

Remarks of Judge Monageng

The Arab Court of Human Rights in Light of Global and Regional Standards and Experiences

Thursday, 9 April 2015

11:20-12:45

Second Session: The effectiveness of the Arab Court regarding the Protection of Victims and Witnesses

- I would like to share a few observations regarding the protection of victims and witnesses based on my experience as a judge at the International Criminal Court, which I will refer to as the ICC. It is pertinent to observe that there are victims who are also witnesses and this distinction is crucial, and rightly observed by the ICJ, the Statute of the Arab Court is silent on victims. It is also silent on other categories like amicus, experts etc.
- The ICC is based on a treaty, called the Rome Statute, which regulates how the Court operates. Other legal instruments, particularly the Rules of Procedure and Evidence, expand upon the various provisions of the Statute.
- The Statute and the Rules were agreed upon and adopted by the states that are parties to the treaty, who are referred to as States Parties. There are currently 123 States Parties to the Rome Statute, with the most recent being Palestine, which joined on 1 April of this year.
- As its name implies, the ICC is a criminal court, it is not a human rights court. Our proceedings are criminal in nature- there is a trial of an individual who, if convicted, faces penalties which can

include a sentence of life imprisonment. The ICC does not prosecute states, only individuals. Having said this, Article 21 (3) enjoins the judges and all organs of the Court to interpret the ICC's legal framework in accordance with fundamentally recognised international human rights standards, including fair trial rights.

- The ICC has jurisdiction over the crime of genocide, crimes against humanity and war crimes. In order for a case to be brought before the ICC, it must meet an admissibility test. As a part of that test, crimes must be of sufficient gravity to be admissible.
- Finally, the ICC is a court of “last resort”. This means that, unlike many other international courts, the ICC only acts when the national system that otherwise would have jurisdiction over the alleged crimes is unable or unwilling to investigate or prosecute these crimes.
- I mention this not only to provide some general background on the ICC, but also because these three aspects of the ICC are relevant to any discussion regarding victims and witnesses at the Court.
- With respect to the types of crimes over which the ICC has jurisdiction, it is important to keep in mind that these crimes are the “most serious crimes of concern to the international community”- they are crimes that have led to victims suffering “unimaginable atrocities that deeply shock the conscience of humanity”.
- When we think of what this means in terms of who are the victims and witnesses that appear before the Court, we can already see that these are individuals who have experienced or witnessed incredibly traumatic and extreme events.

- The fact that the ICC is a court of last resort tells us that the victims and witnesses before the Court have not been able, for whatever the reason may be, to see justice done for the harm they have suffered from their own countries' judicial systems. This may be due to the lack of a functioning judicial system in their own country or because the state is unwilling to investigate or prosecute the crimes that have caused the victims harm.
- Finally, the fact that the ICC is a criminal court means that other fundamental human rights must be taken into account and prioritized, most particularly the fair trial rights of each accused person brought before the Court.
- In terms of victims and witnesses, the criminal nature of the Court's proceedings means that oftentimes these individuals also provide evidence that the Prosecutor will seek to use to prove the accused person's guilt beyond reasonable doubt. Therefore, protecting victims and witnesses must be carefully weighed against ensuring that the accused person is able to prepare his or her defence and meaningfully challenge the evidence against him or her.
- Thus, as we think about how the Arab Court can be effective in protecting the victims and witnesses of its court proceedings, it is critical to keep in mind the nature of the court, what types of claims the court will deal with and from what types of harms the victims and witnesses appearing before the court will likely have suffered.
- In other words, the effectiveness of the Arab Court with respect to the protection of witnesses and victims necessarily depends on the specific challenges that may arise within the framework of the

Arab Court, including the issue of over which actors and which human rights claims it has jurisdiction.

- Many of the human rights claims dealt with by the European Court of Human Rights do not raise the same issues with respect to protecting victims and witnesses as are raised by the types of crimes that the ICC deals with. This does not mean that there are no challenges or lessons to be learned, but rather that effectiveness depends upon programs being designed and tailored to address the challenges that are likely to arise.
- With these preliminary comments in mind, I will now turn to discussing the ICC's witness and victim protection activities.
- The Statute and the Rules contain numerous provisions that relate to various procedures for the protection of victims and witnesses. Given the nature of the Court's work and the crimes that it deals with, this is not surprising. To date, almost 10,000 victims have been represented in the Court's proceedings.
- Article 68 (1) of the Statute is the primary provision that establishes the obligation of the Court to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." Particular emphasis is placed on victims and witnesses who are considered vulnerable.
- A vulnerable witness is someone who is at increased risk to be psychologically harmed by testifying before the Court or who may face psychological or physical difficulties in testifying. Article 68 (1) of the Statute reflects this emphasis on vulnerable victims by requiring the Court to take appropriate measures for protection

particularly “where the crime involves sexual or gender violence or violence against children”.

- However, vulnerable victims and witnesses are not limited to those who have suffered from these specific types of crimes. The elderly, witnesses who are otherwise traumatised, and witnesses suffering from a disability, mental illness or psychosocial problems may also be considered vulnerable.
- In addition, other factors that can be taken into account are significantly increased stress or anxiety due to relocation or resettlement and, for example, fear of retaliation.
- The Registry, a neutral organ of the Court, has units devoted to ensuring that victims are appropriately assessed with respect to their potential vulnerability and any protective measures needed for safety and security reasons. These units work with the victims, witnesses, the Court and the parties prior to, during, and after a witness’s appearance at the Court.
- Article 68 (1) also applies to the Prosecutor and obliges her to take measures “particularly during the investigation and prosecution of such crimes”.
- However, it is again important to note that article 68 (1) makes clear that any measures taken by the Court or the Prosecutor cannot prejudice or be inconsistent with the rights of an accused and a fair and impartial trial.
- In-court protective measures can also be applied to protect the security of witnesses and victims. Rule 87 provides a non-exhaustive list of protective measures that may be appropriate,

such as expunging the name of a victim, witness or other person who may be at risk on account of testimony given or any information which could lead to his or her identification, the use of pseudonyms, proceedings in closed session, voice and face distortion, and proceedings being conducted *in camera*.

- It is at the judges' discretion to order protective measures. But, it is not completely discretionary. The judges must first be convinced that the measures are justified and based on objective information that raises fears of real danger that could arise for a victim or witness if the protective measures are not put in place.
- Furthermore, judges must carefully balance a number of other considerations and rights when considering whether to order in-court protective measures. For example, going into closed session, where the public is unable to see or hear the court proceedings, represents a limitation on the principle of a public hearing that is one of the cornerstones of the Rome Statute system.
- Additionally, any measure to withhold information from the defence will be heavily scrutinised, as it could undermine the right of the accused to prepare his defence.
- An example of this is the issue of whether a witness can testify anonymously. At the ICC, witnesses may *not* appear anonymously - although the judges do have the discretion to order that the identity of a witness be withheld until a short time before they testify so as to allow other protective measures to be put in place.
- Another issue of protection arises after the witness has testified and is returning to his or her home country. In some situations, the testimony given may make it too dangerous for the person to return

home immediately or may require monitoring in the home country after the person has returned.

- The ICC has field staff in the situation countries that assess the security situation for these witnesses and then can propose different protection programmes to meet the security needs of each individual.
- These measures can include having a 24-hour emergency contact, coordination of protection with the local authorities, relocating the person to another area within the country or, in extreme cases, relocating the person and possibly his or her family to a different country.
- As you can see, the ICC has very intensive and developed witness and victim protection procedures. For this programme to succeed, States Parties, especially the host state, must give the Court maximum cooperation.
- In my view, in order for the ICC to be effective in protecting witnesses and victims, all of these potential procedures are necessary due, as I have already said, to the nature of the Court work and the types of crimes that we deal with.
- Victims under the Rome Statute have very extensive rights, for example, they can cross examine, make submissions and they are represented by counsel at the Court's expense. They are allowed to protect their personal rights where these are violated.
- As a final comment, I would like to just mention one other aspect of the ICC's work that is slightly different from what I have just been speaking about, but which may be of interest to you.

- In the Rome Statute, the States Parties not only created the Court, but also created an independent, but connected organization known as the Trust Fund for Victims.
- The Trust Fund has two mandates.
- First, however, I have to explain that one of the unique aspects of the Court is that once there is a conviction, the Court not only sentences the convicted person, but can also order the convicted person to make reparations to victims of his or her crimes.
- If reparations are ordered, the Trust Fund's first mandate is to administer the reparation awards. This means that they may identify beneficiaries if the Court has not identified specific victims and they also work with affected communities to determine what types of reparations are most needed. So, for victims of sexual violence, particularly in situations where women are victims of mutilation and debilitating disfigurement, the Trust Fund may determine that providing free reconstructive surgery is most appropriate.
- However, the Trust Fund is not limited to only administering reparation awards. Its second mandate is actually broader and is not linked to a conviction, or even necessarily a specific trial. This is called the Trust Fund's "assistance mandate". Basically, when the Prosecutor opens an investigation into what is called a "situation", which is the time period when the Prosecutor is investigating whether crimes were committed and if there is enough evidence to bring charges, the Trust Fund, under its assistance mandate, is empowered to provide physical or psychological rehabilitation and

material support for the benefit of victims and their families in those situation areas.

- One of the main groups of victims that the Trust Fund works with under its assistance mandate are victims of physical and sexual violence, many of whom of course are women and girls.
- To give you an idea of the scope of the assistance programme, there are currently 28 active projects in Uganda and CAR that provide support to over **110,000** victims.
- So far, reparations have only been ordered in one case at the Court- in the case of *the Prosecutor versus Thomas Lubanga*, who was convicted of recruiting and actively using child soldiers in hostilities. Another Trial Chamber, in the case of *the Prosecutor versus Germain Katanga*, is currently considering whether to order reparations and, if so, of what type and to which victims.
- One of the issues that arose in the *Lubanga* reparations case was the degree to which the convicted person, Mr Lubanga, could challenge the victims who filed reparations request, including how much of the applications could be redacted for reasons of security and protection.
- Another issue that arose was to what degree Mr Lubanga could be aware of and comment on the work of the Trust Fund in identifying victims to receive reparations.
- As more trials conclude, I believe that reparations will become a more prominent part of the Court's activities. From this, the role of the Trust Fund in administering reparations and the rights of the convicted person during that process will need to be further developed.

- The issue of how best to ensure the protection of victims who participate in these programmes is still ahead of the Court and I raise it today simply to highlight the potential complexities of victim protection.
- I hope that my comments have given you some points and ideas to think about as you consider what types of procedures may be needed at the Arab Court with respect to protecting witnesses and victims during the proceedings.
- I would like to thank the organizers for inviting me to participate in this event, my fellow panellists for their contributions, and each of you for being here and being a part of this important conversation.
- I look forward to continuing this discussion with you throughout the rest of the conference.
- Thank you.