

Written Submissions of the Georgian Coalition for the ICC on the “*Matrix over possible areas of strengthening the Court and the Rome Statute System*”

We would like to present the views of the Georgian Coalition for the International Criminal Court with regard to the issues included in the Matrix of Reforms as well as provide the recommendations on additional actions that should be taken to strengthen the International Criminal Court and the Rome Statute System.

The Georgian Coalition also shares the concerns of other civil society actors, the State Parties and the Court officials with regard to serious challenges and shortcomings the ICC faces in recent years undermining its effectiveness, independence and integrity. Hence, the GCICC welcomes the establishment of the Group of Independent Experts which has a very important task in this review process. We also welcome the elaboration of the Matrix of Reforms of June 2019, which outlines some of the challenges currently faced by the Court as well as the possible actions that should be carried out to ensure effective fulfilment of the Court’s mandate in future.

On 24 February 2020, the Georgian Coalition for the ICC presented its views to the group of Independent Experts during the ICC round table discussion held with civil society organizations. The experts further encouraged the participants to present their views in a written form. The GCICC appreciates the opportunity given to civil society to provide comments and written submissions. Therefore, with this document, we would like to share with you the challenges the Georgian Coalition for the ICC and the victims of the situation in Georgia have faced since the preliminary examination stage up to date, and at the same time, to present relevant recommendations. We hope that our views developed below might have a positive impact on the review process.

Furthermore, considering the fact that the GCICC has worked directly with victims and affected communities for many years, we encourage the Experts to engage more meaningfully and efficiently with us and organize a bilateral meeting, where we can provide you with more detailed information about the shortcomings we have identified until now.

Cluster 1. Governance, Management & Leadership

Role and mandate of the Trust Fund for Victims

Although almost twelve years have passed since the 2008 August war, thousands of displaced victims, even after resettlement as well as the victims residing across the so called administrative boundary line still face difficult socio-economic problems and continue living in dire conditions. The report “*10 Years after the August War – Victims of the Situation in Georgia*”, published by the GCICC in July 2019, further corroborates the victims’ unbearable conditions.¹ In these circumstances, the Trust Fund’s early engagement was particularly important for the victims in Georgian situation. Physical and psychological rehabilitation and material support, such as offering access to income generating and training opportunities, which the Trust Fund can implement under its assistance mandate, is what the victims of Georgian situation need the most.

It was in September 2018, when the Trust Fund announced initiation of an assessment of the victims’ needs. Their announcement gave many victims a hope that the process could still be meaningful for

¹ Report “10 Years after the August War – Victims of the Situation in Georgia”, July 2019, available at: <https://bit.ly/39CBkWB>

them. However, year and half after the announcement, the TFV has not yet decided on whether to initiate the assistance mandate in Georgia. Even in case a positive decision is made in a near future by the Trust Fund's Board of Directors, considering the previous experiences of the TFV in other situations, including in DRC, Uganda, and Cote d'Ivoire, as well as the complex procurement procedures at the ICC, it will take the TFV from 12 to 17 months to start implementing its mandate and specific projects on the ground. Delays in implementing assistance mandate undermines the hopes and expectations of the victims and affected community as well as the credibility of the ICC on the ground.

Thus, in order to ensure that the implementation of the TFV assistance mandate is done in the most effective, efficient and meaningful way, it is crucial for the TFV to:

- Engage in situations and conduct needs assessment at an early stage of investigation, especially in those situations where the significant time has elapsed between the commission of crimes and opening of an investigation.
- Expedite the decision-making process within the Board and ensure with the Registry to simplify procurement procedures in order to initiate timely implementation of projects on the ground.

Cluster 3. Investigations, prosecutions and the judicial process

1. Preliminary examination

On 14 August 2008, the Prosecutor's Office of the International Criminal Court announced the preliminary examination of the Situation in Georgia. On the basis of the information available, the Prosecutor concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed in Georgia in the context of the armed conflict of August 2008. Over 7 years later, pursuant to Article 15(3) of the Rome Statute, the Prosecutor submitted a request to the Pre-Trial Chamber I for authorization to open an investigation into this situation on 13 October 2015. On 27 January 2016, Pre-Trial Chamber I of the ICC authorized Prosecutor, Fatou Bensouda to open an investigation into the 2008 conflict in Georgia.

The preliminary examination was the first phase when the different flaws related to the ongoing process and victims' meaningful involvement were identified. The flaws at the preliminary stage discussed below are not only Georgian specific challenges but are also relevant for other countries, especially in situations where the preliminary examination lasted for several years.

Procrastinated preliminary examination

As mentioned above, it was August 2008, when the International Criminal Court stepped in Georgia opening the preliminary examination. In this respect, it should be emphasized that although the preliminary examination was opened back in 2008, it took the Prosecutor's Office more than seven years to make a decision on the finalization of the preliminary examination. Thus, there was a gap of almost eight years since the commission of crimes and the opening of the ICC investigation.

Throughout these years, the civil society actors acting on behalf of victims, submitted relevant information to the OTP on numerous occasions, underlining that no effective investigation was conducted by the parties of the conflict. Considering the inactivity of Georgian and Russian investigative authorities, for the purpose of ensuring justice for the victims, the civil society requested the OTP to promptly open the investigation back in 2012. However, the OTP neither took into account the request of the victims nor included the reasoning for refusal in its subsequent reports.

Although in Georgian situation the preliminary examination was quite protracted, the victims had no possibility to challenge its procrastination. Neither were the victims of other situation countries granted with such a possibility. This is conditioned by the fact that the Rome Statute System and

related legal documents fail to include relevant mechanism allowing victims to be protected from delayed preliminary examination. Thus, the victims have to await when the OTP would decide to request authorization from the Pre-trial Chamber without any possibility for defending their interests at the preliminary examination phase.

Consequently, in order to strengthen predictable framework for preliminary examinations, it is of utmost importance to:

- Establish possible timelines for the preliminary examination phase in order to avoid its lasting for decades with no meaningful progress;
- Envisage relevant procedures in the legal framework allowing the victims to challenge delayed preliminary examination.

Evidence protection at the preliminary examination stage

Victims and witnesses may contribute positively to the early information and evidence gathering activities of the Prosecutor especially considering the fact that at the preliminary examination phase the OTP's powers are significantly curtailed and the OTP is not empowered to conduct investigative measures on the ground and collect evidences from victims and witnesses until a full investigation is launched.

As highlighted by the PTC in the Decision, with the lapse of time memories of the witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist and thus the prospects that any effective investigation can be undertaken will increasingly diminish. As the time passes by, the victims may have particular difficulty in providing a coherent, complete and logical account of the past events.²

Many victims and witnesses of the 2008 armed conflict were elderly people who left the war zone with the help of Red Cross during the armed hostilities. As it appears from our interactions with some of the elderly victims and witnesses, they have not been approached by the OTP at the stage of preliminary examination. Neither were they informed about possible ways for filing relevant evidences to the OTP.

Although in Georgian situation gathering and collating relevant information and evidences from the victims and witnesses would have guaranteed their involvement at an early stage, the Prosecutor's Office failed to gather and secure potential evidence, including witness testimonials during the preliminary examination stage and to give the victims and witnesses opportunity to pass on relevant information and materials to the OTP. Thus, by the time of opening the investigation in January 2016, many victims and witnesses have already been passed away, the memories have faded and evidence got lost or contaminated.

The delay in opening the investigation and the failure to preserve the evidence at the preliminary examination phase may have significant ramifications for securing the relevant evidence and undermines the quality and effectiveness of the subsequent investigations. Hence, in order to strengthen transparency of the preliminary examinations, it is crucial to:

- Review the policy of the OTP in order to ensure preservation of evidence at the stage of preliminary examination and for this purpose, to gather and collate available information and evidences from the witnesses and victims.

² The preliminary examination of the Prosecutor in relation to the situation in Afghanistan has taken up to ten years. The preliminary examination on Nigeria has been ongoing for almost eight years. For more examples, see OTP's Report on Preliminary Examination Activities 2017, 4 December 2017, para. 68 and para 80.

2. Investigations and case-preparation

As mentioned above, it was 27 January 2016, when the Pre-trial Chamber of the ICC authorized the OTP to open the investigation. The decision of the Pre-Trial Chamber outlined the scope of the investigation, which included: war crimes and crimes against humanity committed by Russian and Georgian armed forces or de facto forces of Ossetia in or around South Ossetia between July 1 and October 10, 2008.

The investigation of Georgian situation is characterized with serious challenges raising concerns within the victims with regard to its effectiveness.

Length of investigation

The investigation of Georgian situation is significantly delayed compared to all the cases that the court has dealt with so far. It is now over 4 years since the investigation has started and it is still ongoing with no tangible progress.

The investigative process gives the impression that the ICC met the Georgian situation unprepared which hampered the progress of the investigation. This was the first time that the Court has launched a full-scale investigation of crimes emerging from a conflict outside the African continent. Thus, the ICC, including the OTP had no knowledge or prior experience of operating in other region and was unfamiliar to the local and regional contexts.

The situation was further aggravated by the fact that the Court for the first time was investigating crimes committed during an international armed conflict, involving a powerful UN Security Council permanent member that is not a party to the Rome Statute. In addition, the separatist administration of Tskhinvali region/South Ossetia is only recognized by Russia and a handful of other states, and it remains under the political sway of Moscow, raising further difficulties for the investigation. Despite the ICC's hopes on Russia's cooperation during the early stages of investigation, Russia has shown no signs of cooperation. By the end of 2016, Russia has withdrawn its signature from the Rome Statute, removing any doubts that the Court's officials might have had about cooperation.

Due to the lack of knowledge and prior experience of working in this region, the OTP appeared to have very little engagement in the Georgian situation and remained almost inactive during the first year of the investigation. It took almost the first year for the investigation team to set up and start various activities on the ground.

The above-mentioned reasons contributed to the lack of progress of Georgian situation. As the Georgian case is the first case outside of African continent, it provides invaluable lessons for the OTP that should guide them while conducting investigations in other situation countries. Furthermore, in order to ensure high quality and promptness of the investigations, it is crucial for the OTP to:

- Conduct background assessment of the situation countries before the investigation is opened and develop a clear strategy on how to handle the specific challenges of concrete situations.

Lack of knowledge about the progress of investigation

Lack of knowledge about the progress of the investigation still remains as one of the serious challenges. Due to the confidential nature of the investigative activities, the victims have not received adequate information about any progress. The only information shared with them is that the investigation is still pending. Despite the confidential nature of the investigation, some information should be shared with the affected communities in order to fill out the existing informational vacuum and to avoid misinformation that can greatly damage the effectiveness of the ongoing process. Furthermore, the information about the progress of the investigation is significant for victims' empowerment to see that the justice is done and that their needs and interests are taken seriously. Lack

of information on the ongoing investigation and interaction from the OTP, might undermine the victims' expectations and interests towards the ICC investigation. Therefore, it is of utmost importance to:

- Ensure victims' involvement during the investigation stage through disclosing adequate information about the progress of the investigation.

3. Victims Participation

Victims have a central position at the International Criminal Court. This is indeed an innovative feature of the ICC Rome Statute as for the first time in the history of international criminal law, the persons whose personal interests are affected, are allowed to participate in proceedings which is indeed a positive step forward. Despite the positive possibility, the Georgian situation revealed multiple challenges with regard to victims' meaningful participation at various levels.

Victim's participation under Article 15 (3) of the Rome Statute

Article 15 (3) of the Rome Statute allows for the possibility for victims to make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

The victims in Georgian situation were informed about this possibility once the Prosecutor filed her request to Pre-Trial Chamber I for the authorization to open an investigation on 13 October 2015. On the same day, a notice was published on ICC's website offering victims to make representations to the Pre-Trial Chamber in order to share their personal views, as individuals or groups, on the opportunity of the opening of an investigation and its scope as defined by the OTP. This was the first opportunity when the victims of the Georgia situation were allowed to engage with the Court.

In order to facilitate the victims' participation process under Article 15, the Victims Participation and Reparation Section (VPRS) conducted a mission visit to Georgia in October 2015 where it met victims and their representatives, as well as government officials and explained the process and related procedures to all of the actors.

The victims and their representatives were given only 30 days to submit the forms. Even though this period is in line with the ICC legal documents, the challenges that follow from this limited time period became extremely clear in Georgian case:

- The filling and submission of Article 15 representation forms were largely led by the local civil society organizations, lawyers and community leaders who effectively engaged their beneficiaries. Thus, the Court relied heavily on the support of civil society actors to reach out the victims during the representations phase rather than having its own "active" general outreach strategy;
- Considering that the total number of the victims are more than 28 000, a 30-day period was insufficient for reaching out and interacting with a large number of victims and their communities residing throughout different regions of Georgia. This problem was acknowledged by the Registry itself stating that "considering the 30-day deadline for submissions, there was insufficient time for the Registry to conduct background assessments or commission mapping reports." In view of the limited time-frame, the voices of vast majority of the victims were not heard by the ICC at this stage.

Despite the flaws outlined above, the civil society organisations managed to submit 69 'representations' on behalf of 6,335 victims in relation to the Georgian situation to the PTC.

The representation forms were one of the supporting materials which the ICC Pre-Trial Chamber relied on in granting the prosecutor's request and in expanding its scope to all crimes within the jurisdiction of the Court, limited only by the temporal and territorial parameters.

Submission of representation forms is not only an opportunity for the victims to share their views and concerns, but it is an important step to influence and nourish the focus and scope of possible investigation. However, vast majority of the victims of Georgian situation were deprived of the possibility to exercise their right granted under Article 15 of the Rome Statute due to the limited time-frame and lack of outreach (in this regard see also “Outreach and Public Information” below).

Therefore, in order to better organize victims’ involvement, comprehensively reflect their views and to optimize their meaningful participation at this stage it is crucial to:

- Clarify the ICC legal documents and provide sufficient time and resources for filling representation forms by maximum number of victims.

Victims’ participation at the preliminary and investigation stages

Victims’ right to participate is guaranteed by the Article 68 (3) of Rome Statute, according to which “*where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.*” While several decisions of the ICC note that the victims’ participation at the ICC takes place only in the context of concrete judicial proceeding,³ other decisions of the Court underline that the victims should be afforded right to participate at the investigation stage including right to present their views and concerns to the OTP and to file material pertaining to the ongoing investigation without being formally granted “a general right to participate.”⁴

The challenges relating to victims’ meaningful participation at the preliminary and investigation stages were also revealed in the Georgian situation. The victims were not informed and given the opportunity to pass on relevant information and materials to the OTP at the preliminary examination stage. Neither were they informed about the ICC, its role and mandate nor the whereabouts of the ongoing processes. The situation largely remained unchanged even at the investigation stage. Only a small number of victims, who were supposedly discretely contacted by investigators, were explained about their rights and the ways for submitting relevant information to the OTP, while other victims, who were not reached by the OTP, lack information about their rights and role during the investigation and subsequent judicial proceedings. Neither are these victims informed on how to proactively reach the OTP and submit relevant information and materials. Lack of information about their rights and the possibilities of reaching the OTP further undermined victims’ motivation to cooperate with the OTP and participate in the proceedings.

Therefore, in order to ensure victims’ effective participation and make it meaningful, it is crucial to:

- Ensure victims’ involvement during the preliminary and investigation stages, including, through clarifying legal framework as well as providing information regarding their role and rights during the ICC proceedings which can be conducive to raise their interest and motivation to cooperate.
- Create feasible and realistic ways for victims to provide their materials and information to the OTP during the preliminary and investigation stages.

³ ICC Appeals Chamber, decision on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December, 2008

⁴ *Democratic Republic of the Congo* “Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” 17 January 2006 (ICC-OI/04-IOI-tEN-Corr).

Outreach and Public Information

According to the Matrix of Reforms, it includes a number of concrete issues for discussions and possible areas that needs to be addressed in order to strengthen the ICC and the Rome Statute System. However, it lacks any reference to the issues relating to outreach and public information despite the fact that the concerns about outreach and awareness raising activities among the affected communities and general public were characteristic to the majority of the situation countries, including Georgia.

The Court's practice reveals that outreach and information activities are initiated either at the stage of a request for authorization to open an investigation before a Pre-Trial Chamber, during the investigation phase or at the time of the arrest and surrender of a suspect to the ICC. Georgian situation was not an exception to this. Although, the OTP stepped in Georgia in August 2008, no outreach activities had been conducted by the ICC prior to the investigation phase among the victims, affected communities or general public.

The Registry also failed to engage with victims and general public at the investigation stage. Only after almost 2 years since the opening of the investigation into the situation in Georgia, the Registry managed to open a field office whose primary responsibility is to provide public information and conduct outreach activities. However, due to the understaffing the office has remained largely inoperative throughout 2018 as it consisted of only a head of the office and a temporary staff member both unable to speak local language. Although the field office has later hired a local assistant, the office still critically lacks human resources for reaching out to the large number of victims in Georgia and for conducting comprehensive public information and outreach activities, as well as preparing the ground for victim participation once a process is triggered by the issuance of a potential arrest warrant, including conducting relevant mapping and analysis conducive to victims participation at later stages. As of now, the field office does not even have the adequate premise where it could receive the victims and answer their questions as well as accommodate its human and technical resources.

According to the Report of *"10 Years after the August War – Victims of the Situation in Georgia"*, half of the victims⁵ that the GCICC representatives have interacted with had not even heard about the ICC. 49% of the victims responded that they have heard something about the ICC, yet they had very little information about the work, mandate and role of the Court. This statistic further confirms the lack of awareness-raising activities in Georgian situation and delays in the process, once again leaving the victims and public at large in an information vacuum.

The lack of information will also influence the victims' participation in subsequent proceedings as without sufficient knowledge about the Court, its mandate and the ongoing process, they would not be able to make decision on whether or not to cooperate with the ICC.

In view of the above-mentioned, it is clear that outreach and public information require due consideration in the context of a review process. Although outreach and public information is not included in the Matrix, the working paper on the Matrix notes that the issues included in the Matrix is not final and can be removed, changed or added.

Consequently, it is important to:

- Include the issues relating to the outreach and public information in the Matrix of Reforms;
- Review engagement of the ICC Registry with victims and general public during the preliminary examination stage;

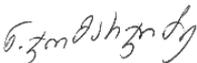
⁵ Within the survey, out of 5,506 internally displaced families, 2,417 families were interviewed. For more details, see the report *"10 Years after the August War – Victims of the Situation in Georgia"*, July 2019;

- Identify the ways to strengthen outreach and public information at the investigation stage as well as to ensure equipment of the field offices with sufficient human and financial resources.

Conclusion

The GCICC hopes that the challenges and recommendations outlined above will have positive impact on the review process and help the independent experts to identify the possible actions that should be taken to strengthen the International Criminal Court and the Rome Statute System. The GCICC is also looking forward to a separate bilateral meeting with the Group of Independent Experts to discuss our views in more detailed manner and to agree on changes that will strengthen the ICC and the Rome Statute System.

Respectfully,

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Chair of the Georgian Coalition for ICC (GCICC)

Member organizations of the GCICC:

Georgian Center for Psycho-social and Medical Rehabilitation of Torture Victims

Georgian Young Lawyers Association

Human Rights Center

Justice International

Rights Georgia