form, referencing the key role played by the VPRS in this regard.<sup>66</sup>

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63. Victims did not have to apply to participate in proceedings at the pre-investigation stage in *Myanmar/Bangladesh* and *Palestine*. In *Afghanistan* the victims had applied for participation before the Pre-Trial Chamber. But there was no separate application process undertaken at the appeals stage. The proceedings in *Myanmar/Bangladesh*, *Palestine*, and *Afghanistan* were however at the situation stage and novel.

64. FIDH – KHRC Nairobi Consultation, 5-6 March 2020.

65. See further, Independent Panel on Victim Participation, 2013, para.65.

66. See ICC, at [https://www.icc-cpi.int/itemsDocuments/appForms-yn/ynAppFormIndInst\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/appForms-yn/ynAppFormIndInst_ENG.pdf), with guidance on how to complete the application form for participation and/ or reparation.

### IV.3. Navigating five entities mandated to provide support to victims

*“The ICC desperately needs to simplify its structure dealing with victims” - Victims representative consulted by FIDH*

93. Entities that are responsible for victims at the court are the Office of Public Counsel for Victims (OPCV), the Victims and Witnesses Unit, the Trust Fund for Victims, the VPRS, and PIOS. Legal Representatives for Victims are to also work in coordination with the Counsel Support Section (CSS), notably concerning legal aid. Consultations with civil society and LRVs underlined that these entities do not work in coordination, and there appears to be internal (and sometimes, external) confusion and disagreement about the responsibility of each section. One recommendation was to examine the structure in place at the Special Tribunal for Lebanon, which, albeit different in terms of mandate and composition, and dealing with a much smaller number of victims, has a significantly simpler structure for victims in place, which could provide some guidance to the ICC on how to simplify its current structure.
94. The VPRS is responsible for assisting victims and groups of victims applying to participate,<sup>67</sup> however several reasons prevent the VPRS from providing more effective support to victims. The VPRS' current human and financial resources appear insufficient to reach out to and assist potentially thousands of victims across several situations. This is likely to deteriorate, given the Registry proposed cuts to its budget for 2020, thereby reducing the VPRS' resources even further.<sup>68</sup> The VPRS' ability to engage and interact with victims in situation countries has also been criticised, as beyond those posted in field offices of the Court, VPRS staff is mostly Hague-based. Even with staff working on victim participation posted in the field offices, FIDH observed that coordination and technical knowledge sharing between headquarters and field offices is a challenge given that structurally, staff in field offices do not fall under supervision of VPRS, but rather the Division of External Operations.
95. In addition, some have voiced concerns about the VPRS' lack of emphasis on their duty of care and the do no harm principle when engaging with victims, in particular through intermediaries. Where intermediaries are used, it is important that the VPRS understands and applies their duty of care towards the relevant intermediaries, and ensures that they understand and apply the principle of do no harm, including in regards to victims of sexual and gender based crimes.
96. The VPRS involvement also comes too late. The VPRS does not have a pre-existing relationship with stakeholders working with victims before a victim representation or application process begins. VPRS staff often does not speak the languages of the victims nor have an in-depth understanding of the social, cultural, religious context in which the crimes have been committed, preventing staff from adequately appreciating the environment in which these processes should be rolled out, and thereby proposing a process that would facilitate meaningful participation. While the VPRS reaches out to civil society for consultation on these matters, these consultations begin too late and are rushed by imposed judicial deadlines.
97. The role of the VPRS in the **Kenya** cases for instance was highlighted as problematic, as it underscored early on the role and potential of the Trust Fund in providing reparations and assistance to victims. This raised expectations, yet insufficient information was provided as to the limits of the Trust Fund's ability to provide assistance, which is particularly problematic in the Kenya situation, where the Trust Fund has yet to provide any assistance, despite announcing its intention to do so.

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67. Regulation 86(9) of the Regulations of the Court.

68. FIDH, *Recommendations for 18<sup>th</sup> Session of the ASP*, 2019, p.13.

#### IV.4. Time frames and circumstances for submission of application forms

98. According to Regulation 86(3) victims shall apply for participation before the start of the proceeding that they wish to participate in. The Court may further complicate the situation of victims and undermine victim participation by setting unrealistic deadlines for submission of application forms.
99. In the **Georgia** situation, the Pre-Trial Chamber asked victims to submit representations within one month.<sup>69</sup> Civil society organisations rushed to facilitate the participation of approximately 6,000 victims over this period.<sup>70</sup> There are an estimated 27,000 victims of the situation, and the majority could not be reached and assisted in time.<sup>71</sup> In *Afghanistan* victims were given about three months to submit representation forms. During this period 699 representation forms were submitted to the Court.<sup>72</sup> In both *Afghanistan* and *Georgia*, many victims live in remote and insecure areas, requiring more time to meet and engage with victims. In the *Afghanistan* situation, the collection of victim representation forms was further complicated as they took place over the winter months, where the harsh weather conditions impact transportation and communication more generally.
100. In Palestine civil society groups and legal representatives for victims had less than two months to facilitate the submission of victim observations from the time that the Chamber issued an order setting the procedure and schedule for submission of observations.<sup>73</sup> They were not assisted by the VPRS.

#### IV.5. Victims' choice of legal counsel and court support<sup>74</sup>

101. Effective legal representation of victims is required to ensure that victims' interests, views and experiences are adequately presented to the Court, and to enable victims to genuinely participate in proceedings. This is particularly true in light of the complex system in place regulating and providing for participation before the Court, which requires an in depth understanding of the relevant national and international law standards, as well as expertise in working with victims, to afford victims with effective participation.
102. The importance of effective legal representation is also reflected in the Court's Rules of Procedure and Evidence, and its regulations, which stipulate that victims are free to choose a legal representative for victims ('LRV').<sup>75</sup> The right to choose a LRV is not absolute, and the Court may appoint a common legal representative "for the purposes of ensuring the effectiveness of the proceedings" and with the assistance of the Registry, if necessary.<sup>76</sup>
103. In order to implement the right to effective participation, the OPCV was established in 2005, specifically to provide support and assistance to victims and legal representatives of victims.<sup>77</sup>

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69. ICC, Pre-Trial Chamber I, *Situation in Georgia, Report on the Victims' Representations Received Pursuant to Article 15 (3) of the Rome Statute*, ICC-01/15, 4 December 2015, para.2, at [https://www.icc-cpi.int/CourtRecords/CR2015\\_23215.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_23215.PDF).

70. Ibid; after the conclusion of the 30 day deadline, the VPRS had received a total of 6,335 representations from victims in relation to the situation in Georgia.

71. Ibid.

72. Registry, *Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017*, 20 February 2018.

73. ICC, Pre-Trial Chamber I, *Situation in the State of Palestine, Order setting the procedure and the schedule for the submission of observations*, ICC-01/18, 28 January 2020.

74. See further on legal representation of victims, FIDH, *5 Myths about victim participation in ICC proceedings*, pp. 19-22; see also FIDH Submission on the Registry's Proposal for the Amendment of the Court's Legal Aid Policy, at [https://www.fidh.org/IMG/pdf/fidh\\_submission\\_on\\_icc\\_draft\\_legal\\_aid\\_policy.pdf](https://www.fidh.org/IMG/pdf/fidh_submission_on_icc_draft_legal_aid_policy.pdf).

75. K. Tibori-Szabo et al, *Victim Participation in International Criminal Justice*, Springer, Volume 11, page. 115.

76. Rule 90(3) and (4).

77. Regulations 80 and 81 of the Regulations of the Court.

104. The starting point for examining effective representation must be how victims can best exercise their rights to participate, and, on that basis, to develop a system that is most suited to render participation meaningful for victims. This is yet to happen, with different models having been tried and tested so far regarding legal representation of victims. Significant challenges highlighted in this respect include:

- Access to and availability of legal aid: Rule 90 (5) provides that “[A] victim or a group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance” (emphasis added). The permissive language in Rule 90 (5) is in stark contrast to the importance of legal aid for victims, as also observed by the Registry: “experience before the Court has demonstrated that in order to ensure the effective exercise of the rights afforded to victims under the Court’s legal framework, the Court must ensure that legal aid resources are made available to indigent victims.”<sup>78</sup> Currently, the Court’s legal aid policy limits the provision of legal aid to Court appointed (as opposed to victims’ chosen) common legal representatives. In other words, a LRV chosen and appointed by (a) victim(s), but not the Court, will not be compensated financially by the Court, even if the victims are indigent. This is particularly concerning at the pre-investigation stage when the Court has not yet appointed a common legal representative.<sup>79</sup> The refusal to provide legal aid fails to take into account the extent of the LRV’s representation of their client victims in judicial pre-authorisation proceedings, their facilitation of victim participation and the collection of application forms.

The problem with the Court’s legal aid policy became clear in the case of *The Prosecutor v Ongwen*, at the pre-trial stage. In that case the Single Judge accepted a structure where victims were represented by two legal representation teams, one was a court appointed common legal representation team and the other team was externally appointed by the victims. But the Single Judge also decided that victims who had appointed their own legal representative would not qualify for financial assistance, even if they lacked the means to pay it.<sup>80</sup> That team was ultimately allowed to access the Court’s legal aid scheme, however, the currently proposed policy for legal aid risks a return to such problematic decisions.

- Overall support: Court support to LRVs should not be construed narrowly and limited only to financial support. Consultations with LRVs speak of difficulties gaining access to the Court premises because they are not court-appointed, and lengthy bureaucratic and complicated approval processes for essential activities such as meetings between LRVs and their victim clients. LRVs consulted described their interaction with the CSS, and other sections, as the most difficult, frustrating, and unnecessarily time-consuming, aspect of their work representing victims. Others have similarly voiced lawyers’ concern that the “CSS failed to appreciate fully the role of victims’ teams, especially the fieldwork necessary to keep victims properly informed” and that “victims’ lawyers found their dealings with the CSS to be frustrating and timewasting.”<sup>81</sup>
- Composition of LRV teams:<sup>82</sup> During consultations, concerns were raised regarding the composition of teams representing victims in particular regarding the OPCV. The concern

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78. ICC, Registry, *Registry’s single policy document on the Court’s legal aid system*, ICC-ASP/12/3, 4 June 2013, para.20, at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-3-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-3-ENG.pdf)

79. In the *Palestine* situation the OPCV was ordered to represent unrepresented victims and the general interests of victims. Pre-Trial Chamber I, Situation in the State of Palestine, *Order setting the procedure and the schedule for the submission of observations*, ICC-01/18, 28 January 2020, at [https://www.icc-cpi.int/CourtRecords/CR2020\\_00217.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00217.PDF). In the situation of *Afghanistan* the OPCV requested to appear before the Appeals Chamber to make arguments in the general interests of victims, Pre-Trial Chamber II, Situation in the Islamic Republic of Afghanistan, *Request to appear before the Chamber pursuant to regulation 81(4) (b) of the Regulations of the Court*, ICC-02/17, 10 June 2019.

80. ICC, Pre-Trial Chamber II, *Situation in Uganda, Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights*, ICC-02/04/01-15, 27 November 2015, para. 18, at [https://www.icc-cpi.int/CourtRecords/CR2015\\_22895.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_22895.PDF)

81. See Richard Rogers, *Assessment of the ICC’s Legal Aid System*, 5 January 2017, para.281, at <https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>

82. See further, FIDH, *Five myths about victim participation in ICC proceedings*, December 2014, pp. 19 -22.



is that by appointing legal representation through the OPCV, the Court risked prioritising knowledge of the Court over a need to understand and have capacity to interact with victim clients on a regular basis. In the **Kenya** situation, one LRV described how much he benefited from having a team composed of several local lawyers. Team members were able to advise on soft issues, such as languages spoken by various victims, explaining the historical, cultural and political contexts in which the crimes were committed which helped understand the impact of those crimes, as well as assisting with Kenyan legal issues. According to the LRV, the benefits of having local staff part of the team working with victims and affected communities are obvious and should be standard procedure followed by each of the entities working with victims at the Court, including the OPCV.

## IV.6. Recommendations

### To all three clusters:

- ❖ The Court and all its staff should ensure that victims are treated with compassion and respect for their dignity.
- ❖ The Court and in particular VPRS should ensure to keep victims informed, through appropriate channels and in a language they understand, at all stages of proceedings and respond to their concerns and questions in a timely manner.

### Cluster 1: Governance

- ❖ Court staff of all entities working with victims, and in particular the VPRS, should receive mandatory expert training on how to interact with (vulnerable) victims, and relevant procedures and protocols should be put in place to ensure that Court staff and intermediaries engaging with victims are adequately trained and do apply the Court's duty of care and follow the 'do no harm' approach.
- ❖ Victims' right to participation should be part and parcel of any outreach strategy, and relevant organs of the Registry, as well as OTP staff coming into contact with victims, should ensure to provide victims with necessary information about their right to participate at the appropriate stage of the preliminary examination. Relevant information should be provided regularly and be tailored and accessible to victims, including by providing it in a language victims understand, and in a manner that takes into account the needs and situations of victims. This includes in particular information regarding application processes, how to get support from relevant Court entities, and how to access to legal representation.
- ❖ The Registry should submit a needs-based budget proposal that takes into account the capacity constraints of entities dealing with victims, first and foremost the VPRS.
- ❖ The Registry should, in consultation with relevant experts and taking into account experiences of legal representatives of victims and civil society working with victims, carry out a review of its current structure of different entities and sections dealing with victims, with a view to enhance internal coordination and streamline processes for external interlocutors working with or for victims, to simplify reporting processes and to clarify clearly each entity's mandate and responsibilities.
- ❖ Composition of VPRS staff should reflect the needs and particular circumstances of each situation. This includes ensuring that a sufficient number of VPRS/Registry staff is based in the relevant situation country, speaks the relevant language and has a first hand understanding of the social, cultural and religious contexts in which crimes have been committed.
- ❖ Coordination between VPRS in The Hague and field offices should be streamlined so as to facilitate reporting and sharing of technical knowledge. In this respect, the Registry is

recommended to reconsider its reporting structure towards having outreach and victim participation staff based in field offices report to PIOS and VPRS in ICC headquarters.

- ❖ The Court should rethink the current draft legal aid policy and develop instead a comprehensive legal aid policy for victims that is guided by victims' right to choose their legal representative and expressly provides for mandatory legal aid to LRVs, including privately appointed counsel, at all stages of the proceedings. It should also provide for adequate resources for genuine and regular consultation with victims in the situation.
- ❖ OPCV teams representing victims should ensure to include local staff as part of their team working with victims and affected communities, and to regularly consult victims in the situation.

## **Cluster 2: Judiciary and judicial processes**

- ❖ The Court should, as a matter of priority, draft a Strategy on Victims that sets out its vision on how to integrate and realise the rights of victims enshrined in the Rome Statute into all aspects of the Court's work. The strategy should aim at addressing the Court's limited success to date in realising victims' rights in a comprehensive manner, and to incorporate views, perspectives and experiences of victims and those working with victims.
- ❖ Taking into account relevant sections in the Chambers Manual, the judiciary should develop practice guidance on modalities for meaningful participation subsequent to application and during proceedings so as to provide relevant guidance across Chambers to ensure greater consistency and with a view to developing a workable and meaningful participation framework that will provide victims, legal representatives and others with greater predictability and clarity.
- ❖ Chambers should ensure that any timeframes imposed for submission of application forms and other relevant information takes into account and accommodates for the specificities of the relevant situation of victims.

## V. The Trust Fund for Victims

105. This chapter examines the Court's reparation and assistance mandates, with a particular focus on the role of the Trust Fund in realising them.
106. In addition to affording victims a right to participate, the Rome Statute also, for the first time, provides victims with a right to claim reparation in international criminal proceedings.<sup>83</sup> This is part of the Rome Statute's vision of victims as rights holders, and gives effect to the evolution of victims' rights over the past decades.
107. The inclusion of the right to reparation in the Rome Statute also envisaged, in Article 79 Rome Statute, the establishment by a decision of the ASP of a Trust Fund "for the benefits of victims of crimes within the jurisdiction of the Court, and of families of such victims." The Trust Fund was created by the ASP in 2004, and has a dual mandate: (i) implement reparation awards in relevant cases where a perpetrator was convicted; and (ii) provide ongoing assistance to victims beyond the individual case.<sup>84</sup>
108. However, to date, victims' right to reparation before the ICC, and their ability to obtain assistance from the Trust Fund, have fallen short of expectations.

### V.1. The Trust Fund and reparation for victims

*"[The Chamber] stresses... that a document of the quality of the DIP [Draft Implementation Plan], filed out of time with such a high number of mistakes and, most importantly, containing vague and entirely unsubstantiated 'proposals' or 'ideas' could have warranted its plain rejection." (Trial Chamber VIII, The Prosecutor v Ahmad Al Faqi Al Mahdi, Public Redacted version of Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations', 12 July 2018)*

109. The low number of successful prosecutions also meant that the Court has only awarded reparation in three cases.<sup>85</sup> The different Chambers have applied different and at times inconsistent approaches to reparation proceedings, resulting in a lack of clarity and predictability, and leading to calls for court-wide principles or guidelines on reparation.<sup>86</sup> This is true in regards to Chambers requiring different application processes for reparation, following different approaches to the assessment of harm and to the type of reparations awarded, including individual or collective reparations; and different directions regarding the Trust Fund's role in implementing reparation orders.<sup>87</sup> The Trust Fund, at the request of the relevant Chamber, plays a critical role in facilitating victims' access to reparation as ordered by the Court. It has been ordered to identify beneficiaries at different stages of the proceedings, and to complement – from its own resources - awards in particular where the convicted person is indigent.<sup>88</sup> To date, the Trust Fund has been asked to consider advancing the full amount ordered in all three cases to reach the implementation phase.

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83. See Article 75 Rome Statute, Rule 94 of the Rules of Procedure and Evidence.

84. See website of the Trust Fund for Victims, at <https://www.trustfundforvictims.org/en/about/two-mandates-tfv>.

85. These are the cases of *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, at <https://www.icc-cpi.int/drc/lubanga>; *The Prosecutor v Germain Katanga*, ICC-01/04-01/07, at <https://www.icc-cpi.int/drc/katanga>; and *The Prosecutor v Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, at <https://www.icc-cpi.int/mali/al-mahdi>.

86. See for instance REDRESS, *No Time to Wait: Realising Reparations for Victims before the International Criminal Court*, January 2019 (REDRESS, No Time to Wait), at <https://redress.org/wp-content/uploads/2019/02/20190221-Reparations-Report-English.pdf>.

87. For an analysis of the Court's reparation procedures to date, see REDRESS, No Time to Wait; REDRESS, *Moving Reparation Forward at the ICC: Recommendations*, November 2016, (REDRESS, Moving Reparation Forward), at [https://redress.org/wp-content/uploads/2017/12/1611REDRESS\\_ICCReparationPaper.pdf](https://redress.org/wp-content/uploads/2017/12/1611REDRESS_ICCReparationPaper.pdf); FIDH, *All I want is reparation – Views of victims of sexual violence about reparation in the Bemba case before the International Criminal Court*, November 2017, at <https://www.fidh.org/IMG/pdf/rca705ang.pdf>.

88. See Regulation 56 of the Regulations of the Trust Fund, at [https://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf).

110. The Court, relying on Article 75 (2) of the Statute and Rule 98 of the Rules, has asked the Trust Fund to implement reparation awards in all three cases. The Trust Fund has to draft an implementation plan, setting out proposed activities corresponding with the modalities identified by the Chamber.<sup>89</sup> The Trust Fund's regulations do not include much detail as to what exactly a reparation / implementation plan should contain and how it should be drafted, making a precise and detailed reparation order from the relevant Chamber particularly important. Otherwise, the Trust Fund may submit implementation plans that lack sufficient detail, resulting in significant delays and additional litigation, as demonstrated in the case of Thomas Lubanga.<sup>90</sup>
111. These are delays that can and should be avoided, as they are impossible to justify with victims, many of whom have waited years if not decades for the Court to deliver some form of tangible justice.
112. The Trust Fund's performance was also criticised in the Al-Mahdi case. The Chamber found that despite requesting two additional months to complete the draft implementation plan, the draft plan was still submitted late, was incomplete and full of errors. The Chamber stated "that these repeated failures to comply with the most basic requirements of a Chamber's order suggest that the TFV [Trust Fund for Victims] has not yet gained command of its own mandate when operating within the judicial process."<sup>91</sup>
113. Chambers clearly have a role to play in ensuring that the Trust Fund is given sufficient guidance and clarity as to what should be included in a draft implementation plan. Where such guidance is missing or insufficient, this may negatively impact on the Trust Fund's proposed implementation plan. However, the fact that thirteen years after its establishment, a Chamber feels compelled to reprimand the Trust Fund in such a way for a failure to "do its job" is deeply worrying and calls into question the performance of the Trust Fund and its management to guarantee that the Fund's staff is able and capable to fulfill the Fund's mandate. Given the critical role of the Fund in realising the Court's reparation mandate, it is important that these issues are addressed, rather than leading to a continuation of business as usual.

## V.2. The assistance mandate of the Trust Fund

114. The Trust Fund's assistance mandate aims at providing victims with physical and psychological rehabilitation and/ or material support. The assistance mandate can be applied to victims regardless of their participation in a specific case, and is triggered as soon as a situation is under investigation and once the Fund has notified the Pre-Trial Chamber of its intent to undertake relevant activities. It therefore has the potential to reach a larger number of victims and also, in theory, help to address urgent interim relief, which is particularly important as proceedings before the ICC can go on for a very long time. At the time of writing the Trust Fund was carrying out assistance activities in the DRC, Northern Uganda and Côte d'Ivoire.<sup>92</sup> Its website also lists under the "where we work" section Central African Republic and Kenya, yet no further information is provided on the work reportedly carried out in these countries. None of the participants of the KHRC – FIDH Nairobi Consultation from Kenya was aware of the Trust Fund's assistance in Kenya.
115. Discussions during the KHRC – FIDH Nairobi Consultation seriously called into the question the Fund's ability to deliver on its assistance mandate. Concerns were raised in particular

89. Regulations 54 and 57 of the Regulations of the Trust Fund.

90. See REDRESS, *Moving Reparation Forward*, pp.5-7.

91. ICC, Trial Chamber VIII, *The Prosecutor v Ahmad Al Faqi Al Mahdi*, Public redacted version of Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations, 12 July 2018, ICC – 01/12-01/15, para.14, at [https://www.icc-cpi.int/CourtRecords/CR2018\\_03672.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_03672.PDF).

92. See Trust Fund for Victims, *Overview of Activities*, undated, providing information on the Fund's activities in DRC and Uganda, planned activities in Cote d'Ivoire (to start in 2019), Central African Republic and Georgia, at <https://www.trustfundforvictims.org/sites/default/files/Trust%20Fund%20for%20Victims-%20Overview%20of%20Activities%20ENG.pdf>.

regarding the Fund's lack of understanding of the situation many victims find themselves in, how and what type of assistance is most needed, significant delays in providing such assistance, or complete absence of promised assistance. This leads to frustration among victims, who, as in the **Kenya** cases for instance, had been promised assistance from the outset of the case, without any assistance having been provided to date, more than thirteen years later, contrary to what the Trust Fund states on its website.

116. Following the acquittal of Jean-Pierre Bemba, which in itself was a huge blow to victims in the **Central African Republic**, the Trust Fund announced in June 2018 that it would be accelerating the launch of a programme under its assistance mandate. It took the Fund until end February 2020 to submit to the Chamber a plan "proposing a pilot project and corresponding specific activities to the benefit of 200 vulnerable victims who have participated in the Bemba case and/ or those who may not have participated in the case, but found themselves in life-threatening conditions...".<sup>93</sup> Trial Chamber II, considering the Trust Fund's plan made things worse and requested the Fund to instead ensure that its proposed activities "target *all* persons in need of its assistance, with no consideration of or distinction based on neither previous participation in the Bemba case or their status of victims during those proceedings."<sup>94</sup> The Trial Chamber's request is illustrative of how far removed the Court is from the realities of victims: the Trust Fund's assistance budget is comprised of 1 million Euro, and there were over 5,000 victims participating in the case, and tens of thousands more victims in the conflict. These figures are difficult to reconcile with the Chamber's decision that the Fund's assistance should target *all* persons in need of its assistance without taking into account or referring at all to the limited resources available.

117. In **Georgia**, victims were looking to the Trust Fund to alleviate urgent problems, yet when approached by civil society organisations working with victims, the Trust Fund was uncertain about what it could do. Civil society then documented key concerns and problems of victims living in IDP cottage settlements, bearing in mind the mandate of the Trust Fund, and submitted its findings to the Trust Fund. The Fund then approved to carry out an assessment of the victims' situations and needs and recruited the former Georgian Ombudsman to carry out that assessment. From the work of the expert to date, it appears that a focus of the Fund is to identify what support the government is providing to address the harm suffered by victims, and understand the government's plans so as to identify the Fund's priorities. This is problematic, as it appears that the Fund is driven by what is possible within their resources, rather than first develop an understanding of what victims need.

118. It is also not always clear what assistance the Fund does actually provide due to a lack of transparency. In **Côte d'Ivoire**, the Fund is active and there is a programme in place, yet no further information is provided on the website, and it is unclear to civil society organisations working with victims who benefits from, and how a victim can apply for, assistance.

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93. Pre-Trial Chamber II, Situation in the Central African Republic I – Information to the Trust Fund for Victims on the Notification by the Board of Directors in accordance with regulation 50 (a) of the Regulations of the Trust Fund for Victims of its conclusion to undertake specified activities in the Central African Republic, ICC-01/05, 8 April 2020, para.1, at [https://www.icc-cpi.int/CourtRecords/CR2020\\_01434.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01434.PDF).

94. *Ibid.*, para.8.

## V.3. Recommendations

### Cluster 1- Governance

- ❖ The Trust Fund should make obligatory training for all its staff on how to develop implementation plans that meet the expectations and needs of the judiciary so as to strengthen the Trust Fund's capacity to draft implementation plans.
- ❖ All Trust Fund staff should be subject to staff appraisals and transparent performance reviews, with consequences for repeated underperformance. The Trust Fund should furthermore introduce term limits to staff at the professional category, similar to structures in place in other institutions such as the OPCW and the OSCE.
- ❖
- ❖ The Trust Fund should develop a strategy that sets out its vision and provides for clear and measurable benchmarks of a successful implementation of its reparation and assistance mandates.
- ❖ Representatives from the judiciary and the Trust Fund should consider convening an exchange of what is needed from each organ's perspective to further improve the working relationship and relevant work products.

### Cluster 2- Judiciary and the judicial process

- ❖ The judiciary should develop court wide principles on reparation that can be tailored to the circumstances of each case while providing guidance to different Chambers on how to approach and realise the right to reparation enshrined in Article 75, with a view to ensuring greater consistency, clarity and predictability of the Court's reparation decisions.
- ❖ The judiciary should endeavour to provide guidance, clarity and detail in its reparation orders so as to support the Trust Fund to develop workable and substantive draft implementation plans that can be approved without leading to further litigation and delays.
- ❖ Representatives from the judiciary and the Trust Fund should consider convening an exchange of what is needed from each organ's perspective to further improve the working relationship and relevant work products.
- ❖ The judiciary should ensure that it has an in depth understanding of the situation of victims in relevant situations, their perspectives, needs and experiences, and that its rulings and decisions, in particular those directly pertaining to rights of victims, are victim sensitive, and avoid risks of re-traumatisation.

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