



International Criminal Court at 10: the implementation of victims rights

Issues and concerns presented on the occasion of the
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The Victims' Rights Working Group (VRWG) is an informal network of national and international civil society groups and experts created in 1997 under the auspices of the NGO Coalition for the International Criminal Court. Its membership includes international as well as local NGOs and experts from a wide array of countries, in particular those affected by ICC investigations and prosecutions.

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1. Budget Concerns

The 2012 budget, adopted at the last Assembly of States Parties (ASP), provided significantly less resources than the Court had originally requested and went beyond the cuts that the Committee on Budget and Finance (CBF), the ASP's expert body on these issues, had originally recommended.¹ In preparation for the adoption of the 2013 budget, the pressure by some States to impose a 'zero-growth' budget has continued despite the fact that two new trials are expected to start in 2013. In the Kenya situation, new costs are arising in relation to the interim premises, as well as increases in legal aid and staff costs.

This pressure has led the Court to submit an extremely lean 2013 budget which, if cut beyond the CBF recommendations² of €115.12 million, could dramatically impact the Court's ability to deliver on its victims' mandate and damage the Court's overall credibility. The Registrar has indeed stressed that "in order to bring [the proposed 2013 budget] as close as possible to the same level of the 2012 budget, the Registry's operations have been stripped to the bare essentials, leaving no room for additional cuts without seriously impacting the adequate functioning of the judicial proceedings and the operations conducted by the parties and participants in the proceedings [emphasis added]."³ The VRWG recalls that in 2011, the lack of resources in the Victims Participation and Reparation Section led to hundreds of victims being deprived of their participatory rights in crucial hearings, a situation which is yet to be resolved.⁴

The VRWG reiterates its concern regarding suggestions periodically made in the budget review context that activities such as outreach, public information to victims and the field work of the Trust Fund for Victims should possibly be funded from sources outside the general budget of the Court.⁵ The work of the Court should not be divided into so-called "core" and "less core" or "non core" activities; the Rome Statute sets out an integrated system which cannot simply be separated out to suit budgetary objectives. Budgeting for outreach and public information and other activities that are necessary for the Court to achieve its mandate and to operate efficiently and effectively should be the same as all other Court activities, allowing it to respond to cases and situations as they arise. Outreach and public information are essential elements to ensuring understanding and the meaningful delivery of fair and credible justice to victims and affected communities, going to the heart of commitments made at the ICC Review Conference in Kampala regarding international justice for victims. They allow victims and affected communities to follow the judicial process and take an informed decision on whether they want to participate in Court proceedings, facilitating the exercise of their right to participation recognised under the Rome Statute. Outreach and public information are also indispensable to speedy proceedings and to avoiding additional costs, for example, due to incomplete victims' applications for

¹ The Court had requested €122 million for 2012; the CBF had recommended a budget of €112 million. The final budget adopted was for €109 million.

² The CBF recommends the approval of €115.12 million out of the €118.4 million requested.

³ 'Report of the Committee on Budget and Finance on the work of its nineteenth session. *Annex III, Impact of measures to bring the level of the ICC's budget for 2013 in line with the level of the approved budget for 2012*', Assembly of State Parties, 29 October 2012, ICC-ASP/11/15, para 31, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-15-ENG.pdf.

⁴ 'The Implementation of Victims' Rights before the ICC - Issues and Concerns Presented by the Victims' Rights Working Group on the occasion of the 10th Session of the Assembly of States Parties – 12-21 December 2011', Victims' Rights Working Group, December 2011, at http://www.redress.org/downloads/publications/2011_VRWG_ASP10.pdf. The persistent backlogs the Court has had in processing applications from victims seeking to participate in proceedings was again stressed this year in the context of the facilitation on victims, affected communities, the Trust Fund for Victims and Reparations, 'Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations', ICC-ASP/11/32, 23 October 2012, page 8, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-32-ENG.pdf.

⁵ *Supra*, note 3, para 154: "The Committee recalled its recommendation at its seventeenth session that the TFV undertake a review of the possibility of using some percentage of voluntary contributions to cover costs for the delivery of programmes and projects in the field. The Committee recommended that the TFV consider this issue further, in view of the increasing complexity of its activities and its income streams, in order to advise on the possibility of using some percentage of voluntary contributions to cover these costs."

participation. As such, they should be funded at sufficient resource levels through the ICC's regular annual budget.

2. The Victims' Strategy

The VRWG welcomes the submission by the Court of a revised Strategy in relation to victims.⁶ The VRWG has consistently expressed its belief that a clear strategy with baseline data and performance indicators for measuring set objectives is essential for progress to be made in meeting the statutory obligations relating to victims. The VRWG encourages the Court to communicate its baseline data in relation to the indicators identified and to report regularly on the implementation of the strategy, highlighting clearly when implementation has been affected by a lack of resources.

The VRWG is concerned at statements made by States Parties on the revised strategy, that "there [are] limits to the possibility to proceed further with enhancing victims' right to participation and [that] there [is] an on-going discussion on how the rights of victims [can] be addressed."⁷ Victims' right to participate in ICC proceedings is enshrined in the Rome Statute; it is not optional for States and the Court to ensure that this right is fully implemented.

3. The Court's Guidelines on Intermediaries

The VRWG understands that the Court has finalised the draft *Guidelines Governing the Relationship between the Court and Intermediaries (Guidelines)*, and that these have been shared with States Parties. These Guidelines are the result of years of Court practice and recognise the "valuable support" intermediaries bring to the execution of the Court's mandate.

The latest draft (May 2012) positively covers selection criteria for intermediaries, such as the ability to ensure gender specific strategies in their work. A welcome code of conduct has also been annexed governing intermediaries designated by the Court. It also recognises that intermediaries may fall within the category of persons who may be at risk and thereby require protection. It remains unclear however how this recognition will translate in practice. The VRWG is particularly concerned at the language of the draft contract attached to the Guidelines which suggests that intermediaries are responsible for protecting themselves and those who may be affected by their actions.

The latest draft also positively includes the need to reimburse the expenses of intermediaries who provide contracted services to the Court. However adequate resources will be needed to ensure this positive step forward is implemented and the fact that intermediaries are generally unable to cover costs up front is still ignored.

The Guidelines make a differentiation between three categories of intermediaries:

- 1) contracted intermediaries to whom all provisions shall apply;
- 2) other intermediaries approved by the Court (by affidavit) to whom the Guidelines shall apply unless otherwise specified; and
- 3) unapproved intermediaries (e.g., self appointed intermediaries) for whom the application of the Guidelines will be subject to a case by case determination.

In the context of assistance to victims, intermediaries will not necessarily be appointed by the Court but by the victims themselves. The VRWG thus welcomes the recognition that the Guidelines may be applied to intermediaries who are "self appointed". However, the VRWG stresses the need for such

⁶ 'Court's Revised strategy in relation to victims', International Criminal Court, ICC-ASP/11/38, 5 November 2012, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf.

⁷ 'Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations', Bureau of the Assembly of States Parties, 23 October 2012, ICC-ASP/11/32, para 18, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-32-ENG.pdf.

intermediaries to be made aware of the Guidelines and provided with an opportunity to discuss whether they could apply in their case. Intermediaries, approved or not, acting as a result of a request from an organ or unit of the Court or counsel should fall within the Guidelines ambit and be entitled to reimbursement of expenses and remuneration. Furthermore, the case by case application of the Guidelines (and the protections for intermediaries contained therein) in such cases, should be based on clear criteria. The VRWG also calls for clarification as to the consequences a negative assessment of the intermediary by the Court would have. It is vital that organisations embarking on an intermediary relationship with the Court are aware from the outset of the variety of responsibilities and duties that are mutually incurred.

The VRWG reiterates that other areas could be clarified or improved upon, which include the need to develop a complaint mechanism whereby intermediaries can raise and seek to resolve disputes arising in the course of their dealings with organs of the Court, or vice versa, and continued attention in the implementation of the Guidelines and the allocation of resources to ensure adequate protection measures are available to intermediaries. The Guidelines also continue to require that when forming a relationship with any organ or unit, intermediaries must disclose “all relevant information” including “links to the parties or participants in the proceedings.”⁸ As the VRWG has previously stressed, whilst it is important for the Court to have such information in order to avoid conflicts of interests and other problem areas, it should be clarified to whom the disclosure should be made, to avoid intermediaries inappropriately disclosing confidential information to any official of the Court.

It is critical for the Court that the *Draft Guidelines* are implemented formally as soon as possible, not least to provide some of the course corrections directed by Chambers in the Lubanga case. Commencement of a process of implementation of the Draft Guidelines is also essential to the appropriate evolution and finalisation of the framework. The VRWG therefore urges states to ensure that the form in which the Draft Guidelines are acknowledged, including in the Omnibus Resolution, allows the Court to begin implementation and monitoring immediately. With new situations under examination and investigation the circle of intermediary engagement is widening. The implementation and ‘road-testing’ of the *Draft Guidelines*, anchored to an effective review procedure, is essential for the safe and effective management of these relationships.

4. Outreach

Outreach is essential to ensure that justice is not only done, it is seen to be done. Outreach activities are designed to promote understanding of and, hence, support for the Court’s mandate in ICC situation countries and other directly affected communities, thereby managing expectations and enabling affected communities to follow and understand ICC processes by engaging them in a two-way dialogue. This engagement enhances the Court’s overall cost-effectiveness, efficiency and fair and independent functioning. Lessons learned—including from the ad hoc tribunals and the Special Court for Sierra Leone—clearly demonstrate that early as well as ongoing, Court-led outreach is essential for the meaningful delivery of fair and credible justice.

Early and direct outreach creates conditions conducive to supporting the Court’s operations by ensuring the necessary cooperation for conducting investigations in the field and carrying out trials; preventing or stemming the spread of misinformation; reinforcing complementarity initiatives; facilitating participation and legal representation of victims in ICC proceedings; explaining due process rights; facilitating redress for affected communities; and creating an enabling and supportive environment for field engagement and presence. In the Lubanga reparations decision, ICC judges put an obligation on the

⁸ This is also requested in the draft model contract which states: “The intermediary undertakes to inform the Court (or the counsel) of any previous and/or ongoing contact established between the intermediary and any other organ, division, section or unit of the court (or counsel).”

Court “to provide information in a form that is comprehensible for the victims and those acting on their behalf.”⁹

Outreach is also essential for informing women and girl victims of their right to participate in proceedings. As of the last publicly available information, male victims are currently the majority of victims applying to the Court, making outreach activities designed to reach potential female applicants vital in ensuring that both women and men have the opportunity to be heard by the Court.

As outlined in the Kampala Declaration, outreach plays an essential role in ensuring that applications by victims to participate are complete and fall within scope of ongoing proceedings, laying the groundwork for the Victims Participation and Reparations Section. This not only reduces delays further down the line but also the resources that the Court would need to spend processing unrelated application or seeking missing information.

New approaches have been adopted by Chambers in the *Gbagbo case* where collective applications were introduced. Similarly in the *Ruto & Al. and Muthaura & Al. cases*, Trial Chamber V introduced a new system altogether whereby only those victims who want to appear in person before the Court need to apply individually (see below, section on participation). One of the objectives of these more collective approaches is, *inter alia*, to make proceedings more efficient, reducing the burden on the Court, the parties and victims when applying to participate. However, without adequate and early outreach explaining what these new approaches entail, victims will be unable to make an informed decision on which type of application they wish to lodge or may misunderstand the implications. In this case, outreach is essential to avoid delays further down the line.

The VRWG had raised concerns about calls for outreach and public information be funded from sources outside of the general budget of the Court.¹⁰ The VRWG is also concerned about the singling out of outreach and public information as activities for which “the Court [could] consider a possible Zero Based Budgeting” in the future.¹¹ Outreach should be funded through the ICC’s regular annual budget, allowing the Court to respond to cases and situations as they arise in the same way all other essential Court activities are funded.

Finally, field presence remains essential to allow outreach to take place in a timely manner. In Cote d’Ivoire, the delayed opening of the ICC field office seriously affected the ability of the Court to inform victims and affected communities with NGOs left to fill the gap. Meanwhile, the downsizing of the ICC field presence in Uganda in the past two years has sent out a negative message to victims and affected communities. The Court should develop comprehensive plans for maintaining a presence and legacy in situations where downsizing or completion strategies for those situations might be considered. This would avoid the current information vacuum in Uganda with regards to the ICC processes which, in turn, is creating additional outreach needs, challenges and costs for the Court.

⁹ ‘Decision establishing the principles and procedures to be applied to reparations’ (*Lubanga case*), 7 August 2012, ICC-01/04-01/06-2904, para 214, at <http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf>.

¹⁰ ‘Report of the Committee on Budget and Finance on the work of its seventeenth session’, Committee on Budget and Finance, 18 November 2011, ICC-ASP/10/15, para 25, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-15-ENG.pdf: ‘[T]he Assembly may wish to consider whether alternative mechanisms both for financing and for delivering certain services may also be an avenue to accommodate increased desirable activity. For example, in this report, the Committee recommended that the Secretariat for the Trust Fund for Victims undertake a review of the possibility of using some percentage of voluntary contributions to cover costs for the delivery of programmes and projects in the field. There may well be other areas of current Court activity that could benefit from a mixed financing system of assessed and voluntary contributions, such as outreach and public information.’

¹¹ *Supra*, note 3, para 36.

5. Protection

Article 68 of the Rome Statute establishes the Court's obligation to protect “the safety, physical and psychological well-being of victims and witnesses”. The VRWG notes that recent cases brought by the ICC’s Prosecutor have involved several high ranking or high profile individuals, including a former head of State (Cote d’Ivoire) and Ministers (Kenya; Darfur) with powerful support networks at the national level. While threats and reprisals cannot be assumed, victims and witnesses are unlikely to want to engage with the Court without strong reassurances regarding their protection. Furthermore, protection also includes putting in place measures to ensure the safety and integrity of victims and witnesses and all those who may be put at risk because of their interaction with them. Protection equally includes the obligation to ensure that victims and witnesses are able to engage with the Court in an emotionally safe space, and are not retraumatised by and through the process.

Newly elected Prosecutor Fatou Bensouda has recently highlighted that witnesses relating to the cases in Kenya may have been interfered with, indicating that her office was verifying information relating to that possibility and highlighting a “climate of fear [which] is being created for witnesses who do not want to come forward to give evidence”.¹² The VRWG is concerned at the lack of progress regarding the signature of relocation agreements – no agreement was signed in 2012 – despite such agreement being cost-neutral for States.¹³ We share the Court’s concern that this is “an alarming shortfall in its ability to protect victims and witnesses potentially under threat.”¹⁴

We thus fully support the call in the draft Resolution on Cooperation for “all States Parties and other States [...] to consider strengthening their cooperation with the Court by entering into agreements or arrangement with the Court or any other means” and the encouragement to “consider making voluntary contributions to the Special Fund for Relocations.”¹⁵

6. Victim Participation

2012 has seen new approaches being considered in relation to the participation of victims in proceedings and the application process relating to it.

The application procedure for victims to participate in proceedings formed part of the discussions of The Hague Working Group’s joint facilitation on Victims, Affected Communities, and the Trust Fund and Reparations.¹⁶ In addition, as part of the work of the Study Group on Governance, the Judges led a lessons learnt exercise, in which victims’ participation and reparations were identified as issues “that need discussion with the view to expedite the judicial proceedings and enhance their efficiency.”¹⁷ Finally, Chambers themselves took the initiative. In the *Gbagbo case*, Pre Trial Chamber I recognised the ability for victims to submit “collective” applications for participation.¹⁸ In both Kenya-related cases,

¹² ICC Prosecutor: Kenyan Accused Being Investigated for Links to Witness Interference Allegations’, Tom Maliti, 23 October 2012 (online), at <http://www.icckenya.org/2012/10/icc-prosecutor-kenyan-accused-being-investigated-for-links-to-witness-interference-allegations/>.

¹³ A relocation fund is in place which allows for relocation agreements and/or arrangements to be entered on a cost neutral basis.

¹⁴ Report of the Bureau on cooperation’, Bureau of the Assembly of States Parties, 23 October 2012, ICC-ASP/11/28, para 12, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-28-ENG.pdf.

¹⁵ *Ibid*, Annex I Draft resolution on cooperation, para 16-17.

¹⁶ *Supra*, note 7.

¹⁷ ‘Study Group on Governance: Lessons learnt: First report of the Court to the Assembly of States Parties’, International Criminal Court, 23 October 2012, ICC-ASP/11/31/Add.1, para 1, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-31-Add1-ENG.pdf.

¹⁸ In that case, groups of victims could submit a collective form to which individual declarations with minimal information on each victim in the group were appended. Only VPRS was allowed to assist victims filling in the collective form. Victims wishing to apply individually were still able to do so.

Trial Chamber V departed significantly from previous jurisprudence and found that only victims who wanted to appear in person before the Court needed to send in an individual application. Trial Chamber V found that victims who only wanted to participate “through a common legal representative” did not need to apply, but could still register with the Registry if they wished.

Parallel review efforts should be coordinated. They should be holistic and include consultations with relevant stakeholders, including victims, experts and civil society.

The VRWG stresses that consideration of the options for review of the application system and of the participation of victims more broadly should form part of a comprehensive and coordinated review that ensures adequate consultations of all stakeholders, including victims, and which seeks to draw from the experience of other processes which have involved applications from large numbers of victims. Such a review ought to be done with careful scrutiny of the far-reaching consequences potential changes may have on the rights of victims as set out in the Rome Statute, and seek to involve victims and groups working with them. The VRWG underlines that some of the proposals under consideration may lead to proposed changes to the legal framework of the Court. Coordination of the various efforts to review the application process will thus be pivotal to avoid duplication and ensure a harmonised approach among all relevant actors.

Proposals for review of the application system

The Court has put forward six proposals in relation to the review of the application system¹⁹ and indicated that it requires additional funding in order to address the current processing backlogs and to maintain an efficient and effective system along the lines of the existing system:²⁰

1. *Continue to implement current system;*
2. *Implement a partly collective application process;*
3. *Undertake collective processing of applications by the Registry;*
4. *Produce Registry reports as the basis for observations and decision-making;*
5. *Limit decision-making on victim status to Judges, not litigated between the parties; and*
6. *Deal with victims’ applications only at the pre-trial stage.*

The VRWG underlines, as the Court itself stresses, that all options “have both advantages and disadvantages” and that the Court “has still to evaluate some of the options identified in this report”. In light of the impact that changes to the application system could have on the ability of victims to exercise their statutory right to participate in proceedings, the VRWG urges the Court to further assess such impact for each of the options put forward. Furthermore, considering that each situation or case will be different, with different crimes covered and challenges faced by victims, a certain degree of flexibility may need to be retained. Each option should be considered on its own merits, financial considerations being only one of a number of objectives, the key one being to develop a system of meaningful participation as anticipated by the drafters of the Rome Statute.²¹

¹⁹ “Under the current system, all victims wishing to participate in proceedings before the Court must send applications to the Registry, setting out in detail the nature of the harm they suffered, and how their personal interests are affected. The [VPRS] then assesses the completeness of applications with regards to the requirements of Regulation 86(2). If an application is incomplete, the VPRS can request further information [...] to ensure that the application contains all the requisite information, before transmitting the application to a Chamber, together with a report. So far, most Chambers have ruled that only ‘complete applications’ should be transmitted by the VPRS for a decision” (*supra*, note 4, page 7).

²⁰ ‘Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings’, International Criminal Court, 5 November 2012, ICC-ASP/11/22, paras 22, 24 and 25, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-22-ENG.pdf

²¹ ‘The Participation of Victims in International Criminal Court Proceedings – A Review of the Practice and Consideration of Options for the Future’, Redress Trust, October 2012, page 24, at http://www.redress.org/downloads/publications/121030participation_report.pdf.

While all 6 options deserve careful consideration, in light of recent calls by some States Parties for a move towards a more collective approach and of the recent attempts by Chambers to implement collective or semi collective approaches in the *Gbagbo* and Kenya cases, we will only focus here, on some considerations relating to these approaches.

Collective or semi-collective approach

A high number of victims can be expected to want to engage with the Court in light of crimes falling within the Rome Statute's mandate. A collective application process could thus appear not only logical but also sensible, particularly considering that participation itself will often take place "through" a legal representative.

However, a collective approach may not be suitable for all victims.²² To be efficient and meaningful to victims, it will require that victims have a common "collective", for example, similarities in relation to the victimisation suffered, their interests in the proceedings, or overall objective for participation. In addition, a collective approach to the application process but also to the modalities of participation could silence those in the group with a different or marginalised voice.²³ Challenges in relation to the determination of who the "legitimate voice" or leader of the group is are also likely to arise. Finally, collective approaches may not necessarily be less costly. In order to guarantee that victims' participation is fully realised, mechanisms will need to be set up, and supported to allow individual OR all members of "the group" to be consulted and informed on the proceedings.

A mixed approach was applied for the first time in the *Gbagbo case* where both collective and individual applications were allowed.²⁴ However, in the end, only 6 collective applications representing 101 victims and 57 individual applications were transmitted to the Chamber. The VRWG encourages the Court to assess the impact this new approach has had on victims' ability to participate in the Pre Trial proceedings and ensure that lessons learnt from this experience are fed into the discussions of the facilitation on victims as well as the Study Group on Governance.

New approach in the Kenya cases

In both the *Ruto & al. and Muthaura & al. cases*, Trial Chamber V distinguished *direct individual participation* from *participation through a common legal representative ('CLR')* and ruled that for victims who do not wish to appear in person before Court, an individual application will no longer be necessary. However, victims who wish to will be able to register with the Registry.

This is likely to limit the burden on victims, intermediaries and the Registry in relation to applications when victims do not seek to appear in person and may significantly decrease the amount of time and resources needed to fill in and process applications. The VRWG stresses, however, that it should not necessarily be presumed that only a limited number of victims would want to appear in person and the Court should be ready and have the necessary resources to ensure that it can cope with larger numbers of victims wishing to appear in person.

²² Strong concerns were voiced by OPCV about the detrimental effect such a system was likely to have for victims' participation and the ability to check the credibility of the applications, Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims' application process (*Gbagbo case*), ICC-02/11-01/11-40, 14 February 2012, at <http://www.icc-cpi.int/iccdocs/doc/doc1331914.pdf>; Second Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to the victims' application process (*Gbagbo case*), ICC-02/11-01/11-51, 8 March 2012, at <http://www.icc-cpi.int/iccdocs/doc/doc1367762.pdf>.

²³ *Supra*, note 21, page 36.

²⁴ 'Second decision on issues related to the victims' application process' (*Gbagbo case*), 5 April 2012, ICC-02/11-01/11-86, at <http://www.icc-cpi.int/iccdocs/doc/doc1392379.pdf>.

In addition, this “tiered process” will require outreach to victims and intermediaries to take place as early as possible so that victims can make an informed decision on what form of participation they wish to exercise. The VRWG would strongly oppose any attempts at discouraging victims to apply to appear in person or register. In addition, the VRWG underlines that it may not be possible at such an early stage to determine who can or cannot, want or does not want, to appear in person.

Finally, the approach in the Kenya cases allows the CLRV to speak on behalf of non identified victims. This may positively enable victims who do not wish to register to have their general interest represented in the proceedings. However, it is unclear how the “general interest of victims” will be defined. Adequate mapping of victims communities will be essential to enable these “unregistered” victims to be identified, and for counsel to be able to accurately represent their views. Furthermore, the possibility for victims to opt out as well as other options should be envisaged.

7. Legal aid / Legal Representation for Victims

The Registrar undertook a review of the Legal aid system in 2012, including some aspects relating to the legal representation of victims. The VRWG had recommended that any systemic review of the provision of legal aid that may be carried out “considers at its heart the adequacy and effectiveness of legal representation” and “include[s] canvassing victims’ views about the character and quality of legal representation and the extent to which their concerns were addressed.”²⁵ The VRWG stresses that prior to any further review of legal aid, a comprehensive review of the legal representation system should be undertaken with a view to ensure it guarantees the meaningful participation of victims in proceedings.

Among the issues considered in the Registry review was the possibility of an enhanced role for the Office of Public Counsel for Victims. The Committee on Budget and Finance has indeed repeatedly noted that “a strengthening of the role of the Office of Public Counsel for Victims could lead to an overall reduction of costs, if sufficient resources were provided” and also stressed that “while acknowledging the benefits of using external counsel, the Committee had already made the point that a system in which victims would be represented only by the Office of Public Counsel for Victims would be more cost efficient”.²⁶ The Registry in its *Supplementary report on four aspects of the Court’s legal aid system*, acknowledged the strong concerns from civil society and the legal profession against “an overly enhanced or exclusive role of the OPCV”²⁷ and recommended “that the system ought to be maintained as a two-tier system as currently established, where both OPCV and external lawyers and other relevant team members (or professionals) can be engaged in the representation of victims in Court proceedings.”²⁸ The VRWG recalls in that regard the Registry’s statement that “the question of whether the Office should have an enhanced role in the representation of victims in proceedings before the Court is first and foremost a judicial determination, in particular as it relates to common legal representation as mandated by the relevant legal texts of the Court.”²⁹

Legal representatives are in most respects the vehicle by which victims can participate. They are essential to victims’ understanding of proceedings, and to conveying victims’ views and concerns and ensuring that their interests are safeguarded throughout the proceedings. While recognising the invaluable work of the OPCV, the VRWG opposes proposals for a complete shift of *all* legal representation of victims requiring legal aid being undertaken by OPCV as it would compromise victims’ choice of counsel. Furthermore, an enhanced role of the OPCV in relation to representation of victims

²⁵ *Supra*, note 4, pages 2 and 10.

²⁶ ‘Report of the Committee on Budget and Finance on the work of its eighteenth session’, Committee on Budget and Finance, 22 May 2012, ICC-ASP/11/5, para 57, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-5-ENG.pdf.

²⁷ ‘Supplementary report of the Registry on four aspects of the Court’s legal aid system’, Registrar of the International Criminal Court, 1 November 2012, ICC-ASP/11/43, para 50, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-43-ENG.pdf.

²⁸ *Ibid*, para 54.

²⁹ *Ibid*, para 46.

would have to be paired with adequate field structure and resources to allow the office to adequately communicate and consult with victims.

In the October 2012 decisions of Trial Chamber V in both the *Muthaura & Kenyatta* and *Ruto & Sang* cases,³⁰ the Trial Chamber developed a new procedure whereby a common legal representative based or with a field presence in Kenya will be appointed and it adjointed the OPCV to that counsel to appear on a day-to-day basis before the Court and to otherwise assist the common legal representative. This new configuration could allow the CLRV to choose when his/her presence in the courtroom is warranted and devote more time to direct contacts with victims. However, the VRWG calls for clarity as to which “junctures of the proceedings” would automatically allow the CLRV to be in the courtroom and highlights the need to ensure that CLRV can retain his/her independence and autonomy to decide when his/her presence in the courtroom will be warranted ; this will guarantee that the CLRV ‘s position is not transformed into the one of a mere ‘enhanced intermediary”. Furthermore, challenges have already arisen in relation to the division of responsibilities that will be implemented, with the Registry and OPCV unable to agree on this issue and others.³¹

Despite CLRV being already in place in both cases, the Chamber has invited the Registry to make a new recommendation in that regard. Among the criteria set are geographic proximity with the victims (willingness to maintain an ongoing presence in Kenya). While the VRWG supports a requirement that counsel be able to maintain a presence close to the victims, we are concerned at the apparent lack of consultation of currently participating victims in relation to the new appointment. The VRWG recalls its previous position that such an approach ignores “victims’ agency and autonomy and [gives] cause for concern regarding the transparency of the process.” The VRWG continues to call for “victims [to be] able to have a say in selecting the counsel to represent their interests in legal proceedings before the Court [as] a crucial component of the right to legal assistance as reflected in Article 68(3) of the Rome Statute, Rule 90 of the RPE and Regulation 112 of the Regulations of the Registry.”³²

8. Reparations and the Trust Fund for Victims

On 7 August 2012, the first ever decision on the principles and process to be applied to reparations was issued in the *Lubanga case* and tasked the TFV with the implementation but also the determination of appropriate reparations to be awarded to the victims. The VRWG emphasizes that the ability for the TFV to deliver on its reparation mandate is likely to have a dramatic impact on the credibility of the Court as a whole, as a Court that can provide reparative justice, including redress to victims. Now more than ever, the TFV must to be given the resources it needs from the Assembly, if the Court is to have the lasting reparative impact States Parties envisaged when they created it.

The VRWG is seriously concerned that the Committee has recommended a freeze on the non-staff costs of the Trust Fund for Victims (TFV) and is yet again considering the possibility of the Trust Fund “using some percentage of its voluntary contributions to cover [administrative] costs.” We note that, in the Court’s paper *Impact of measures to bring the level of the International Criminal Court’s budget for 2013 in line with the level of approved budget for 2012*, the Trust Fund indicates that significant reductions in travel, consultancy and other non-staff costs would risk,

“crippling of the Fund’s operational flexibility and effectiveness, especially in regard of the implementation of reparations awards, but also in terms of fundraising capability.”³³

³⁰ ‘Decision on victims’ representation and participation’ (*Muthaura & Kenyatta case*), 3 October 2012, ICC-01/09-02/11-498, para 24, at <http://www.icc-cpi.int/iccdocs/doc/doc1479387.pdf>; ‘Decision on victims’ representation and participation’ (*Ruto & Sang case*), 3 October 2012, ICC-01/09-02/11-460, para 24, at <http://www.icc-cpi.int/iccdocs/doc/doc1479374.pdf>.

³¹ ‘Registry’s Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System’, 17 October 2012, ICC-01/09-01/11-463, at <http://www.icc-cpi.int/iccdocs/doc/doc1491344.pdf>.

³² *Supra*, note 4, page 11.

³³ *Supra*, note 3, Table 7.

The VRWG is particularly concerned that, if implemented, the recommended freeze would undermine the work of the TFV as it is currently only partially equipped to implement its goals and, to date, has only been able to implement its assistance mandate in two of seven ICC country situations. The budget of the Secretariat notes that the ability for the TFV to manage the implementation of both mandates “is already straining the existing capacity of the Secretariat, which continues to feel the lack of capacity to address financial/administrative processes.”³⁴The VRWG also stresses the imperative need to ensure the TFV has adequate financial and administrative management capacity as well as the ability to encourage further contributions to the Fund through fundraising and visibility activities. This is all the more important considering the current international financial situation which has made competition for funds highly competitive.

Furthermore, we are concerned that any effort to fund the administration of the TFV through voluntary contributions could have a devastating impact on the ability of the Fund to fundraise and perform its functions. At this time, the level of voluntary contributions is not sufficiently consistent or high enough to adopt such measures without undermining the support that the TFV can offer to victims. The Committee’s recommendation is especially concerning given that the Trust Fund is expected to play a key role in developing and implementing the ICC’s first reparation orders.

This is especially poignant as the voluntary contributions to the Fund in 2012 stand in stark comparison to the contributions received in 2011. So far this year, the TFV has received €252,252 of voluntary contributions from member states. In addition, the United Kingdom pledged a £500,000 contribution at the commemoration of the 10th anniversary of the Court. Notwithstanding this generous contribution, the voluntary contributions to the Fund are only a portion of last year’s voluntary contributions of €3.2million. The VRWG therefore calls on states, and other organisations and individuals, to generously donate to the Fund. States should also seriously consider the TFV’s Board of Directors’ request to the ASP to pledge a collective, voluntary €1 million exceptional contribution to the TFV reserve for its reparations mandate, especially as the reserve currently stands at only €1.2 million euros for the possible future reparations award in all cases before the Court.

9. Summary Recommendations

The VRWG recommends that States Parties should:

On the Budget

- Ensure the budget adopted at the 11th Session of the ASP gives the Court the necessary resources to fulfil its mandate ‘*in relation to victims*’.
- Acknowledge that the integrated system set out in the Rome Statute cannot be separated and reject the division between so called “core” and “non core” activities.
- Continue to give full support to the Court’s outreach activities as an essential element for implementing the Court’s judicial mandate and obligations towards victims.
- Oppose calls for outreach, public information to victims and the field work of the Trust Fund for Victims to be funded from sources outside of the general budget of the Court.

On the Victims’ Strategy

- Endorse the revised strategy on victims and ensure that the Court has the resources to implement it successfully.

³⁴ ‘Proposed Programme Budget for 2013 of the International Criminal Court’, Registrar of the International Criminal Court, 16 August 2012, ICC-ASP/11/10, para 537, at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-10-ENG.pdf.

On the Guidelines on Intermediaries

- Recognise the crucial role played by intermediaries in the implementation of the Court's mandate.
- Endorse the Draft Guidelines on intermediaries and ensure the Court can start implementing and monitoring them as soon as possible.
- Ensure adequate resources are in place to implement the draft guidelines on intermediaries.

On Outreach

- Express principled support for outreach and public information during the General Debate as well as in other relevant fora, underlining how early and direct ICC outreach and communication with victims and affected communities ensure a fair, effective, independent and efficient Court.
- Ensure continued inclusion of references in the *Omnibus Resolution* to the importance of, as well as the need to improve, ICC outreach and public information activities by early and direct outreach from the Court.
- Ensure that outreach and public information activities continue to be funded through the regular annual budget of the Court.

On Protection

- Support the Court's efforts to put in place adequate and effective measures of protection through entering into relocation agreements with the Court and, even in the absence of standing arrangements, positively responding to urgent temporary relocation requests.
- Contribute to the Special Fund for relocations created by the Registry and support the Registry's local protective measures, including temporary ad hoc measures to respond to situations in which individuals face imminent harm.

On Participation

- Ensure the VPRS is given adequate resources to prevent repetition of situations where victims are not able to exercise their rights as enshrined in the Rome Statute.
- Continue to engage in constructive discussions with the Court, civil society and experts on victims' related issues on how to revise the current system for victims' participation in order to make it more effective, efficient and sustainable.
- Ensure that the VPRS is able to base more of its staff in field offices to allow closer and constant interactions with victims and with relevant groups.
- Ensure that any review of the Court's policy on victims-related issues aims at ensuring effective and meaningful procedures, not merely less costly ones, and that it is based on a careful analysis of where the system has worked and where it could be improved or changed to make it more efficient and effective.
- Give due consideration to the problems associated with collective applications and participation processes including protection risks, challenges in determining the most 'legitimate' voice or voices to represent victims' groups, the potential to silence divergent or dissenting voices and the fact that Article 68(3) of the Rome Statute and related rules appears to require an individualised application process.

On Legal Aid/legal representation

- Ensures the Court undertakes a comprehensive review of legal representation prior to further reviews of the legal aid system and that such review considers at its heart the adequacy and effectiveness of legal representation, is open to the widest array of stakeholders, is transparent and leads to a clear result.

- Recognise that victims' choice is the rule with regards to legal representation and ensure that the Court is in a position to recognise victims' choice with regards to the appointment of common legal representation.

On Reparation and the Trust Fund for Victims

- Contribute to the Trust Fund for Victims.
- Refuse to implement the Committee's recommendation to freeze the Trust Funds non-staff costs.
- Ensure that the Trust Fund's Secretariat is adequately equipped to implement the first reparations ordered by the Court, including by ensuring the Fund's ability to adequately manage funds and fundraising.
- Intensify discussions on the issue of cooperation with respect to the identification, freezing, seizure and transfer of assets and other cooperation needs relating to reparations and the Trust Fund for Victims.
- Consider the TFV's Board of Directors' request to the ASP to pledge a collective, voluntary €1 million exceptional contribution to the TFV reserve for its reparations mandate.

Recommendations to the Court

On the Budget

- Ensure that budgets fully include ALL the resources required to implement the Court's mandate, in particular, resources needed for the processing of victims' applications.
- Continue to provide States with detailed explanations of the consequences of cuts in relation to the implementation of victims' rights.

On the Victims' Strategy

- Ensure that the Revised Victims' strategy can be operationalised and that indicators are monitored and reported upon on a regular basis.

On the Guidelines on Intermediaries

- Ensure that resources necessary to implement the guidelines are requested in future Court budgets.
- Incorporate a complaint mechanism into the Guidelines.
- Clarify the application of the guidelines to intermediaries appointed directly by the victims.
- Clarify disclosure obligations for intermediaries.

On Outreach

- Vocally defend public information and outreach as integral to the Court's objective of providing justice to victims.
- Encourage all Court organs and officials, to work with the Registry to achieve greater level of coordination of "Court-wide" messaging, including around reparations proceedings, situations under preliminary examination, gender-related issues, and downsizing.

On Protection

- Ensure that protection systems, both reactive and responsive, are in place with regards to victims and other persons at risk.
- Ensure that special protection measures are in place to address the specific physical and psychological protection needs of children, the elderly and/or severely traumatised victims.
- Assess the efficiency, adequacy and impact of current protection measures with regards to the specific protection needs of victims of gender based violence and revise them as appropriate.

On Participation / Application

- Request the resources necessary to cope with increasing number of victims' applications and engage in a dialogue with the relevant ASP structures to justify why these resources are necessary.
- Put in place adequate systems to ensure that the Court can handle the increasing number of victims' applications.
- Set up clear timeframes for requesting and obtaining missing information in victims' applications for participation including.
- Provide adequate support to victims and their legal representative in order to obtain missing information.
- Work more closely with victims, intermediaries and legal representatives at the earliest possible stage to ensure that applications are submitted as completely as possible.
- Ensure that any review of the Court's policy on victims-related issues aims at ensuring effective and meaningful procedures, not merely less costly ones, and that it is based on a careful analysis of where the system has worked and where it could be improved or changed to make it more efficient and effective.
- Seek further input from the parties, victims, other stakeholders and experts to determine the viability and impact on victims of proposals for review of the existing victims' participation system.
- Give due consideration to the problems associated with collective applications and participation processes including protection risks, challenges in determining the most 'legitimate' voice or voices to represent victims' groups, the potential to silence divergent or dissenting voices and the fact that Article 68(3) of the Rome Statute and related rules appears to require an individualised application process.
- Ensure that the ability of participating victims to voice their views and concerns and the nature of their participation are not diminished or circumscribed as a result of a more collective or tiered application process.
- Ensure that common legal representatives have the necessary resources, capacity and support in the field to be able to maintain constant communication with the "victim participants" and enable victims to make an informed decision as to which form of participation they wish to exercise.

On Legal Aid/ Legal representation

- Undertake a comprehensive review of legal representation prior to further reviews of the legal aid system and ensure it considers at its heart the adequacy and effectiveness of legal representation, is inclusive of victims' views, is open to the widest array of stakeholders, is transparent and leads to a clear result.
- Communicate promptly with counsel appointed directly by victims to ensure they are informed of their mandate and in possession of their clients' files.
- Ensure that appointment of common legal representation is done well in advance of crucial hearings where counsel will be expected to act upon instructions of victims while ensuring adequate consultation with victims on their choice of representation.
- Adequately support victims' legal representatives who are receiving legal aid.

On Reparation

- Intensify discussions on the issue of cooperation with respect to the localisation, freezing, seizure and transfer of assets and other cooperation needs relating to reparations and the Trust Fund for Victims.