



**THE INTERNATIONAL CRIMINAL COURT:
How Nongovernmental Organizations Can Contribute To
the Prosecution of War Criminals**

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INTRODUCTION

In many conflicts around the world, armies or rebel groups attack ordinary people and commit terrible human rights abuses against them. Often, these crimes are not punished by the national courts. But since July 2002, we have an international court for such crimes. The International Criminal Court (ICC) is a permanent international tribunal created for the prosecution of crimes against humanity, genocide, and war crimes. The International Criminal Court is currently in the process of preparing its first cases and is based in The Hague.

The Democratic Republic of the Congo (DRC) will become the first place where grave crimes are prosecuted by the International Criminal Court.

On June 23, 2004, the Court's Prosecutor, Louis Moreno Ocampo, announced that he was opening his first investigations in the DRC, for crimes committed since July 2002. This announcement was an answer to a formal referral of the situation in the country to the ICC by the DRC government in March 2004. The Office of the Prosecutor had been conducting a "preliminary analysis" of the situation in DRC, initially focusing on the situation in Ituri, Oriental Province, as "the most urgent situation to be followed."

In Uganda, the government has referred the situation regarding the rebel Lord's Resistance Army (LRA) to the International Criminal Court. In a press conference, the Prosecutor of the Court has explained that the LRA has indeed committed grave crimes against civilians and that the Court will take this matter seriously.

Congolese and Ugandan nongovernmental organizations (NGOs) can play a vital role by cooperating with the International Criminal Court. This guide answers some of the frequently asked questions about the Court. In particular it explains how NGOs can contribute to the Court's work of prosecuting war crimes, crimes against humanity, and genocide at the international level. It does so by answering frequently asked questions about the International Criminal Court and the way NGOs can contribute to its efforts. However this guide does not provide a legal commentary or detailed explanation of the ICC crimes, nor does it tell the history of the International Criminal Court.

THE MANDATE OF THE INTERNATIONAL CRIMINAL COURT

How was the Court created?

The Statute for the creation of the Court was adopted at an international conference in Rome on July 17, 1998. After intense negotiations, 120 countries voted to adopt the treaty. One hundred thirty-nine states have signed the treaty as of mid-2004. Sixty-six countries – six more than the threshold needed to establish the court - ratified the treaty on April 11, 2002. This meant that the ICC's temporal jurisdiction commenced on July 1, 2002. In February 2003, the Court's Assembly of States Parties - the ICC's governing body - elected the Court's first eighteen judges. The resulting high quality and diverse judicial bench (the judges include 7 women and represent all the regions of the world) were sworn into office on March 11, 2003, in The Hague, the seat of the court. On April 21, 2003, the Assembly of States Parties elected the chief prosecutor, Luis Moreno Ocampo. As of July 8, 2004, ninety-four countries have ratified the ICC treaty.

Each state party has to adopt laws that set out how the state is going to implement its obligations under the Rome Statute. Such laws cover, for example, the technicalities of the cooperation between the state and the Court, and define the crimes covered by the Rome Statute. Such laws are often called “implementing legislation.”

The Jurisdiction of the Court

Which crimes will the Court prosecute?

The Court will prosecute the most serious crimes that are of concern to the international community. These are crimes of genocide, crimes against humanity, and war crimes. It has been proposed that the Court should prosecute the crime of aggression but the state parties have yet to agree on a definition. Below are brief definitions of the crimes as agreed to in the Rome Statute.

What is genocide?

Genocide occurs when acts are “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” Such acts of genocide can be carried out by:

- killing members of the targeted group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- imposing measures intended to prevent births within the group;
- or forcibly transferring children of the group to another group.

This definition of genocide is based on the definition found in the 1948 U.N. Convention on the Prevention and Punishment of the Crime of Genocide, which confirmed genocide as a crime under international law in the aftermath of the Holocaust.

What are crimes against humanity?

Crimes against humanity are crimes that are “committed as part of a widespread or systematic attack directed against any civilian population.” They can include acts such as:

- murder
- extermination
- enslavement
- deportation
- forcible transfer of population
- imprisonment
- torture
- rape
- sexual slavery
- enforced prostitution
- forced pregnancy
- enforced sterilization
- other forms of sexual violence
- persecution against any identifiable group or collectivity
- enforced disappearance of persons
- the crime of apartheid
- other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

What are war crimes?

War crimes are grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in armed conflicts. The Geneva Conventions are international agreements defining the rules of war. They set international standards for the protection of the civilian population and the treatment of combatants in international and internal armed conflicts.

War crimes are committed in the context of armed conflict. Some war crimes are specifically linked to internal armed conflict – such as civil war – and others are linked to international armed conflict. But most war crimes can occur in both situations.

Given that foreign troops have fought on Congolese soil, the DRC conflict has both an international and an internal dimension.

In northern Uganda, foreign troops have not been involved directly, and hence the war there is understood to be an internal armed conflict.

War crimes in international armed conflicts consist of acts such as:

- willful killing
- torture or inhuman treatment including biological experiments
- willfully causing great suffering or serious injury to body or health
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
- compelling a prisoner of war or other protected person to serve in the forces of a hostile power
- willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial
- unlawful deportation or transfer or unlawful confinement
- taking of hostages.

War crimes in internal armed conflicts include acts such as

- violence to life and person, in particular murder of all kinds
- mutilation, cruel treatment and torture;
- outrages upon personal dignity, in particular humiliating and degrading treatment
- taking of hostages
- conscripting and enlisting children under the age of fifteen years

In addition to the Geneva Conventions, other violations of the laws and customs of war can also be war crimes. The Rome Statute lists a wide range of such acts. Examples include:

- intentionally directing attacks against the civilian population;

- intentionally directing attacks against civilian objects;
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission;
- killing or wounding a combatant who, having laid down his arms or having no further means of defence, has surrendered..

Under international law, such acts can be war crimes even if they are not committed as part of a systematic or widespread attack on civilians, but if they are only rare or sporadic. However, the authority of the International Criminal Court is more limited. According to the Rome Statute, « the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes ».

Can the Court prosecute crimes of aggression?

No. When the statute of the International Criminal Court was prepared, countries could not agree on a definition of aggression as individual crime. Seven years after the entry into force of the Rome Statute (in 2009), the issue of aggression will be reviewed. If a sufficient number of states agree on a definition, it will be included in the Rome Statute, and only then could the Court prosecute crimes of aggression.

The question of aggression is of great importance to the DRC because troops from Rwanda and Uganda attacked and occupied part of the DRC for several years. The Security Council stated that “Uganda and Rwanda... have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo...” (Resolution 1304 on 16 June 2000), and many others have adopted a similar viewpoint.

Can the Court prosecute acts of sexual violence?

Yes. The jurisdiction of the Court explicitly names a number of sexual and gender-based crimes: rape; sexual slavery; enforced prostitution; forced pregnancy; enforced sterilization; and other forms of sexual violence, gender-based persecution and enslavement, including trafficking in women and girls. These crimes constitute crimes against humanity if they are carried out as part of a systematic or widespread attack on the civilian population. Acts of sexual violence can also be prosecuted as a war crime if they were committed in the context of, and associated with, an international or internal armed conflict.

Can the Court prosecute the recruitment and use of child soldiers?

Yes. The Rome Statute says that “conscripting and enlisting children under the age of fifteen years into armed forces or using them to participate actively in hostilities” is a war crime. This is the case in internal as well as international conflicts.

The Rome Statute does not deal with the recruitment of children between fifteen and eighteen years. Nonetheless, states may be prohibited from recruiting children between fifteen and eighteen years.

For example, the Congolese government has signed and ratified the Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict, which prohibits recruitment of children under the age of eighteen. The Ugandan government has also acceded to the Optional Protocol, raising the legal age for recruitment to the age of eighteen. In addition it has made a binding declaration affirming eighteen as its minimum age for voluntary recruitment.

Can the Court prosecute child soldiers who have committed crimes?

No. The Rome Statute excludes prosecution of a person who was under the age of eighteen at the time of the alleged commission of a crime.

Can the Court prosecute acts of economic exploitation or pillage?

Economic exploitation as such is not part the Court’s jurisdiction. However, it can be a war crime to pillage, starve civilians, or destroy or seize enemy property. A leader or member of an army or armed group involved in such crimes can be prosecuted.

Individuals can become criminally responsible by facilitating a crime. For example if an individual involved in economic exploitation activities facilitates a war crime, he or she can be prosecuted. Corporations cannot be prosecuted.

Can the Court prosecute crimes from the past?

The Court has jurisdiction over crimes committed after July 1, 2002, i.e. the date when the Rome Statute entered into force. Crimes committed before that date cannot be prosecuted by the Court. For those crimes, other solutions need to be found, such as prosecution in the national justice system, in an ad hoc international tribunal such as the International Tribunal for Rwanda, or any other special tribunal such as the Special Court for Sierra Leone or before the courts of a third country where individuals could be prosecuted under universal jurisdiction. If a country ratifies the Rome Statute later than

July 2002, the Court will only be able to prosecute crimes committed after the date of ratification

In which countries can the Court prosecute crimes?

The Court can prosecute crimes committed in states that are party to the Rome Statute. The DRC signed the Rome Statute on September 8, 2000, and ratified it on April 11, 2002. Uganda signed the Rome Statute on March 17, 1999, and ratified it on June 14, 2002. Therefore crimes that have been committed after July 1, 2002 on the territory of the DRC and Uganda can be prosecuted by the Court.

Can the Court prosecute crimes committed by foreigners, i.e. individuals who do not have the nationality of the country where the crimes occurred?

Yes, in two cases. The Court can prosecute crimes committed on the territory of a country that has ratified the Rome Statute whether the accused are citizens of that country or another. (There is an exception with regards to members of peacekeeping forces though; see below). And, the Court can prosecute crimes committed by citizens of a country that is party to the Rome Statute, whether the crimes are committed on the territory of their home country or of another country. Since the DRC and Uganda are party to the Rome Statute, their citizens can be prosecuted for crimes they commit in any country.

Can the Court prosecute crimes committed by U.N. peacekeeping forces?

This depends on the nationality of the peacekeepers. If the peacekeepers are from a country that has ratified the Rome Statute, they can be prosecuted. But peacekeepers from states that have not ratified the treaty are currently exempt from the Court's jurisdiction. This was decided by the U.N. Security Council in July 2002, and the rule was renewed for another year in June 2003. As a result, crimes committed by peacekeepers between July 14, 2002 and June 12, 2004 are exempt from the Court's jurisdiction (if the peacekeepers come from a country that has not signed or ratified the Rome Statute). This exception, however, has not been renewed after June 2004.

When is a person criminally responsible for genocide, crimes against humanity, or war crimes?

Crimes of such a magnitude are almost always committed by more than one person. The Court has jurisdiction over those who physically committed such crimes, as well as over persons who intentionally ordered the crimes, incited others to commit them, and assisted others in carrying out the crimes. The Court also has jurisdiction over military

commanders or persons effectively acting as military commanders who failed to exercise control over their forces when they committed such crimes.

Can a Head of State or Government, a member of a government or parliament be prosecuted?

Yes. The Rome Statute applies equally to all persons, regardless of their status. Government officials are not granted immunity.

Can the Court prosecute individuals who are not members of any government or armed group?

Yes. The Court can prosecute persons who facilitate a crime. For example, if a person knows about plans to commit a crime and gives the perpetrator funds or arms to commit the crime, he or she might be prosecuted for having given this help. In the language of the Rome Statute such as person “aids, abets or otherwise assists” the commission of the crime.

Can the Court prosecute governments or armed groups?

No. The Court is based on the principle of individual criminal responsibility. It will not try governments and armed groups, but rather individual members of governments or armed groups, analyzing how each one in the hierarchy committed, ordered, assisted, or tolerated the crime.

How many accused will the Court be able to try?

We do not know how many accused the Court will prosecute in each situation, but it will be a very small number. The Court will concentrate on those who bear the greatest responsibility for the most serious crimes. Each case demands large amounts of resources and time, and the Court will most certainly not be able to deliver justice on all such crimes committed in any particular situation. As a result the Court by itself will not be able to bring justice throughout a country such as the DRC, where more than 3 million people have died as a direct or indirect result of the war.

Complementarity

How will national courts and the International Criminal Court work together?

The International Criminal Court was created to complement national courts. The Court will not begin investigating a crime if the state concerned is already investigating or

prosecuting it, or even if the state has investigated it and then decided not to prosecute the persons concerned. However, under the Rome Statute, the Court has the power to prosecute cases if the national state is “unwilling or unable” to carry out a genuine investigation or prosecution. This part of the Statute is meant to make it less likely for perpetrators to escape punishment for crimes because their own state is not willing to investigate and prosecute them.

- In order to determine if a state is “unwilling” to genuinely investigate and prosecute a case, the Court considers whether it has taken measures to shield the suspect from criminal responsibility, whether it has unduly delayed the proceedings and whether it conducted proceedings in an independent and impartial way.
- In order to determine if a state is “unable” to genuinely investigate and prosecute a case, the Court considers whether it is unable to arrest the accused, to obtain the necessary evidence, and to otherwise carry out judicial proceedings. This could be the case if the national justice system has collapsed, totally or substantially.

Structure and Organization of the Court

Where is the Court based?

The Court is based in The Hague. Its address is:

International Criminal Court

174 Maanweg

2516 AB The Hague

The Netherlands

Website: www.icc-cpi.int

The Court can open field offices for investigations in other countries. It can also decide to hold hearings in a place that is closer to the site of the crime than The Hague. For example, if the Court does prosecute crimes committed in the DRC, it is possible that it would open an office in the DRC.

How is the Court organized?

The Court has three organs: the Office of the Prosecutor, the Chambers, and the Office of the Registrar. NGOs will most often be in contact with the Office of the Prosecutor, but there are also opportunities for contact with the Registrar.

Who is the Prosecutor and what does he do?

The Prosecutor and his Office gather information about crimes and present evidence against an accused before the Court. The Prosecutor's Office acts independently as a separate organ from the Court.

The Prosecutor of the International Criminal Court is Luis Moreno Ocampo. Previously an Argentinean state prosecutor, Mr. Moreno Ocampo played a key role in prosecuting members of the military junta following Argentina's "dirty war." As Assistant Prosecutor he was involved in the prosecution of nine military commanders for their role in crimes against humanity committed during the military government of 1976-1983. In 1985, five of these commanders were sentenced to prison terms. Since 1992, he has been in private practice as a lawyer. During that time he pushed for the prosecution of organized crime and corruption in business and has advised governments and international bodies on controlling corruption in Argentina and elsewhere.

What are the chambers?

The judicial functions of the Court are carried out by chambers. The chambers are each composed of several judges. The Court has three chambers, the Pre-Trial Chamber (with seven judges), the Trial Chamber (with six judges) and the Appeals Chamber (with five judges). The Pre-Trial Chamber decides whether the Prosecutor is allowed to start a formal investigation into a case. The Trial Chamber decides whether the accused person is guilty as charged and if they find him or her guilty, will assign the punishment for the crime and any damages to be paid to the victims. It also must ensure that a trial is fair and expeditious, and is conducted with full respect for the rights of the accused with regard for the protection of victims and witnesses. When the Prosecutor or the convicted person appeals against the decision of the Pre-trial or Trial Chambers, the case comes to the Appeals Chamber. The Appeals Chamber may decide to reverse or amend a decision, judgment, or sentence. It can also order a new trial before a different Trial Chamber.

What are the functions of the Registrar and the Registry?

The Registrar has the task of running the administration of the Court and keeping records. The Registry locates witnesses and victims and provides for their protection in participation during investigations and trials.

How are the Prosecutor and judges elected?

The Prosecutor as well as the judges are elected by the Assembly of State Parties, i.e. all countries that have ratified the Rome Statute. In February 2003, the first eighteen judges were elected, and in April 2003, the Prosecutor was elected.

Who are the judges?

The eighteen judges are: Rene Blattman from Bolivia
Maureen Harding Clark from Ireland
Fatoumata Dembele Diarra from Mali
Adrian Fulford from the United Kingdom
Karl T. Hudson-Phillips from Trinidad and Tobago
Claude Jorda from France
Hans-Peter Kaul from Germany
Philippe Kirsch from Canada (President)
Erkki Kourula from Finland
Akua Kuenyehia from Ghana (First Vice-President)
Elizabeth Odio Benito from Costa Rica (Second Vice- President)
Gheorghios M. Pikis from Cyprus
Navanethem Pillay from South Africa
Mauro Politi from Italy
Tuiloma Neroni Slade from Samoa
Sang-hyun Song from the Republic of Korea
Sylvia H. de Figueiredo Steiner from Brazil
Anita Usacka from Latvia

Rights of the Accused and Punishment

What are the rights of those accused of a crime by the Court?

Under the Rome Statute, any accused person is guaranteed the highest standards of fair trial. Hence, no person can be tried for a crime for which he or she has already been convicted. The accused has a right to be presumed innocent until proven guilty.

The accused also has a right to choose his or her own counsel, or if the person does not have legal assistance, to have legal assistance assigned to him or her. The accused does not have to pay the legal counsel if he or she does not have the means to pay. Furthermore, the accused has the right to get a competent interpreter if necessary. The accused has a right to be questioned only in the presence of counsel, to present evidence, to remain silent, and to have charges proved beyond reasonable doubt. The Rome Statute also makes explicitly clear that the accused shall not be subjected to any form of coercion, duress or threat, torture or cruel, inhuman and degrading treatment.

Under which circumstances can someone be excluded from criminal responsibility?

The Court can exclude someone from criminal responsibility when that person has lost the intellectual capacity to understand that he or she is committing a crime. This can be the case when a person suffers from a mental disease, was in a state of unwanted intoxication at the time of the crime, or acted to defend him or herself.

Persons can also be excluded from criminal responsibility when they did not know that they were committing a crime or committed a crime under a legal obligation to obey orders of the government or a superior.

What is the maximum sentence of the Court?

The maximum sentence is life imprisonment. The Court plans to have pre-trial detention facilities in The Hague. A sentence of imprisonment will be served in a state that has indicated its willingness to incarcerate a convicted person. The enforcement of a sentence of imprisonment in the host State is subject to the supervision of the Court and must be consistent with international standards governing treatment of prisoners, including the right of prisoners to be free of any torture or cruel, inhumane, or degrading punishment.

The Start of an Investigation

How is the Court's authority triggered?

There are three ways in which the Court can initiate investigations.

First, a state that is party to the Rome Statute can refer a case to the Prosecutor of the Court. This is what the Ugandan government did in January 2004, about the situation in northern Uganda. In March 2004, the government of DRC referred crimes in the DRC to the Court.

Second, the U.N. Security Council can refer a case to the Prosecutor.

Third, the Prosecutor can initiate investigations into a case on his own initiative, based on credible information that he has received. This information can come from states, NGOs, victims, or any other source.

How will the Court decide whom to prosecute?

The Court is likely to consider the gravity of the crime and the degree of individual responsibility for it. It will probably give priority to prosecuting persons accused of committing the most serious crimes and those who are suspected of being directly responsible for those crimes.

What does the Prosecutor do to start an investigation?

In those situations where the Prosecutor decides to take action by himself – without a state referral – he first carries out a preliminary examination and then submits a request for authorization of a formal investigation to the Pre-Trial Chamber of the Court.

In those situations where the Prosecutor receives a referral from a State Party, he must check whether the referral is admissible under the requirements of the Rome Statute and whether crimes under ICC jurisdiction appear to have been committed. If those criteria are satisfied, the prosecutor must launch an investigation to determine the persons bearing responsibility for the crimes committed.

HOW NATIONAL NONGOVERNMENTAL ORGANIZATIONS CAN WORK WITH THE COURT

The Interaction between NGOs and the Court

What role can NGOs play vis-à-vis the Court?

NGOs can play a central role before, during, and even after an investigation. Their contributions fall into three main categories:

Telling others about the Court

NGOs can play an important role in informing the media and the general public about the Court. They can do this through radio, leaflets, posters, conferences and information sessions. They may want to use materials produced by the Court itself or this guide.

Providing information to the Court

NGOs can inform the Office of the Prosecutor about crimes committed, a specific case, the historical and political context of human rights abuses, or the capacity or will of a state to investigate or prosecute crimes. This information could help the Prosecutor decide whether or not to open an investigation.

Serving as a link between the Court and victims and witnesses

NGOs are often close to the victims and witnesses. They can play an important role by accompanying victims and witnesses throughout the process of providing evidence to the Office of the Prosecutor. They can inform victims and witnesses about procedures at the Court and prepare their work with the Court for example by informing them about security risks, helping them to take action collectively, and putting their information into a form most easily used by the Office of the Prosecutor.

How can NGOs submit information to the Court?

Ordinarily persons from outside the Court will be in touch with the Office of the Prosecutor rather than other branches of the Court. They can send information on a number of issues, illustrated below. Sometimes NGOs send information directly to other branches of the Court. In particular, they can send submissions to the any of the Chambers in a legal document called an Amicus Curiae. NGOs may also directly address the Court in order to represent victims. Moreover, NGOs can also apply to participate to the proceedings when they have suffered a crime themselves. In addition, NGOs can

represent victims who want to submit information regarding the Prosecutor's decision not to investigate a case.

NGOs can also send case information to a government that is party to the Rome treaty, or even to the U.N. Security Council, and ask them to refer a case to the Court.

Can NGOs help in launching proceedings before the Court?

Yes. NGOs regularly publish reports on human rights crimes that may fall under the jurisdiction of the International Criminal Court. If NGOs believe that the abuses they have documented are serious enough to merit investigation by the Court, they should send the most solid reports on the most serious crimes to the Prosecutor. NGO reports have already played a role in spurring the investigation in DRC. The Prosecutor received six communications regarding the situation in Ituri, among them "two detailed reports from nongovernmental organizations." Evidently, the reports from the NGOs prompted the Prosecutor to identify the situation in Ituri as "the most urgent situation to be followed." However NGOs should refrain from sending the Office of the Prosecutor every piece of information they have, in order to avoid the Prosecutor getting swamped and paying less attention to reports he receives.

What information should NGOs send to the Office of the Prosecutor?

NGOs can send information on crimes regarding individual cases or patterns, providing as much detail as possible. In addition, NGO reports could explain the historical and political context of the crimes investigated, in order to provide the Prosecutor with a better understanding of the situation. By reporting on the capacity or will of a state to investigate or prosecute crimes, NGOs can also help the Prosecutor determine whether a case falls under the jurisdiction of the Court or should be left to the national courts. NGOs could also inform the Prosecutor about the practical feasibility of investigations. It is not possible to give a precise list of all the kinds of information that NGO reports might include, but when an NGO sends information about human rights crimes, it should include the following:

- Location (in DRC: province, territoire, collectivité, groupement; in Uganda: district, county, sub-county),
- Time, date, and duration of the incident
- Chronology of the incident
- Nature of crime (i.e. torture, rape, killings), and methods used
- Possible reasons for the incident

- Identity of alleged perpetrators (the army, armed group, or individuals involved)
- The identity of the victim (name, age, gender, occupation, address, relevant information about ethnicity, religion, or other affiliation)
- A list of evidence available such as photos, written records. However do not send the evidence itself unless requested by the Prosecutor.

When sending information to the Court, the NGO should always ensure that they have one copy of their communication in their own files.

What should NGOs do with other evidence they might have, such as photos, video films, documents, medical certificates, or even objects?

They should provide the Office of the Prosecutor with a list of all such evidence in their possession and keep it safe until they hear from his office. They should not send the evidence itself unless requested by the Prosecutor, as it could otherwise get lost, damaged, or be overlooked.

Should NGOs work like criminal investigators?

No. NGOs can provide information on crimes which they gather in the course of their normal work. They are not expected to be “mini-prosecutors.” In fact it is the role of the Office of the Prosecutor alone to develop solid evidence that can be used in Court.

Do NGOs have to follow a specific format when sending information to the Office of the Prosecutor?

No. NGOs can submit their own reports to the Prosecutor and do not need to fill in forms or fulfill other formalities. However, as noted above, those reports should include specific information.

Will NGOs get a reply from the Prosecutor’s Office when they send information?

In principle the Office of the Prosecutor must send a reply to all communications received, if only to acknowledge receipt. However, in practice, they might not always have the capacity to do so. The Office of the Prosecutor will probably just receive the information and use it as wishes, unless it has a specific question for the NGO. In that case, the Prosecutor’s Office will contact the NGO. NGOs submitting information to the Prosecutor should avoid raising expectations among the victims and other possible witnesses, as they cannot know what the response of the Prosecutor will be. The

Prosecutor may well decide not to proceed farther with the information, taking into account a variety of factors.

How can NGOs submit information in an Amicus Curiae?

In addition to factual information NGOs can provide to the Court, they can also submit legal analysis or policy arguments in an Amicus Curiae, a legal document accepted by one of the Court chambers (it means “Friend of the Court”). A Court Chamber can invite a state, organization, or individual to submit a written statement on a specific topic, a so-called Amicus Curiae brief. The Amicus Curiae is prepared by an organization that has a professional interest in the topic. It presents the issue at stake in a concise manner and makes suggestions to the Court how to settle the matter. The Amicus Curiae gives NGOs the opportunity to be heard on a number of legal and practical issues, for example, the competence of national courts to prosecute a case. NGOs can also contact a Chamber and propose to submit an Amicus Curiae.

Can representatives or members of NGOs be called to testify?

Yes. The Prosecutor or the defence lawyers can call anyone to testify in Court. NGOs might have to answer questions about the information gathered on crimes or about the circumstances of their research. Such testimony might include elements of information collected by researchers that were not previously made public – and NGOs could potentially be forced to disclose information that they intended to keep confidential.

The Court will only be able to prosecute a few cases – what does that mean for NGOs?

Because the Court will prosecute only a small number of cases, NGOs should think strategically about which are the most important cases to submit, and not expect that “their” case will necessarily be prosecuted. Where possible, NGOs should coordinate among themselves and decide to push jointly for a particular case or situation to be investigated.

Should NGOs send only material on the geographic areas in which the Prosecutor has expressed a special interest – Ituri in DRC and northern Uganda?

In the DRC, the Court is likely to concentrate on Ituri for a while. But that does not mean that NGOs should limit their submissions to Ituri. When the Prosecutor announced the launch of the investigation in DRC in June 2004, he made clear that the scope of the investigation would cover the whole territory of the DRC. If NGOs have

relevant information about crimes committed in other parts of DRC, they should send this to the Office of the Prosecutor.

In Uganda, the Prosecutor will concentrate on the north as requested by the Ugandan government. Hence NGOs should concentrate on sending information on the crimes committed by all sides in relation with the conflict in northern Uganda.

Will the Court intervene on behalf of human rights defenders who are threatened, arrested, or face danger because of their submission of information to the Court?

NGOs should not expect to be protected by the Court. The Court will take all possible measures to ensure the safety of those assisting it, but it will not be able to protect everyone who brings it information. Human rights defenders should therefore develop their own strategies for protection and not wait for the Court's help. Nevertheless it would be important to inform the Court of any attacks on human rights defenders resulting from their contribution of information to the Court.

NGO Assistance to Victims and Witnesses

What can NGOs do to assist victims and witnesses in contacting the Court?

NGOs can become a bridge between victims and witnesses and the Court:

- They can send information gathered from victims and witnesses to the Court
- They can inform victims and witnesses about different possibilities of participation in the Court proceedings, and assist them in this participation
- They can help victims and witnesses get legal representation
- They can represent victims at any stage of the trial
- They can help victims and witnesses organize themselves in groups
- They can help victims apply for reparations
- They can inform victims and witnesses about the security risks involved and help them take measures for their protection

Who are victims and witnesses under the Court rules?

The Court rules define victims as “persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court” Organizations such as NGOs that have “suffered direct harm” can also be victims. Witnesses are persons

called by the Prosecution or the Defence to give testimony to the Court, including victims, persons who saw a crime committed, experts, or relatives of a suspect.

What is the difference between participating in Court proceedings as victim and as witness?

Victims can ask the Court to allow them to express their views and concerns in the proceedings. This is quite an unusual and innovative element for an international court. It means that there is a real opportunity to bring the viewpoint of the victims to the Court. Victims who participate will probably have legal representation. They will not be asked to tell their story in Court; rather, their legal representatives will have to answer specific questions. The role of victims in the ICC is somewhat similar to the role of the *partie civile* in the civil law system which is in place in the DRC. When victims come to participate in this way, they have to pay their own expenses. The Court might not cover the costs for the legal representation either.

The Prosecutor or the Defence might call some victims as witnesses to testify in Court. When that happens, they must answer questions from the Prosecution, the Defence, and the legal representatives of the other victims. If victims are invited as witnesses, the Court covers their costs and organizes their stay for them. Victims cannot apply to become witnesses. The Prosecution or the Defence decides whom to call as witnesses.

How should NGOs present their relationship with the Court to victims and witnesses?

When talking to victims and possible witnesses, NGOs need to make clear that they are not working as agents of the Court. They collect their information independently, as part of their own work, although they might later submit some or all of this information to the Court.

Should NGOs send statements from victims and witnesses to the Court?

No. When speaking to victims and witnesses about alleged crimes, NGOs should avoid taking statements that contains word by word what the victims and witnesses are saying (these are called verbatim statements). They should record a summary of the information provided by the victim or witness. Only the Prosecutor's Office should decide what questions to ask victims and witnesses and in what form to take down their answers. Since NGOs are not part of the Prosecutor's office, they might make mistakes in interviewing witnesses that would complicate the work of the Prosecutor. This is why they should just take a summary of the information and provide it to the Prosecutor's office, along with information about how the victim or witness can be contacted in the

future. Of course the NGO must seek the agreement of the victims and witnesses when doing so.

But if victims or witnesses insist on making formal, verbatim statements or if the NGOs have already collected such statements in the past, NGOs can send the statements to the Prosecutor. When doing so, NGOs must make sure not to comment on, alter, or edit any statements made by victims and witnesses or any documents that they want to submit to the Prosecutor's Office.

How can NGOs help victims to decide if they want to apply to participate in a case?

First of all, NGOs can help victims assess the security risks that might arise for the victim from participation in a case. They can also take protection measures on the local level.

Secondly, the NGOs should explain to victims the different stages of examination and formal investigation. NGOs should encourage those victims to apply whose cases are connected with the situation under investigation; and they should discourage others from making contact with the Court.

Finally NGOs can assist victims in filling in the forms needed to apply for participation in a case. The forms are not yet available but should become available during 2004 on the Court's website, at www.icc-cpi.int. Victims can apply for participation when a formal investigation has been launched or even before that if the Prosecutor has launched an investigation on his own initiative.

Victims will apply to the Registrar of the Court who will pass the form onto the relevant Chamber. The Chamber will decide whether and how victims can participate. It can reject the application if (i) it considers that the applicant is not a victim, if (ii) the victim has no personal interest in the proceedings or if (iii) it determines that the participation of the victim would be contrary to the rights of the Defence and the requirements of a fair and impartial trial. A victim whose application has been rejected by the Chamber may file a new application later in the proceedings.

How can NGOs help victims participate before an investigation is formally launched?

NGOs can assist victims in providing evidence to the Office of the Prosecutor (see above). In addition, NGOs can also help victims in applying to the Pre-Trial Chamber to

be heard when the Prosecutor has decided that it is in the interest of justice not to prosecute a case. They can also assist the victims in presenting their views.

How can victims participate in the trial itself?

Once the trial has started, victims can ask to be heard and express their views through their legal representatives.

Victims might also be invited to give their view in Court on a number of issues. For example, victims might be invited to express a view when Court decides whether to judge a group of accused together or separately.

The Registrar should notify the victims regularly of developments and decisions by the Court. Particularly important steps are:

- The decision of the Prosecutor not to initiate an investigation or not to prosecute
- The Pre-Trial Chamber's decision to hold a hearing to confirm charges against the accused
- The progress of the proceedings, in particular the date of hearings and any postponements, and the date of the judgment
- Requests, submissions, and motions that are important for the case.

How can NGOs assist victims with legal representation?

NGOs can assist victims in identifying qualified, trusted lawyers who can represent them at the Court. They can also propose lawyers to the Court itself, which can choose legal representatives for the victims in some situations. There will be an office of Public Counsel within the Registry of the ICC. The office will provide support and assistance to the legal representatives of victims or victims, including legal research and advice or appearing in Court.

Furthermore, NGOs can help victims organize themselves in groups and seek common legal representation. This will be important to ensure effectiveness in situations when there are many victims. The Court itself can decide to group victims and designate a common legal representative.

Does the Court keep the information provided by victims and witnesses confidential?

The Court rules require the Prosecutor to protect the confidentiality of the information he has received and collected. This means he cannot release the names of his sources publicly. However under due process rules, the Prosecutor must provide the Defence with the names of witnesses he intends to call. The accused has a right to know who is testifying against him or her.

If there are security concerns, a Court Chamber may decide to prohibit the public disclosure of the name or location of a victim or witness, or even of another person who is neither victim nor witness. In certain cases victims and witnesses can be heard in closed sessions (*in camera*), or they can be given pseudonyms. Sometimes their testimonies might be presented with technologies that alter their voice or image in order to keep their identity confidential. But there is no guarantee that this will happen in all cases where victims might wish for it to happen.

Under certain circumstances the Court has to respect the confidentiality of information, and cannot force disclosure of the information as evidence. This is the case with information that was given by representatives of the International Committee of the Red Cross (ICRC), to the legal representative of an accused person, medical doctors, or others in professional confidential relationships. Other information is not protected and might hence be used – and disclosed – in Court.

Protective measures can also be requested by the Prosecutor, the defense or victims and witnesses themselves. The Victims and Witnesses Unit can make recommendations in this sense to the Chambers.

What other measures are available to protect victims and witnesses?

The Victim and Witnesses Unit within the Registry of the International Criminal Court is in charge of the security and well-being of the victims and witnesses. The Court's rules define this role in general terms such as planning for their protection, providing them with medical and psychological assistance, and ensuring that victims of gender-based violence receive necessary help

However in practice, it is likely that there will be a number of problems and the Victim and Witness Unit might not be able to protect all victims and witnesses. Each case will probably involve a high number of victims and witnesses; but the funds allocated to victim's and witness protection are very limited.

How can NGOs ensure the safety and confidentiality of victims and witnesses?

NGOs can closely observe the progress of the trial to ensure that the Court respects its own rules. They should help the victims understand the limitations of the Court in protecting them, while also pushing for better protection measures where possible. Victims and witnesses who want to testify or otherwise participate need to be told about risks to their security, as well as the protection measures that are available.

NGOs themselves should take precautionary measures to ensure that a victim's or witness' identity is protected. If an NGO wishes to send information from victims or witnesses to the Court, it must inform those persons about the Court's proceedings and about the possible security implications. Only after doing that should the NGO seek the agreement of the victim or witness for sending on information to the Prosecutor's Office. They should only transmit documents from victims and witnesses to the Prosecutor's Office if the victims and witnesses expressly agree to this being done.

When planning to contribute information to the Court, NGOs should carry out a security assessment and decide on a strategy for protecting their own staff and others in contact with them. In some cases, discretion is the best strategy; in others, openness may work better (though that does not mean divulging the identity of victims and witnesses).

There is a range of measures NGOs can take to protect the confidentiality of information:

- regularly carry out risk assessments
- join national and international human rights networks
- build channels with security officers
- ensure security of the office premises and control the flow of visitors
- recruit people you can trust
- be discreet about your interactions with the International Criminal Court
- always be careful about what you say on the phone, in emails, faxes, and letters; possibly using code words for sensitive information or using encryption.
- use the addresses of other trusted organizations for sending and receiving mail
- interview victims and witnesses without other persons present
- interview victims and witnesses in a location and in circumstances that do not arouse the interest of outsiders

- ask a local contact to interview the victim or ask the victim to come to you, in order to avoid raising suspicion through your visit
- change plans where necessary, for example if you realize you are being followed
- store the information about the interview safely, i.e. use passwords and encryption
- keep notebooks in safe locations
- delete the name of the source of information from your notes
- avoid using information that could easily betray the identity of the informant

(some of the suggestions are taken from Amnesty International/ CODESRIA: “Ukweli, Monitoring and Documenting Human Rights Violations in Africa, A Handbook,” Amsterdam/ Dakar 2000).

Can victims obtain reparation from the Court?

Yes. Victims or their close relatives can obtain reparation, including restitution of property and compensation for losses. The compensation granted to the victim can come from the funds of an accused. The states that founded the Court also created a trust fund to give reparations to victims and the Court may decide to give victims money from this fund. The judges of the Court determine the amount of compensation. The Court can determine the amount of compensation without a specific request from the victim when it finds that the victim is unable to claim reparation. In order to allow the greatest number of victims to obtain reparation, the Court rules require the Registrar to give adequate publicity of the reparation proceedings before the Court. The Court can also allow collective reparation that is, reparation to a whole group of victims – if the number of victims is too high for individual reparation or if the provision of individual reparation is too difficult.

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