



## INTERNATIONAL CRIMINAL COURT: Shield for victims and witnesses....

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*"Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."*<sup>1</sup>

In the struggle towards International Justice, participation of the victims in the criminal proceedings is a very innovative approach and it breaks the age-old tradition of judicial process. It makes justice more accessible and at the same time victims have a control over the whole process and, undoubtedly, participation of the victims strengthens the cases.

The Rome Statute deals with delicate process regarding victims and witnesses protection, as previous experiences from International Criminal Tribunals for Rwanda ("ICTR") and the former Yugoslavia ("ICTY") showed that victims faced lack of security and other physical and psychological challenges and that witnesses refused to take part in the court's proceedings for the fear of reprisals.

The Rome Statute can be treated as the most effective mechanism to date, that acknowledges the rights of the victims and treats victims not only as witnesses of the crimes within the jurisdiction but also as persons who have a valid interest in the outcome.

### **Who are the victims?**

Victims before the ICC may be individual persons or organisations or institutions, and the harm that a victim suffers may take different forms. It can be

- physical harm to a person's body or
- psychological harm, by which a person's mind is affected because of what she or he has had to do or see: or
- material harm, by which goods or property has been damaged or lost as the result of crime.

A person can also be a victim though s/he has not suffered directly. S/he can be a member of a victim's family who has been killed or suffered harm as a result of crime.

For the purpose of the court the word '**victim**' is defined by the Rules of Procedure and Evidence. As per it,

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

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<sup>1</sup> Preamble of the Rome Statute of the International Criminal Court



(b) Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.<sup>2</sup>

### **Participation of victims and witnesses:**

"Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered."<sup>3</sup>

According to the Rome Statute, victims will be able to participate in stages of the Court's proceedings determined to be appropriate by the court and in a manner, which is not prejudicial or inconsistent with either the rights of the accused on a fair and impartial trial. A legal representative may also present the views and concerns of the victim at stages where the court considers it appropriate. The ICC may provide financial assistance to assist victims in securing legal representation if necessary.

### **The victim may make the following presentations:**

- explain why s/he thinks a case falls within the jurisdiction of the Court;
- present views and concerns where her or his personal interests are affected at different stages of the proceedings;
- participate in the oral proceedings of the court, for example making opening and closing statements;
- may question witnesses;
- or ask the Court to take special gender sensitive measures, especially if she or he is a victim of sexual violence.

### **Victims and Witnesses Unit:**

The **Victims Participations and Reparation Unit** and the **Victims and Witness Unit** of the Court deal primarily with victims' rights where a person will be considered to be a victim by the court when her or his personal interests have been affected because of the commission of a crime falling within the jurisdiction of the ICC.

According to the Statute, a Victims and Witnesses Unit (VWU), which is to be established under the Registry, is to provide directly, or to advise the Prosecutor and Court on, protective measures and security arrangements, counselling, and other appropriate assistance for victims and witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.<sup>4</sup> This unit also informs victims about court appearances and the limits of confidentiality.

### **Functions of the Victims and Witnesses Unit:**

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<sup>2</sup> Rule 85, Rules of Procedure and Evidence

<sup>3</sup> United Nations Declaration of Basic Principles of justice for Victims of Crime and Abuse of power, Principle 4

<sup>4</sup> Rome Statute, art. 43(6) and 68(4)



The Victims and Witnesses Unit shall, *inter alia*, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate<sup>5</sup>:

1. With respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

- (i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;
- (ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;
- (iii) Assisting them in obtaining medical, psychological and other appropriate assistance;
- (iv) Making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality;
- (v) Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasising the vital nature of security and confidentiality for investigators of the Court and of the defence and all intergovernmental and non-governmental organisations acting at the request of the Court, as appropriate;
- (vi) Co-operating with States, where necessary, in providing any of the measures stipulated in this rule;

2. With respect to witnesses:

- (i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
- (ii) Assisting them when they are called to testify before the Court;
- (iii) Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.

3. In performing its functions, the Unit shall give due regard to the particular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, the Unit may assign, as appropriate, and with the agreement of the parents or the legal guardian, a child-support person to assist a child through all stages of the proceedings.

Article 68 of the Rome Statute is the main article laying out the procedural provisions relating to victims and witnesses. Along with that article some other provisions found elsewhere in the Statute require or allow the organs of the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, having regard to all factors, particularly where the crime involves sexual or gender violence.

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<sup>5</sup> Rule 17,



These measures may include:

- *In camera* proceedings or any other means to present evidence by using electronic or other techniques;
- Participation of victims at appropriate stages of the proceedings; and
- Withholding of evidence or information that would gravely endanger the security of a witness.<sup>6</sup>

The Statute also includes a provision enabling the Court to award reparations to or for victims.<sup>7</sup>

Under the Rome Statute and the ICC Rules, victims have the opportunity to participate in criminal proceedings at the Court in a number of ways.

- Victims or their legal representatives may make submissions to the Court on the authorization of an investigation.
- Victims or their legal representatives may submit observations to the Court regarding challenges to the admissibility or jurisdiction of a case.
- Victims or their legal representatives may, at the discretion of the Chambers, make representations to the Court including opening and closing statements.<sup>8</sup>

### **Functions of the Participation and Reparation Unit:**

The **Participation and Reparation Unit's** work will specifically encompass responsibilities concerning outreach, the processing of applications for participation, legal representatives, and nongovernmental organisations in relation to victim participants, all of which involve significant protection issues. Additionally, victims' legal representatives are entitled to attend and participate in hearings and, at the discretion of the Chambers, may question the accused, a witness, or an expert.

Victim participants and their legal representatives may consult the trial record and, where possible, be present for announcements of decisions on admissibility, jurisdiction, criminal responsibility, sentencing, and reparations. A Chamber may also seek the views of victims or their legal representatives on any issue.

As a result, effective consultation, coordination, and collaboration between the Protection Unit and the Participation and Reparation Unit will be essential for ensuring adequate protection.

Similarly, coordination between the Protection Unit and ICC field offices, which are envisioned once investigations are commenced, will be important to ensuring adequate protection. These field offices should be closely monitoring the security situation in the territory where the crimes were committed.

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<sup>6</sup> Rome Statute, arts. 54(1)(b), 57(3)(c), 64(2) and 68.

<sup>7</sup> Rome Statute, art. 75.

<sup>8</sup> *Rome Statute, Art. 68(3); ICC Rules, Rules 89(1)-(2), 90.*



### **Responsibilities of the Unit:**

For the efficient and effective performance of its work, the Victims and Witnesses Unit shall:<sup>9</sup>ensure that the staff in the Unit maintain confidentiality at all times and recognising the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers.

The unit also have administrative and technical assistance available for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, during all stages of the proceedings and thereafter, as reasonably appropriate;

The unit makes sure the training of its staff with respect to victims' and witnesses' security, integrity and dignity, including matters related to gender and cultural sensitivity and if necessary cooperate with intergovernmental and non-governmental organisations.

### **Expertise in the Unit:**

In addition to the staff mentioned in article 43, 44 of the Rome the Victims and Witnesses Unit may include, as appropriate, persons with expertise, inter alia, in the following areas.<sup>10</sup> Some of these are:

- Witness protection and security;
- Legal and administrative matters, including areas of humanitarian and criminal law;
- Psychology in criminal proceedings;
- Gender and cultural diversity;
- Children, in particular traumatized children;
- Elderly persons, in particular in connection with armed conflict and exile trauma;
- Persons with disabilities;
- Social work and counselling;

### **Responsibility of the Registrar:**

The Registrar will provide notice or notification to victims or their legal representatives and assist them in obtaining legal advice and organising their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings.<sup>11</sup>

It also takes gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.

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<sup>9</sup> Rule 18

<sup>10</sup> Rule 19

<sup>11</sup> Rules 89 to 91



In relation to victims, witnesses and others who are at risk on account of testimony given by such witnesses, the Registrar

- Will inform the victims about their rights under the Statute and the Rules, and of the existence, functions and availability of the VWU. &
- Ensures that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests, subject to provisions on confidentiality.

For the fulfilment of his or her functions, the Registrar may keep a special register for victims who have expressed their intention to participate in relation to a specific case.

Registrar on behalf of the Court may also negotiate with the States in some special cases. Especially when the victims are traumatised or threatened for support services on their territory and certainly these agreements will be confidential.

### **Role of victims in challenges to admissibility and to jurisdiction:**

Victims, their families or their representatives should have notice of all proceedings concerning preliminary rulings regarding admissibility<sup>12</sup> and an opportunity to present their views at each stage of these proceedings and to have them considered. And when the personal interests of victims are affected, the Court shall permit their views and concerns to be presented at any stage it determines to be appropriate “in accordance with the Rules of Procedure and Evidence”

### **Working with legal representatives:**

**An important feature of victims' participation involves the legal representative.** A victim participant may choose a legal representative to act on his or her behalf.<sup>13</sup> Alternatively, the Chamber may request, "victims or particular groups of victims, if necessary with the assistance of the Registry, [may] choose a common legal representative or representatives."<sup>14</sup> A legal representative of a victim participant may conduct a range of activities on behalf of victims, including attending proceedings, making written submissions, and questioning witnesses, accused, and experts. S/he may play a positive role in protection of participants.

### **Right to reparation under ICC:**

The reparation procedures revolve around a series of measures:

After issuing an arrest warrant or summons, the Pre-trial chamber may make an order for protective measures to ensure that any assets which might be the subject of future reparations order are maintained.<sup>15</sup>

These provisions may well be of critical importance to the realisation of reparation awards, in those instances where there are assets and they are traceable. Upon a finding of guilt, the court may proceed to a determination of reparations of victims.

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<sup>12</sup> Article 18

<sup>13</sup> ICC Rule 90(1),

<sup>14</sup> ICC Rule 90(2)

<sup>15</sup> Art: 57.3



The basic provisions regarding reparation before the Court appear in article 75 of the Statute and rules 94-8 of the finalized Draft Rules of Procedure and Evidence. Article 75.1 provides that the Court shall “establish principles relating to reparations to, or in respect of, victims” and, based on these principles, the Court may “determine the scope and extent of any damage, loss and injury to, or in respect of, victims”.

It also authorizes the Court either to “make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims including restitution, compensation and rehabilitation” or, where appropriate, to “order that the award for reparations be made through the Trust Fund provided for in article 79”.

As per the article, the Court “may invite and shall take account of reparations from or on behalf of the convicted person, victims, other interested persons or any interested States,”

While those interested in making reparations regarding reparations are required to file written requests with the Registrar in accordance with rules 94 & 95, oral reparations can be made in certain circumstances. These reparations can be made during the sentencing hearing or subsequent hearings scheduled by the Trial Chamber (art. 76.3 & rule 143).

Rule 97 specifies how reparations are to be assessed:

The reparations provisions are without prejudice to the rights of victims under national or international law, and also without prejudice to the responsibility of states under international law.

The possibility for the Court to award collective reparations is likely to have a significant effect on the shaping and developing of new jurisprudence for reparations. There will only be limited amount of funds for reparation awards when compared with the rights and needs of victims, and therefore collective awards may be, at times, the only method to bring a certain measure of justice.

Paragraph 1 of rule 98 provides that “individual awards for reparations shall be made directly against a convicted person”, and paragraphs 2-4 detail modalities for using the Trust Fund for Victims to allocate or distribute the reparations awards made by the Court to victims. Paragraph 2 provides that the Court may order it is impossible or impracticable to make individual awards directly to each victim”. Paragraphs 3 & 4 provide that awards for reparations be made through the Trust Fund “where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate” or when made “to an intergovernmental, international or national organization approved by the Trust Fund”. Paragraph 5 provides that “other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79”.

The Court may decide to request assistance from States Parties, such as the execution of searches and seizures, and the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, to facilitate forfeiture proceedings. 10 States Parties would be obliged to give effect to fines and forfeitures ordered by the Court, as well as reparation orders.

In this regard, rule 217 provides that “The Presidency shall, as appropriate, seek cooperation and measures for enforcement... as well as transmit copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality domicile or habitual



residence or by virtue of the location of the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection. ”

A victim may also apply to receive reparations from the ICC. Reparation means that a victim may be entitled to receive compensation, rehabilitation and /or restitution for the harm suffered as a result of the crime, which was committed against her or him.

Thus, while it is impossible to value a price on how much victim has suffered, the ICC may give victim money to compensate for what the victim has lost as a result of a crime, and to compensate for her or his suffering. The ICC can order that the person convicted of a crime against a victim pay the victim these reparations. A Trust Fund has also been established to gather funds that will be used to provide victims with reparations.

Restitution involves returning to a victim her or his property where it was illegally taken away, while rehabilitation is intended to allow the victim to continue his or her life as normally as is possible. This can take the form of money to pay for legal, medical, psychological and other care, and can even include apologies from perpetrators of crimes to the victims.

### **How the Court will implement the reparation orders:**

In respect of post –conviction reparation orders of forfeiture and confiscation proceedings relating to assets, State Parties must take all necessary steps to enforce the orders. However it is not evident how national courts will deal with competing claims for assets, or how they will assign priorities in order to adjudicate between these claims.<sup>16</sup>

### **Trust Fund for victims- a way out:**

Article 79 of the Rome Statute states the provision for establishment of a Trust Fund-“ ....for the benefit of victims of crimes within the jurisdiction of the Court , and the families of such victims”.

This Trust Fund could in principle provide relief to those victims for whom reparation orders had been awards has been possible due to the insolvency of the perpetrators or the inability to recover his or her assets.<sup>17</sup>

### **Conclusion:**

In a nutshell ICC has following provisions for the victims and witnesses:

- Victims and witnesses of sexual violence may testify in closed hearings or through special means to protect their privacy.
- They can also have a special helper (such as a psychologist or family member) present while giving testimony.
- The Victims and Witnesses Unit will include experts on trauma related to sexual violence. These experts will be available to counsel victims and advocate appropriate treatment in the courtroom.

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<sup>16</sup> The right to reparation at the International criminal Court-Carla Ferstman, Legal Director , REDRESS.

<sup>17</sup> The right to reparation at the International criminal Court-Carla Ferstman, Legal Director , REDRESS.



- Victims of sexual violence will not be "put on trial" when they give testimony, and their privacy will be protected.
- The confidentiality of victims and witnesses will be protected throughout the proceedings and in published court documents.
- Victims do not need corroboration to prove crimes of sexual violence, and their personal sexual conduct cannot be considered as evidence.
- The definition of "consent" in cases of sexual violence is strictly limited to protect victims.
- Judges must prevent the harassment or intimidation of victims and witnesses during questioning, particularly in cases of sexual violence.

Under the Rome Statute, justice for victims will become a real possibility for the first time in the history of law. However, their active participation and total co-operation will be vital. To strengthen the evocative participation of the victims and witnesses, they must receive both adequate protections as provided for under the Statute and physical and emotional protection. Protection must commence from the investigation stage through trial and post-trial stages, because without appropriate and adequate protection, victim's co-operation cannot be achieved and their active participation is not possible in the whole proceedings.

**Reference:**

1. Intimidated Witnesses and Victims: Treated with Hostility- Saumya Uma
2. Proceedings of the First Asian Victims' Forum on the International Criminal Court
3. Memorandum to the International Criminal Court- Human Rights watch
4. The International Criminal Court: Ensuring an Effective Role for Victims-Amnesty International Report