



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

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.

Contents

1. Summary Recommendations.....	2
2. Budget Concerns	4
3. The Victims' Strategy.....	5
4. The Court's Guidelines on Intermediaries.....	5
5. Protection.....	6
6. Victim Participation.....	7
7. Legal Aid for Victims.....	10
8. Reparations and the Trust Fund for Victims	11
Annex: VRWG Paper on Establishing effective reparation procedures and principles for the International Criminal Court, Sept 2011	14

1. Summary Recommendations

The VRWG recommends that States Parties should:

On the Budget

- Ensure the budget adopted at the 10th 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.

On the Victims' Strategy

- Continue to engage in discussions on the proposed revised strategy on victims.

On the Guidelines on Intermediaries

- Recognise the crucial role played by intermediaries in the implementation of the Court's mandate.
- Ensure adequate resources are in place to implement the draft guidelines on intermediaries, once adopted.

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.
- Engage in constructive discussions with the Court 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 relevant groups.

Legal Aid

- Ensure 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, 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.

Reparation

- Contribute to the Trust Fund for Victims.

- 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.
- Acknowledge that reparations proceedings are a key means by which victims' suffering will be acknowledged and their dignity restored.

The VRWG recommends that the Court should:

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.

Victims' Strategy

- Ensure that the Revised Victims' strategy can be operationalised and provide adequate baseline data and indicators to allow for meaningful discussions ahead of the adoption of the revised strategy.

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.

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.

Participation

- 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.
 - Endeavour to review incoming requests and request any missing information within two weeks of the receipt of an incoming application.
- 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.

Legal Aid

- Ensure 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, is inclusive of victims' views, is open to the widest array of stakeholders, is transparent and leads to a clear result.
- Communicate promptly with counsels 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.

Reparation

- Carry out as much advance planning as possible before the commencement of the first reparation proceedings in order to foster a common approach across different chambers, to ensure that there is a common understanding of what the process will entail and what the possible results might look like.
- 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.

2. Budget Concerns

Funding pressure constraints affect all areas of the International Criminal Court's work. Some States continue to exert pressure to impose a zero growth budget despite the new resource requirements associated with the investigation into crimes committed in Libya as well as to fund the general increase in judicial activity while upholding the necessary level of activity in existing situations. This pressure has negatively impacted the 2012 budget proposed by the Court and has led to the Court underestimating the costs of certain activities and programmes.¹

Notably, the Court has underestimated the costs required to implement its victims' mandate. As will be noted, underfunding of certain functions relating to victims has already negatively impacted service delivery (in particular, the processing of victims' applications to participate in proceedings).

The VRWG is concerned that the drive to introduce further cost-saving measures might indicate a general finance-driven approach to the review of, or introduction of, new policies and procedures. We are specifically troubled by certain suggestions 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 of the general budget of the Court.² The work of the Court should not be divided into so-called 'core' and 'less core' or

¹ See, CICC Budget and Finance team paper for 10th session of the ASP, 29 November 2011; CICC Letter to Ministers on the 2012 ICC Budget, 6 July 2011, http://iccnow.org/documents/CICC_Letter_on_the_2012_ICC_Budget_-_6_July_2011.pdf; Submission to the Committee on Budget and Finance at its seventeenth session on 22 to 30 August 2011, 17 August 2011, http://iccnow.org/documents/Commentary_on_2012_Budget_17_August_2011.pdf

² Report of the Committee on Budget and Finance on the work of its seventeenth session, ICC-ASP/10/15, para 25: '[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

'non core' activities; the Rome Statute sets out an integrated system which cannot simply be separated out to suit budgetary objectives. The reality is that outreach, victims' participation, reparations and victim and witness protection, are necessary for carrying out the ICC's judicial functions. For example, outreach is essential to ensure that victims can access their rights of participation under the Rome Statute and is one of the quintessential, core non-judicial functions of the Court: this has been recognised by States and by the Court since 2006. It would be dangerous to allow it to be weakened under the guise of separating core and non-core functions by whether they are judicial or not. The Court should develop creative and innovative processes to overcome these challenges.

3. The Victims' Strategy

The VRWG welcomes the references in the Omnibus resolution to the ongoing work of the Court to develop its strategy in relation to victims. The VRWG believes that a clear strategy with detailed baseline data and clear performance indicators for measuring progress in achieving the set objectives, in relation to each of the areas outlined in the strategy, is essential if progress is indeed to be made in meeting the statutory obligations relating to victims. This is also necessary from the perspectives of transparency and accountability/good administration.

4. The Court's Guidelines on Intermediaries

The VRWG understands that the Court has finalised draft guidelines on its work with intermediaries. Once this strategy is adopted, it will be crucially important both for the Court and for those that engage with it as intermediaries. Given the range and complexity of situations the Court is involved in, it is natural that the Court will work with many different kinds of counterparts to aid in fulfilling its mandate: e.g., the Office of the Prosecutor would work with different sources which may lead investigators to witnesses; local organisations will help victims to fill in forms to apply to participate in proceedings and will maintain contact with victims even after legal representatives have been appointed; the Trust Fund for Victims will work with implementing partners to fulfil its assistance and rehabilitative work on behalf of victims and their families. It is important for the Court to determine an appropriate strategy to manage these different relationships and to ensure that intermediaries are not put at undue risk as a result of their engagement with the Court.

The finalised draft positively incorporates a series of guidelines that include selection criteria for intermediaries, such as the ability to ensure gender specific strategies in their work. It also makes provision for a code of conduct for intermediaries the Court chooses to work with to help regulate work relationships and expectations. The draft recognises the need to reimburse the expenses of intermediaries who provide contracted services to the Court, notwithstanding that they are unlikely to be able to cover the costs up front. It also recognises that intermediaries may fall within the category of persons who may suffer risks and thereby require protection, although further work may be required to clarify the responsibility of different Court organs and sections to ensure the neutral, expert provision of protection.

Yet, particularly in the context of victims, intermediaries will not necessarily be appointed by the Court but by the victims themselves- there will be natural interlocutors in victims' communities that may be local persons of trust that victims may ask for advice or assistance when contacting the Court. It is unclear to what extent the guidelines (and the protections for

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.'

intermediaries contained therein) apply to intermediaries that are not selected by the Court, but by the victims themselves. This is of concern, given the inherent vulnerability of such individuals and groups as a result of their proximity to victims and the spectre of continued instability and ongoing conflict in many of the situation countries.

Other areas to clarify or improve upon 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. The guidelines also specify that when forming a relationship with any organ or unit, intermediaries must disclose any prior engagement they may have had with another organ. 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.

5. Protection

The VRWG notes that without a robust system in place to ensure the protection of victims and witnesses, few would agree to engage with the International Criminal Court, either as witnesses, participants or in any other category. While the continued existence of conflicts in many situation countries complicates the process of putting in place protection measures, this, nonetheless, does not lessen the legal or moral obligation to ensure adequate and effective protection. Protection 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, and doing so preventively to avoid late interventions which are likely to be both ineffective and inefficient. 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. Moreover, what may be adequate or appropriate may depend on the circumstances and the individuals involved. Indeed, as much as possible, the Court's protective measures should be reparative to victims. Special measures may be required for particularly vulnerable categories of persons such as children and the elderly or severely traumatised individuals. Victims of gender-based violence may also require special forms of protection in view of the pervasive stigma they may face in their homes and communities, as well as the specific types of trauma they may have suffered.

Recent months have brought to the fore certain protection concerns that have emerged during Court proceedings. Allegations were made that defence investigators have disclosed the names of protected victim-witnesses³ and that witnesses have been intimidated.⁴ The VRWG is dismayed by some of the comments in the section on witness protection and support in the Report of the Court on Cooperation, which outline very limited state cooperation.⁵ We encourage States Parties to support the Court's efforts to put in place adequate, and effective and, in as much as possible, reparative measures of protection such as entering into relocation agreements with the Court and even in the absence of standing arrangements, positively responding to urgent temporary relocation requests; contributing to the Special Fund for

³ Requête relative à la situation sécuritaire de la victime [Expurgé] et potentiellement d'autres victimes, 14 October 2011, ICC-01/04-01/07-3179-RED, <http://www.icc-cpi.int/iccdocs/doc/doc1246288.pdf>; Decision on the "Prosecution's Urgent Submission Concerning Defence Public Disclosure of Confidential Witness Information, 2 November 2011, ICC-01/09-01/11-362, <http://www.icc-cpi.int/iccdocs/doc/doc1260017.pdf>.

⁴ Closing statement of the Legal Representative for Victims in the Ruto confirmation of charges hearing, 8 September 2011.

⁵ Report of the Court on Cooperation, ICC-ASP/10/40, 18 November 2011, At paras. 45-6. "The Court currently faces a critical challenge in terms of witness protection. Faced with an urgent and unforeseen situation at the beginning of 2011, the Court requested States Parties to temporarily accept witnesses on their territory. Out of the 9 requests for cooperation sent to that effect, none received a positive reply. The Registry needs to be able to urgently evacuate witnesses to a "safe haven" country when a life threatening situation for the witness materialises. It is paramount that States carefully consider their respective legal parameters with regard to the protection of witnesses. Should the Court not be able to find a State willing to accept witnesses on its territory on very short notice, there is a serious and imminent risk of having a witness in grave danger."

relocations created by the Registry and supporting the Registry's local protective measures, including temporary ad hoc measures to respond to situations in which individuals face imminent harm.

6. Victim Participation

The VSWG welcomes the statement in the Draft Omnibus resolution⁶ which notes with concern reports from the Court on the continued backlogs the Court has had in processing applications from victims seeking to participate in proceedings⁷ and underlines the need to consider reviewing the victim participation system with a view to ensuring its effectiveness, efficiency and sustainability.

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 Victims' Participation and Reparation Section (VPRS) of the Registry 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 in accordance with Regulation 86(3) to ensure that the application contains all the requisite information, before transmitting the application to a Chamber, together with a report.⁸ So far, most Chambers have ruled that only 'complete applications' should be transmitted by the VPRS for a decision⁹ on whether the applicant may be accorded victim's status as a participant in a case or situation.

In recent months, on numerous occasions, the Registry has cited resource and personnel constraints to justify its inability to process in a timely fashion victims' applications, particularly in the *Mbarushimana*, *Ruto et. al* and *Muthaura et. al* cases. We understand that 470 victims who applied to participate in the *Mbarushimana* case ahead of the deadline set by the Chamber, were denied the opportunity to have their applications ruled upon due to the inability of the VPRS to process them on time. In the *Ruto et. al* case, while the Registry was in the end able to assess, for the purpose of completion, most if not all the applications received, and transmitted complete applications to the Chamber, 1,700 applications were deemed incomplete by the Registry and never transmitted to the Chamber. In the ongoing *Bemba trial*, the timetable proposed by the Registry and adopted by the Pre Trial Chamber, to transmit to the Chamber the 2,830 applications that had already been pending by the end of August implies that some victims may not have their applications ruled upon before February 2012.¹⁰ By then, it is likely that the Prosecution will have concluded its evidence. Finally, as recently as November 2011, the Victim Participation and Reparations Section indicated that despite obtaining previously requested missing information in July 2011, 27 victims' applications in the *Lubanga* case were not

⁶ As set out in the Report of the Bureau on victims and affected communities and Trust Fund for Victims, ICC-ASP/10/31, 22 November 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-31-ENG.pdf

⁷ At the end of October 2011, according to Registry statistics:

9,910 victims applied to participate in proceedings (2,228 for the situation or individual cases in the Democratic Republic of the Congo; 1,028 for Uganda; 209 for Darfur; 3,873 for the Central African Republic and 2,572 for Kenya). The numbers have significantly increased in the last year. 5,639 of these applications were lodged since the beginning of 2011.

3,446 of these applications were accepted by the relevant Chambers: 127 for the Lubanga case; 366 for the Katanga and Ngudjolo Chui case; 132 for the Mbarushimana case; 41 for the Kony et al. case; 1,937 for the Bemba case; 87 for the Abu Garda case; 6 for the Harun and Kushayb case; 12 for the Al Bashir case; 178 for the Banda and Jerbo case; 327 in the Ruto et al. case; 233 in the Muthaura et al. case.

6,896 applications for reparations have been received by the Registry (1,160 relating to the DRC; 15 for Uganda; 54 for Darfur; 1,943 for the Central African Republic and 2,857 for Kenya).

⁸ Regulation 86(5) of the Regulations of the Court

⁹ As will be discussed below, some Chambers have however indicated that when applications are not completed within a reasonable time, then they should be transmitted to the Chamber.

¹⁰ Decision setting a timeline for the filing of observations on pending victims' applications, 09 September 2011, ICC-01/05-01/08-1726, <http://www.icc-cpi.int/iccdocs/doc/doc1229914.pdf>. The Chamber approved the Registry's submission to file remaining applications on a rolling basis between 9 September 2011 and 13 January 2012, with parties having 21 days from notification to file observations.

processed and transmitted to the Chamber before the end of the trial due to resource constraints.¹¹

The VRWG is dismayed that so many victims are missing the opportunity to participate in key hearings because 1) the VPRS does not have the capacity to review their applications, and/or, 2) missing information is not obtained by VPRS in a timely manner to ensure that applications can be processed and transmitted. The latter challenge relates to the limited financial and human resources of the VPRS at headquarters and particularly in its field offices to relay to victims and their legal representatives information about missing documentation. It also relates to the problem that legal representatives do not receive legal aid until the status of victims is confirmed by the Chamber, which impedes travel to the field and adequate contact with victims.

The system is not functioning satisfactorily and victims are losing out. A confirmation of charges hearing in the *Gbagbo case* can reasonably be expected in 2012 and the VRWG urges States and the Court to ensure that victims in that case do not also lose out. A *laissez-faire* approach is simply not acceptable; there is an obligation to ensure that the system works, or to revise the system to maximise efficiency without detracting from victims' rights under the Statute. The Court will be faced with more and more applications from victims. High numbers of applications is positive in that it shows that victims and wider communities wish to engage with the Court. However, the Court has a responsibility to put in place adequate systems to ensure that it can handle such increases – by increasing staff and resources or by making its procedures more efficient and effective, or both.

Need for a clear timeframe for requesting and obtaining missing information

The Statute and Rules do not provide a timeframe within which victims' applications for participation should be assessed, completed and transmitted to the relevant Chamber. In practice, it can be months and sometimes years before a victim's application is completed and ruled upon.

However, some Chambers have set deadlines suggesting that once an application for participation has been received, it should be assessed by the Registry and any missing information requested within two weeks.¹² The recent jurisprudence in the Kenyan cases recognises that "it is the responsibility of the VPRS to ensure that **all** applications are filled in with pertinent information and completely and, in case of missing information, request, pursuant to regulation 86(4) of the Regulations, such information or documentation within two weeks after receipt of the application. If those requests prove to be unsuccessful **within a reasonable period of time**, the Registrar shall submit those applications to the Chamber for the Single Judge's consideration."¹³ [emphasis added]

Clearly, there are difficulties inherent to obtaining information from victims who often live in remote and unsafe locations. The VRWG therefore calls on the Registrar, in the absence of more specific instructions by a Chamber, to set up its own internal guidelines on what timeframes should be applied with regards to requesting and obtaining missing information. For instance, the Registry could endeavour to review incoming requests and request any missing information within two weeks of the receipt of an incoming application; should the Registry be unable to obtain the said information within six months, it should then proceed to transmit the application, as appropriate, to the relevant Chamber. It is important that the Registry respond to

¹¹ Request for instructions on victim's applications for participation and reparations received by the Registry, 2 November 2011, ICC-01/04-01/06-2817, <http://www.icc-cpi.int/iccdocs/doc/doc1260260.pdf>

¹² *Ruto et. al Case*, First Decision on Victims' Participation in the Case, 30 March 2011, ICC-01/09-01/11-17, <http://www.iccpi.int/iccdocs/doc/doc1049619.pdf>.

¹³ First decision on Victims' Participation in the Case, 30 March 2011, ICC-01/09-01/11-17, para 18, <http://www.icc-cpi.int/iccdocs/doc/doc1049619.pdf>.

victim applications within clear deadlines. This is necessary both as a matter of the general accountability of the Registry and in terms of treating victims with consideration and respect.

Need for adequate support to obtain missing information

The rules and regulations refer only to the Registrar being able to make “requests for information” or “seek further information”. It is our understanding that the legal aid scheme of the Court does not currently provide for financial assistance (neither fees nor logistical support) for victims’ legal representatives to collect any missing information that is not specifically requested by a Chamber.¹⁴ The VRWG calls on the VPRS to assist victims’ legal representatives to obtain the missing information through the provision of financial and logistical support. This is the most appropriate response in cases where victims have confirmed counsel. In all other cases, the VPRS should obtain that information directly in view of the fact that it is the unit which “**shall** be responsible for assisting victims and groups of victims.”¹⁵

It is evident that the failure to submit required information is likely to result in victims’ applications being rejected. Obtaining missing information is very time consuming and sufficient resources should be provided to those mandated to collect the information, whether they are inside or outside of the Court. As long as the Court continues to require this information, there is an onus on the Registry to facilitate its receipt, in line with the obligation that it “**shall** be responsible for assisting victims and groups of victims.”¹⁶

With regard to ‘situations’ before the Court, the Registry has been put on notice by Chambers to ensure that it is ready to submit to the Chambers all relevant complete victim applications should a ‘proceeding’ arise in which they are potentially eligible to participate.¹⁷ It is thus crucial that resources are located to ensure that the applications can be completed in time.

The VPRS should be working more closely with victims, intermediaries and legal representatives at the earliest possible stage to ensure that applications submitted are as complete as possible. The VPRS should formulate strategies for ensuring that missing information is collected expeditiously and identify (and request) the resources it needs to ensure the job is done. The VRWG calls on the Registry to finalise the development of the victims’ applications database as a matter of urgency and to ensure it can be made available or that access can be granted, as appropriate, to victims’ legal representatives to facilitate the management and review of their clients’ applications. The VPRS should also consider the possibility to base more of its staff in the Court’s field offices in order to allow closer and constant interactions with relevant groups. We are astounded and concerned by the seeming contradiction that the Registry has repeatedly listed ‘lack of resources’ for its failure to comply with time limits, and yet it did not take the opportunity of the 2012 budget to set out in realistic terms its needs to do the job.

The VRWG and some of its members have already raised some of these concerns with the Registry, and believe that certain efficiencies may be made in the processing of victim applications without detracting from the important rights afforded to victims under Art 68(3) of

¹⁴ Interim report of the Court on legal aid: Legal and financial aspects for funding victims’ legal representation before the Court, 9 May 2009, ICC-ASP/8/3, at para 35 which states that “To date, in seeking to set limits on the scope of what will be covered, the Registry has not foreseen the possibility, within the scope of the legal aid budget, to authorize such costs. Such costs include the following: [...] c) Costs relating to assisting victims in filling in application forms for participation or reparations.”

¹⁵ Regulation 86(9) of the Regulations of the Court: “there shall be a specialised unit dealing with victims’ participation and reparations under the authority of the Registrar. This unit shall be responsible for assisting victims and groups of victims

¹⁶ Regulation 86(9) of the Regulations of the Court

¹⁷ *Situation in the Republic of Kenya*, Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2010, ICC-01/09-24, para 21 in which “The Chamber stresses the importance of the VPRS to be ready at any time to present complete applications together with the assessment when an issue requiring judicial determination arises before the Chamber”. *Situation in Democratic Republic of Congo*, Decision on victims’ participation in proceedings relating to the situation in the Democratic Republic of the Congo, 11 April 2011, ICC-01/04, 593, para 13.

the Rome Statute. Here again, any review should be aimed at maximising efficiency and effectiveness.

7. Legal Aid for Victims

In light of the recent comments made by the Committee on Budget and Finance (CBF),¹⁸ the VRWG recommends 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. This would include canvassing victims' views about the character and quality of legal representation and the extent to which their concerns were addressed. The review itself should be open to the widest array of stakeholders, be transparent and lead to a clear result.

Determining common legal representation

The inclusion of a novel system of common legal representation for victims is an important efficiency marker. The Court (including the Registry) has only begun to develop a process to determine when a common legal representative is warranted, how to choose such a representative and how to make this appointment effective.

Transmission of applications to legal representatives

Rule 90(1) states that "a victim shall be free to choose a legal representative". Often, victims appoint a legal representative without informing the person that they have listed him/her as legal representative. The VPRS should automatically and promptly liaise with the representatives named in applications to ensure that 1) the representative is aware of the mandate being given to him or her; and 2) the representative is in possession of his/her clients' applications for participation and/or reparation (often they are not, as these will have been transmitted directly to the Court), so that they can begin fulfilling their duties to their clients.

Process for the appointment of common legal representation

We recognise the challenges for the Registry to develop a system which complies with its obligations under Rule 90 of the Rules of Procedure and Evidence, and gives full effect to victims' autonomy to exercise their right to participate in proceedings in accordance with Article 68(3) of the Statute. We also acknowledge the challenges faced by the Registry in carrying out its mandate within the context of budgetary and practical constraints.

We have already written to the Registrar on 17th August 2011 our concerns about how the recent appointment of common legal representatives in the *Ruto et. al.* case and *Banda and Jerbo* case has proceeded, in particular, the failure of the Registry to comply with the Chambers' orders to consult with victims, instead, proceeding directly to choose a legal representative on their behalf, thereby ignoring victims' agency and autonomy and giving cause for concern regarding the transparency of the process. We reiterate that victims' choice of counsel is the rule, not the exception. Ensuring that victims are able to have a say in selecting the counsel to

¹⁸ Report of the Committee on Budget and Finance on the work of its seventeenth session, ICC-ASP/10/15, para 15, which notes that, in light of the increasing costs for legal aid for both the defence and for victims, 'The Committee is of the view that a review of the legal aid system is now urgently warranted. Simply put, a decision will ultimately be required as to the sustainability of the financial costs of this legal aid system and whether there are alternatives or changes that can help contain costs while still ensuring a fair trial for the accused and adequate representation and participation of victims.' See, also, Annex 3 of this CBF Report, para. 10, which provides that: '...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 (OPCV) would be more cost efficient. In any case, the OPCV already provided sizeable support to external counsel, having assisted 39 legal representatives and more than 2,300 victims. To the extent that the Court is the only international criminal court to accept the participation of victims, all comparisons with other international courts are not based on the same situations. Such a system should not rule out the possibility of obtaining external counsel in the event of conflicting interests between the groups of victims.'

represent their interests in legal proceedings before the Court is 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.

Timeframe for the Appointment of common legal representation

Under the Rules, “the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims [...] to choose a common legal representative or representatives.”¹⁹ “If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.”²⁰

The VRWG is concerned at the recurring appointment of common legal representatives only a few weeks or even days (in the *Bemba case*), before the start of crucial hearings. The purpose of any legal representation is to act on the basis of instructions of clients, and this is hampered by the late designation of common legal representation (which impedes them from having the time and opportunity to consult with and obtain instructions from their ‘clients’).

Although we welcome the efforts by the Chambers to start consultations around the appointment of a common legal representative as early as possible, we were dismayed that in practice appointments are still being made at the last minute. For example, in the *Ruto case*²¹ the Single Judge first raised the issue in March 2011; however, the new common legal representative was not appointed until 5 August, only one month in advance of the confirmation of charges hearings. The VRWG is concerned that this practice of late confirmation of common legal representatives limits victims’ ability to participate in proceedings and of their counsel to represent them adequately. If the victims are to be represented effectively in hearings, Chambers need to ensure that 1) victims are provided with a meaningful opportunity to choose a common legal representative and 2) the appointment of common legal representation is done well ahead of hearings where counsel will be expected to speak on behalf of his or her clients.

Supporting victims’ legal representatives

The VRWG encourages the Court to ensure adequate support of legal representatives teams, in particular, that the teams which receive legal aid from the Court, and are independent from, but have an office at the ICC are provided with adequate facilities.

As mentioned earlier, the VRWG also calls for adequate support to legal representatives of victims before victims’ status is granted. Indeed, the Court should not expect counsels to cover the expenses needed to complete victims’ applications. If this information is required in order for participatory status to be ruled upon, then legal aid should be provided.

8. Reparations and the Trust Fund for Victims

The VRWG welcomes the call upon States, international organizations, individuals, corporations and other entities to contribute to the Trust Fund for Victims. The VRWG is committed to working with the Trust Fund for Victims as appropriate to provide whatever technical, strategic or other assistance may be required.

¹⁹ Rule 90(2).

²⁰ Rule 90(3)

²¹ In the Kenyan cases, the Registry was tasked with taking steps for the appointment of common legal representation in March 2011, when the confirmation of charges hearing was not due to start until September.

The Court has not yet adopted principles on reparations in line with Article 75 of the Rome Statute. Recently, the VRWG issued a paper on reparations, setting out key areas which we believe should be covered in the principles. This paper is annexed to the current report. We consider it important for the principles to convey a common Court-wide vision on reparations which reflects international standards and comparative best practise. We encourage the Court to carry out as much advance planning as possible before the commencement of the first reparation proceedings in order to foster a common approach across different chambers, to ensure that there is a common understanding of what the process will entail and what the possible results might look like and to provide victims and their legal representatives with sufficient advance notice of any procedures they may be expected to comply with and/or participate in.

The ASP's CBF and Study Group on Governance have begun to consider the issue of reparations. The fact that the ASP is engaging on the issue of reparations is positive, given the important role that they will be called upon to play in cooperating with the Court and complying with any orders to locate, freeze, seize and ultimately transfer assets to the Court for the benefit of victims.²² In the Report of the Court on Cooperation, it is noted that,

“In the reporting period, 10 requests were transmitted by the Registry at the request of the Chamber, 8 to States and 2 to an international organisation. Of these requests, 3 have been fully executed, 1 State indicated that it was unable to execute the request without additional and detailed information and the other requests are pending. The requested international organisation indicated it was unable to assist the Court directly and that such requests should be addressed to its Member States. The Registry sends regular reminders to States that have not replied to requests for assistance.”²³

In addition, situation countries and other countries where beneficiaries are located may in future be called upon to assist with the implementation of reparation orders, e.g., by granting permission to carry out projects on behalf of victims and/or to assist with the distribution of benefits to named beneficiaries.

The VRWG encourages the Court and States Parties to 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. These discussions will become more concrete once a Court-wide vision on reparations is articulated.

The VRWG also calls on the Court and States Parties to reflect further on how to address potential challenges which may arise in situations where competing claims by a State, victims and a defendant are made over assets acquired by a defendant during his or her tenure in an official position, e.g., head of state. Given the fact that meaningful monetary reparations in mass atrocity situations are likely to be available only where a convicted person has acquired wealth, in precisely those circumstances in which states have historically asserted claims over the assets, the VRWG would encourage further discussions on the issue.

In their consideration of reparations, the CBF has called *inter alia* for the Court to consider what alternatives may exist to ‘costly reparations proceedings’, and have suggested that the Court may need strategic guidance from the ASP on issues such as the proportion between the cost of the reparations process and the amount of voluntary funds and assets seized.²⁴ The VRWG

²² See, Report of the Court on Cooperation, ICC-ASP/10/40, 18 November 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-40-ENG.pdf,

²³ Ibid, Para. 33.

²⁴ See, of the Committee on Budget and Finance on the work of its seventeenth session, ICC-ASP/10/15, para 21, which notes: “**The Committee was of the view that this is an area where strategic guidance from the Assembly would be important.** What should the proportion be between the costs of the reparations process in relation to the amount of voluntary funds and seized assets? In the context of significant costs for legal aid, are there alternatives to costly proceedings in order to maximize assistance or reparations to victims? Are there alternative mechanisms for delivering the same results, either through the Trust Fund for Victims

reminds that reparations proceedings are a key means by which victims' suffering will be acknowledged and dignity restored. The process is a crucial marker for the Court's interaction with victims and affected communities. It is not only about a monetary award that may be afforded following a conviction; reparations hearings, the establishment of principles relating to reparations for the victims in each concrete case adjudicated by the Court resulting in a conviction, and any eventual award, if appropriately planned and executed, will have great symbolic importance. As such, we encourage States Parties to avoid introducing calls for financial proportionality and to await the jurisprudence of the Court concerning principles to repair the harm suffered by the victims, either individually or collectively and a definition of reparation, which should provide further guidance on the Court' approach to both individual and collective forms of reparation, monetary (compensation) and/or non-monetary awards such as restitution and rehabilitation.

The proposed draft resolution on reparations for this session states that "under no circumstances shall States be ordered to utilize their properties and assets, including the assessed contributions of States Parties, for funding reparations awards, including in situations where an individual holds, or has held, any official position." Given the role the Trust Fund for Victims might be called to play and the fact that its administration is supported by "assessed contributions", the VRWG cautions against such a restrictive statement in the resolution.

or through a national process with assistance from the Court? Is there any area where States could provide voluntary funds to offset some of the costs?

Annex: VRWG Paper on Establishing effective reparation procedures and principles for the International Criminal Court, Sept 2011



Victims' Rights Working Group Establishing effective reparation procedures and principles for the International Criminal Court September 2011

With potentially months to go before the landmark first reparation process at the International Criminal Court (ICC) begins, the Victims' Rights Working Group is concerned that insufficient progress has been made to clarify the reparation process and to establish principles on reparation required by Article 75 (1) of the Rome Statute.

Trial Chamber I is currently deliberating on the *Lubanga* case and is expected to deliver its final decision pursuant to Article 74 of the Rome Statute by the end of 2011. Trial Chamber II is expected to deliver its final decision in the *Katanga/Ngudjolo* case by June 2012.¹ Decisions in either of these cases could trigger the first process under Article 75 to determine whether the ICC will order reparation for victims. The proposed ICC budget for 2012 anticipates that reparation proceedings in the *Lubanga* case could extend into the first quarter of 2012.²

Unresolved procedural questions as well as reports that the judges intend to develop the principles required by Article 75 (1) on a case by case basis raises concern for the effectiveness of the first proceedings. In particular, determining the ICC's approach to reparation on a case by case basis creates a real risk that principles established and applied by different panels of judges could result in weak and inconsistent reparation orders. It also significantly delays proper information to victims about the reparation process which is creating confusion and frustration.

Furthermore, the lack of clarity about the process and the principles is causing tensions among states parties regarding the potential cost of the reparation process. The Committee on Budget and Finance has even implied that the Assembly should consider recommending that the ICC depart from the provisions of the Rome Statute or to look at the option of voluntary contributions to save costs.³

¹ Proposed Programme Budget for 2012 of the International Criminal Court, ICC-ASP/10/10, 21 July 2011, paras. 7 and 62.

² Ibid., para 61.

³ In the Report of the Committee on Budget and Finance on the work of its seventeenth session, para. 36, the Committee states: "The Court is rapidly moving to, potentially, the first reparations proceedings, which will constitute an innovation in international criminal law. Depending on the type of process, the costs of reparations proceedings could be significant. During its session, the Committee was informed that there was still no overall strategy for reparations in the Court. The Committee was of the view that this is an area where strategic guidance from the Assembly would be important. What should the proportion be between the costs of the reparations process in relation to the amount of voluntary funds and seized assets? In the context of significant costs for legal aid, are there alternatives to costly proceedings in order to maximise assistance or reparations to victims? Are there alternative mechanisms for delivering the same results, either through the Trust Fund for Victims or through a national process with assistance from the Court? Is there any area where States could provide voluntary funds to offset some of the costs."

The Victims' Rights Working Group calls on the ICC to take immediate measures to develop a clear court-wide vision on reparation, including resolving procedural issues promptly and establishing principles on reparation as required by Article 75 (1). In this paper, the Victims' Rights Working Group sets out a number of issues that should be reflected in the procedures and recommends key principles on reparation that should be applied from the first cases. In particular, we encourage the ICC to consult with victims, victims' legal representatives, experts within the ICC and outside and civil society in developing the principles.

The need for clear procedures and principles

The reparation system of the ICC is in many respects unique. There is little precedent to be drawn from other international and internationalised criminal courts. The ICC system is also distinct from the practice of regional and international human rights bodies and courts which concern state responsibility. The ICC reparation system most closely resembles national civil law justice systems – in many countries referred to as *partie civile* – though differences remain and clearly the ICC is not a national court and not part of the machinery of any state.

The Victims' Rights Working Group considers that the establishment of clear procedures and principles is vital to:

- ***Inform victims, the defence, third parties and states about the ICC reparation process, how it may affect them and what they may expect from it***

At present, victims who have filed applications for reparation with the ICC in its first cases have almost no information, beyond the provisions of the Rome Statute itself, about the process potentially ahead of them or the potential outcomes should they be determined to be eligible beneficiaries of an ICC order. There is also reluctance on the ground to conduct extensive information campaigns with regards to ICC reparation due to the number of questions still unanswered as to what the process will entail both in terms of procedural steps and requirements, as well as in relation to the nature and extent of reparation. The situation is inevitably creating confusion and frustration.

Similarly, defendants will be unclear about what the process will mean for them, if they are convicted. For example, it is currently unclear whether the reparation process would proceed in the event that a convicted person files an appeal against conviction or be postponed until after the appeal is completed, even if there is no statutory provision that would allow such a postponement.⁴ It is vital that the Defence is well-informed about the process and the principles.

Equally, third parties who may be affected by reparation orders have the right to understand the entire process, in addition to the possibility that they may be invited to make representations during the reparation process⁵ and are able to appeal.⁶

Furthermore, states should be made more clearly aware of the forms of cooperation they may be expected to carry out to assist the ICC and enforce reparation orders.

⁴ Article 75 regulating Reparations is placed at the end of the trial, in part VI of the Rome Statute.

⁵ Such third parties would fall under "interested persons" in Article 75 (3).

⁶ Article 82(4), Rome Statute.

- ***Ensure a court-wide approach to reparation***

Reparation is not simply a responsibility of the judges. All organs of the ICC have responsibilities when it comes to ensuring that the reparation process is capable of affording victims full and effective reparation.

The Office of the Prosecutor is responsible for conducting financial investigations to identify a suspect's assets in order to ensure that measures are taken to trace, identify and freeze them so that they are not disposed of.

The Registry is responsible for coordinating and facilitating the application process for victims wishing to apply for reparation and for the administration of reparation awards, including pursuing enforcement.

The Court may order that awards for reparation be made through the Trust Fund for Victims. The Trust Fund also implements projects of assistance to victim communities.

Across its organs, the ICC needs to engage strongly with victims and affected communities on reparation issues, including through a strengthening of the ICC's field presence.

Clear procedures and principles on reparation would ensure greater clarity for all organs of the ICC on how they should be contributing to the overall process and would foster greater coordination. As implied by the wording of Article 75 (1), which requires "the Court" to establish principles, it is essential that all organs of the ICC contribute to the process of identifying the appropriate principles⁷.

- ***Ensure consistency in the ICC's decision making from the very first cases***

The ICC is made up of judges from all regions of the world and different national legal systems and traditions— which may approach reparation in different ways. A process whereby trial chambers decide reparation orders without, at a minimum, a general framework of principles in place could lead to inconsistency. Different approaches taken in different cases will confuse victims, lead to accusations of unfairness against different convicted persons and undermine the reputation of the ICC which has been lauded for its mandate to protect the rights of victims. Principles should provide clear guidance for all judges to follow in order to ensure consistent decisions. At the same time, principles must still afford the necessary flexibility to enable judges to make substantive orders that reflect the particularities of the victimisation in the given case. Principles should allow for the establishment of a general framework, which will inevitably be further defined through jurisprudence in particular cases. Although the Appeals Chambers will certainly play an important role to ensure consistency in the long term, the desirability of a general framework of key principles at the outset cannot be contested.

- ***Establish the ICC reparation system in the broader context of the right to reparation***

The ICC reparation process does not exist in a vacuum. It exists amidst other avenues that may or may not be open to victims under national and international law. Indeed, since the Rome Statute is limited to only providing reparation in relation to persons convicted by the ICC and

⁷ While the "Court" means all the four organs of the Court under article 34, the term the "Court" has been used in several articles of the Rome Statute as referring to the relevant Chamber adjudicating at given stages of the proceedings. Therefore, an interpretation of the "Court" in article 75 can be referred to the Trial Chamber at post-conviction or sentencing stage. Even if this interpretation would prevail, all above-mentioned organs of the Court should still have an important role to play in the reparation process.

not against states, the ICC will not be able to provide full reparation to victims in all cases. The current restrictive prosecution strategy makes it even more essential that the ICC reparation process acts as a catalyst for states to fulfil their obligations to ensure that all victims of genocide, crimes against humanity and war crimes are provided full and effective reparation.

- ***Address states concerns regarding costs***

The Victims' Rights Working Group is seriously concerned that the failure of the ICC to present a clear vision for the reparation process is fuelling a negative debate among states parties and within the Committee on Budget and Finance about the cost of the reparation process, which could undermine the ICC's ability to perform this vital part of its mandate. In particular, as discussed further below, recommendations to limit the costs of the reparation process to the assets of the convicted person or the resources of the Trust Fund for Victims demonstrates misunderstandings about the right to reparation and the purpose of the process, which must be positively addressed by the ICC. Certain procedural issues, including the composition of chambers conducting the reparation process, should be communicated to states by the ICC without delay.⁸

- ***Realise the rights of the victims***

International criminal justice has many objectives, including the key aim of providing redress to victims of crimes under international law. The ICC's procedures and principles should ensure that the ICC upholds the rights of victims participating in reparation proceedings set out in the Rome Statute and in international law. Since victims and affected communities are the main stakeholders and clients of the ICC, the reparation principles should aim at enhancing the ICC's positive impact on these groups and reinforcing the role of the ICC as a pillar of international justice.

Recommendations for key principles that should be applied by the ICC⁹

To assist the ICC in preparing for the first reparation process, the Victims' Rights Working Group sets out below its recommendations for key principles that the ICC should apply from its first cases. In accordance with Article 21 of the Rome Statute, the recommendations take into account the provisions of the Rome Statute and the Rules of Procedure and Evidence as well as principles on reparation established in existing international law, including those set out in international standards. References to international standards and other precedents are listed in footnotes.

Principles to ensure victims have equal, effective and safe access to reparation before the ICC

Achieving equal and effective access should be a fundamental goal of any reparation process. Failure will result in disappointment of victims, accusations of discrimination and damage to the ICC's

⁸ The Victims Rights Working Group has recommended: "Reparation proceedings should be conducted by the relevant Trial Chamber, recognizing that the reparation process in the Rome Statute forms part of the trial. Should a judge no longer be available, as opposed to a Judge whose term of office might expire, he or she should be replaced, allowing for efficiency while limiting the organizational demands.... A full chamber should conduct reparation proceedings, at least for the first cases whilst the principles on reparation are being developed. Indeed, these decisions will not be easy and will set an important precedent. Only once the ground work has been set, and the process gone through at least a full cycle, could discussions around a modification of the structure to a single judge be considered." Victims' Rights Working Group, A victims' perspective: Composition of the Chambers for reparation proceedings at the ICC, April 2011, available at: http://www.vrwg.org/VRWG_DOC/2011_VRWG_JudgesReparations.pdf

⁹ The development of these recommendations was greatly facilitated by the report *Justice for Victims: The ICC's Reparations Mandate* issued by Victims Rights Working Group member Redress in May 2011. Many of recommendations reflect Redress's reflections on Draft ICC Reparations Principles contained in Annex 1 of that paper.

credibility. The need for equal access is reflected in international standards.¹⁰ For the ICC, this point is particularly vital given that victims will, in many cases, be at a long distance from the ICC process and unaware of their rights. While some affected communities will have been reached through outreach efforts of the ICC and civil society, there will be many more who have not yet heard about their rights under the Rome Statute and the possibility and process to claim reparation before the ICC. Ensuring equal and effective access will thus require an active effort by the ICC to identify potential challenges and address them. Victims may also face obstacles to access the ICC reparation process, including social, linguistic, logistical, economic and gender-based barriers that must be considered and addressed in the development of procedures that cater to these realities and in the substantive forms of reparation afforded. The Victims' Rights Working Group recommends that principles clearly set out the ICC's commitment to:

- *Non-discrimination*¹¹: In establishing policies and making decisions, the ICC shall ensure non-discrimination on the basis of sex, gender, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion, geographic location and disability, and will endeavour to provide affirmative measures to redress inequalities.
- *Ensure women and girls' access to reparation*¹²: In view of the prevalence of gender-based violence that forms part of genocide, crimes against humanity and war crimes, and the common socio-economic and discriminatory obstacles that women and girls face in seeking access to justice, the ICC must take specific measures to facilitate their applications and participation in all stages of reparation proceedings. This would include widows, girls, the children of child-mothers and other dependants of victims, with particular concern for women and children. Best practices should apply to ensure that women and girls are not subject to discriminatory laws or customs divesting them of accessing their rightful benefits.
- *Ensure children's access to reparation*¹³: Children have been victims of genocide, crimes against humanity and war crimes. Indeed the first cases being prosecuted by the ICC include individuals who are charged by the ICC with committing the war crime of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. In view of the legal, educational and social obstacles facing children in accessing reparation, the ICC must take specific measures to facilitate children's applications and participation in all stages of reparation proceedings, acting in their best interests and according to the evolving capacities of the child, including providing psychological support.
- *Publicize the ICC's reparation process effectively*¹⁴: The ICC shall ensure effective outreach to appraise potentially eligible victims and affected communities of eventual reparation proceedings to enable applications for reparation in advance of any reparation hearings, including the measures required of the Registry in Rule 96 of the Rules of Procedure and

¹⁰ See for example, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines on Reparation), Principle 11.

¹¹ Basic Principles and Guidelines on Reparation, Principle 25; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 3; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Principle 1.

¹² Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Principle 2. See also: Reparations For Women Subjected To Violence: First Thematic Report Submitted to the Human Rights Council by Rashida Manjoo, Special Rapporteur on Violence Against Women, Its Causes and Consequences, 19 April 2010.

¹³ Convention on the Rights of the Child, Article 12, guaranteeing children the right to participate in judicial and administrative proceedings affecting them, and Article 39, regarding the promotion of physical and psychological recovery and social reintegration of child victims.

¹⁴ Basic Principles and Guidelines on Reparation, Principle 12 (a); Updated Set of Principles for the Protection and Promotion of human rights through action to combat impunity, Principle 33; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Principle 2 (a).

Evidence.¹⁵ Outreach strategies must consider the specific needs of children, including by ensuring that information is also available in child friendly formats, and that children, as well as parents and teachers, are informed¹⁶. In situations where security considerations prevent the ICC's staff from conducting outreach in locations where affected communities reside, specific strategies will be designed, well ahead of reparation proceedings, to ensure alternative ways of sharing information with potentially eligible victims. Publicity of the reparation process will also strengthen the understanding and knowledge by victims and affected communities about the reparation phase and enable them to make an informed decision about whether they want to seek reparation.

- *Provide proper assistance to victims, including legal representation*¹⁷: In many cases, victims of genocide, crimes against humanity and war crimes will require assistance to complete and lodge application forms to the ICC and then to participate throughout the reparation process. The ICC shall ensure that victims are provided with proper assistance, including through working with intermediaries, so that victims can apply for reparation. In particular, in many situations special support structures may be required to assist women and children in the process of speaking out and claiming reparation.¹⁸ Because of their age, level of education and legal status under national law, children would need specific support in applying for reparation. In particular, children's applications should not be conditional to the consent of the parents.¹⁹ The ICC shall then ensure that all victims seeking reparation are able to appoint a legal representative of their choice to assist and represent them throughout the process as required by Rule 90 (1)²⁰ and that the said legal representative benefit from adequate support from the Registry. Recognizing that, in most cases, victims of genocide, crimes against humanity and war crimes will lack the resources to fund their legal representation, the Registry should fund their representation in accordance with Rule 90 (5) of the Rules of Procedure and Evidence.²¹ If the ICC is inclined to appoint one or several common legal representatives for the reparation process, victims must be provided with ample opportunity to express their views on choice of counsel, and the representative must be afforded adequate human and logistical support to effectively carry out the functions.
- *Set reasonable time limits for applications and participation*: Time limits set by the ICC should not unduly limit victims' access to rightful entitlements. In order to ensure adequate access to reparation, notification should ensure sufficient time for applicants to make requests and participate in relevant processes, including allowing for adequate time and/or resources for the

¹⁵ Rule 96 of the Rules of Procedure and Evidence states that the Registrar shall "take all the necessary measures to give adequate publicity of the reparation proceedings before the Court.[...] [In doing so], the Court may seek [...] the cooperation of relevant states parties."

¹⁶ UN Guidelines on Justice in Matters Involving Child Victims and Witnesses, Chapter VII, The right to be Informed, paras. 19 and 20.

¹⁷ Basic Principles and Guidelines on Reparation, Principle 12 (c); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 6 (c).

¹⁸ Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Principle 3 (g).

¹⁹ The Committee on the Rights of the Child in its concluding observations on Laos (CRC/C/LAO/CO/2) stated:

"30 ...The Committee is also concerned that the views of the child are not respected before the courts, where children do not have the right to be a witness or to bring a complaint or seek reparation without the consent of their parents.

31. The Committee recommends that the State party ensure respect for the views of the child in all settings, including in the home. The Committee encourages the State party to take the necessary steps to raise awareness among persons working with or for children on the need to respect the views of the child. The Committee also encourages the State party to put in place measures to ensure that children are not denied their legitimate right to reparation or to bring a complaint before the court, solely because of the parental consent requirement. The Committee recommends that the State party take into account its General comment No. 12 (2009) on the right of the child to be heard (CRC/C/CG/12)."

²⁰ Rule 90 (1) of the Rules of Procedure and Evidence requires, consistent with Article 68 (3) of the Rome Statute that "[a] victim shall be free to choose a legal representative." See also: Basic Principles and Guidelines on Reparation, Principle 12 (d).

²¹ Rule 90 (5) states: "A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance."

Victims Participation and Reparation Section to fully process the applications received and obtain any missing information. Time-limits should take into account the specific circumstances of each situation, including factors such as remoteness of victims and the ability to reach victims through existing infrastructure, plus specific assistance that the victims are likely to require. The ICC should seek and take into account the views of victims, victims' representatives, experts with knowledge of the situation on the ground, experts who have carried out mass reparation programmes in other countries, civil society, the Public Information and Documentation Section, the Trust Fund for Victims and the Victims Participation and Reparation Section in setting time-limits.

- *Protect victims seeking reparation*²²: Appropriate policies and measures shall be put in place to respect victims' psychological well-being, dignity and privacy with regard to reparation as required by Article 68 of the Rome Statute, which binds all the organs of the ICC at all stages of the proceedings. Considering the varying levels of insecurity in situation countries and the specific risks linked to victims' association with the ICC's processes, best practices regarding protection and safety must apply with regard to reparation proceedings, the issuance of awards and their implementation. The privacy of vulnerable victims, must be protected and their identity and identifying personal data must be considered protected information to be disclosed to parties to the proceedings with appropriate safeguards when withholding such information would be prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial hearing. Specific risks to the physical, psychological and cultural/familial well being of victims of gender based violence when applying for and receiving reparation should be identified in advance and adequate strategies put in place to address them.
- *Inform victims about the proceedings*²³: Victims shall be kept regularly informed of the status of proceedings, including through notifications by the Registry and through their legal representatives. The Registry will take the necessary steps to ensure that the information is indeed safely received by victims in a format they understand and to address any challenge faced in that regard.
- *Conduct reparation processes on the ICC's own motion*. As set out in Article 75 (1), the ICC may make determinations in relation to reparation on its own motion in view of "exceptional" circumstances. This should include conflict and post-conflict situations, where victims, particularly the most vulnerable ones most in need of reparation, may not be in a position to request reparation of their own accord.
- *Conduct in situ hearings*: Where possible, the ICC should conduct at least some of the reparation hearings at a location where victims can attend and participate in a safe manner, as provided for in Article 3 (3) of the Rome Statute.
- *Conduct reparation processes on request*: Rule 95 (2) (b) of the Rules of Procedure and Evidence provides that victims shall be able to request that the ICC does not make an individual order in respect of them. This should include allowing victims to withdraw but also to amend a request for reparation.²⁴

²² Rome Statute, Article 68; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 6 (d); Updated Set of Principles for the Protection and Promotion of human rights through action to combat impunity, Principle 32.

²³ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 6(a).

²⁴ Regulation 101 of the Regulations of the Registry.

Principles relating to eligibility

Principles are required to establish who the ICC may award reparation to. These should include:

- *The definition of Victim:* Consistent with the definition of “victim” in Rule 85 of the Rules of Procedure and Evidence, “victim” shall include immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.²⁵
- *The scope of beneficiaries:* In determining the scope of beneficiaries within the context of an award against a convicted person, due regard shall be given to victims who have explicitly requested reparation, as well as victims that have suffered harm as a result of the specific crimes for which there is a conviction, even if such individuals are as yet unidentified.

Principles to “determine the scope of any damage, loss or injury to, or in respect of, victims”

Principles relating to determining the scope of harm are expressly required in Article 75 (1), which also requires the ICC to state the principles upon which it is acting. The ICC may conduct such an analysis even where it does not go on to order reparation against a convicted person. Indeed, a comprehensive analysis which documents the full scale of the harm caused to victims will no doubt be a useful tool for victims outside the scope of ICC reparation orders to campaign nationally for reparation. Principles should include:

- *The scope of determinations:* Judges should base their orders on reparation on a comprehensive analysis of the harm caused to victims of crimes for which the perpetrator has been convicted, including both individual and collective aspects of harm caused to eligible victims, and taking into account the specific and differential impact on victims in all their diversity.
- *Appointing experts:* The ICC may appoint, in accordance with Rule 97, appropriate experts to assist it. Experts should include experts on trauma, sexual violence and violence against women and children, in addition to those with area-specific or country expertise or technical expertise on reparation such as valuation specialists.
- *Consulting with victims:* In accordance with Article 75 (3), the ICC should seek and take into account the views of victims on the scope of harm they have experienced.
- *Effective standards of proof.* The standard of evidence for establishing identity and evidence of harm should recognise the often difficult circumstances of victims and availability of evidence and should make use of presumptions and the balance of probabilities where appropriate.
- *Recognizing all forms of harm:* The ICC should take into account all forms of harm resulting from the commission of crimes for which there has been a conviction in determining the damage, loss or injury to, or in respect of victims, including: physical injury and death; disease; psychological harm including traumatic stress; damage or loss of property or land; exile; loss of education; loss of earnings; damage to victims’ life plan²⁶; loss of liberty; loss of rights; loss of family life; social harm and cultural harm.

²⁵ Article 75(1) stipulates that “principles relating to reparations to, or in respect, victims” shall be established by the Court. The wording “in respect of” victims was included to “extend the scope of application of article 75 to all victims defined in the UN Declaration of victims’ rights of 1985” (cf. Triffeter’s Commentary, Article 75, page 1402, citing the text of a footnote unanimously adopted by the relevant Committee of the Rome Diplomatic Conference in UN Doc. A/CONF. 183/C.1/WGPM/L.2/Add.7, page 5). See also: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 2, and Basic Principles and Guidelines on Reparation, Principle 8.

²⁶ Intern-American Court of Human Rights, Case of Loayza-Tamayo v. Peru, Judgment of 27 November 1998, paras. 147-150.

- *Factors related to the crimes:* The ICC should take into account the rights violated by the specific crimes; the gravity of the violation, including any aggravating circumstances; any patterns of violations and the characteristics of the individuals or groups targeted.
- *Response to the crimes:* The ICC should take into account additional harm experienced by victims as a result of the crimes, including stigma (particularly experienced by survivors of sexual violence²⁷ and child soldiers or their relatives²⁸) and knock-on crimes, as well as the ongoing effects of continuing crimes.
- *Services provided to victims:* The ICC should take into account the impact of any services provided or denied to victims since the crime was committed in assessing the harm and needs for rehabilitation, including healthcare and psycho-social support, financial assistance etc.

Principles to guide the development of reparation orders against a convicted person

ICC reparation orders will need to be tailored to each specific case. To guide this process and ensure consistency, the ICC should establish principles to guide the process, including:

- *The aim of reparation orders:* ICC reparation orders shall seek to, as far as possible, wipe out the consequences of the crimes and re-establish the situation which would, in all probability, have existed if that act had not been committed.²⁹ Where the pre-existing situation was a contributing factor to the crime, reparation should as far as possible aim to be transformative, to avoid recurrence.³⁰
- *Proportionality to the harm*³¹: Reparation shall be proportional to the gravity of the violations and the harm suffered.
- *The need to consult with the victims.* In support of restoring victims' dignity, rehabilitation and reintegration into communities, ICC policies should encourage the participation of victims, including women³² and children³³, in the process of decision making about reparation. Due

²⁷ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: A/HRC/14/22, 19 April 2010, para. 45, states: "harms emanating from sexual violence — including the contraction of AIDS and other sexually transmitted diseases, undesired pregnancies, complications due to often unsafe abortions, unwanted children, loss of reproductive capacity, fistulas and vaginal injuries, and multiple psychological disorders — are always compounded with social stigmatization and ostracism by the family and/or community, subsequent emotional distress, loss of status and the possibility to marry or have a male protector, and access communal resources".

²⁸ With regards to designing reparation programmes, the Truth and Reconciliation Commission for Sierra Leone noted that "developing programmes for specific categories of people carries the risk of creating new stigma, whereas some of the victims already suffer from stigmatisation. Avoiding new stigma or reinforcement of existing stigma was one principle behind the development of this programme. The Commission wanted to reduce existing stigma as much as possible and considers the development of programmes to increase awareness and understanding of the specific needs of victims as a necessary measure in reducing their suffering."

²⁹ *Chorzow Factory (Claim for Indemnity, Merits) Judgment*, 13 September 1928, PCIJ Series A, No. 17, para. 28.

³⁰ Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Principle 3 (h). See also: Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: A/HRC/14/22, 19 April 2010, paras. 24 and 31: "Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation."

³¹ Basic Principles and Guidelines on Reparation, Principle 15.

³² Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: A/HRC/14/22, 19 April 2010, para. 29: "Without the participation of women and girls from different contexts, initiatives are more likely to reflect men's experience of violence and their concerns, priorities and needs regarding redress. Additionally, without such participation, an opportunity is missed for victims to gain a sense of agency that may in itself be an important form of rehabilitation, especially when victims come to perceive themselves as actors of social change."

³³ Convention on the Rights of the Child, Article 12 states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

consideration should be given to victims to determine for themselves what forms of reparation are best suited to their situation. In particular, victims may present to the ICC the realities they face and, where appropriate, how they would want reparation awards to reflect local cultural and customary practices.

- *Forms of reparation*³⁴: Although Article 75 (1) of the Statute refers to restitution, compensation and rehabilitation, these types of measures of reparation should be interpreted in conformity with Article 21(3) of the Rome Statute, thereby entailing essential forms of reparation such as satisfaction and guarantees of non-repetition, which – in and of themselves – may have a rehabilitative meaning not only for the victims, but also for the convicted persons. Guarantees of non-repetition of the crimes adjudicated in a given case should be always sought as one of the appropriate forms of reparation.
- *Provisions related to the ability of the convicted person to provide reparation*: Reparation should address the specific harm suffered and should not be linked to the convicted person's capacity to pay. Where the convicted person is unable, due to a lack of or insufficiency of resources, to comply with a reparation award, or in other circumstances as set out in Rule 98 of the Rules of Procedure and Evidence, the Trust Fund for Victims may apply a portion of its voluntary income towards implementing the order. Furthermore, as provided in Rule 98 (4), the ICC may order that an award for reparation against a convicted person be made through the Trust Fund for Victims to an intergovernmental, international or national organization approved by the Trust Fund for Victims. The Trust Fund can conduct specific fundraising efforts in relation to fulfilling the order.
- *State cooperation in implementing certain forms of reparation*: Certain forms of reparation may not be directly executable without the assistance of the state. For example, an order for the convicted person to establish a memorial to victims may require planning and other permissions by the national authorities. Where appropriate, the ICC may request the cooperation of the national authorities in accordance with Article 93 (1).
- *Individual and/or collective awards*. Victims' requests specified through application forms, consultation, hearings or other means should be given due consideration in determining the nature and form of awards. Particularly in relation to collective awards, facility should be made to enable, though not require, groups of victims, associations and other collectives to make joint submissions. Determination of individual awards should be made in the context of the circumstances and the particular nature of the victimisation in the case before the ICC. Where reparation is awarded on a collective basis, forms of reparation should address the specific harm suffered by eligible victims such as specific medical services, psychosocial treatment, housing, education and training benefits or awareness raising on victimisation as a means of enabling more effective reintegration, without being subsumed within general humanitarian or developmental assistance, as appropriate.
- *Feasibility*. In determining time frames for implementing reparation benefits, due regard should be given to both the immediate short term needs of the victim as well as long term needs.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

See also: UN Guidelines on Justice in Matters Involving Child Victims and Witnesses, Chapter III, Principle 8 (d) the right to participation and Chapter VIII, Paragraph 21, the Right to be heard and express views and concerns.

³⁴ Basic Principles and Guidelines on Reparation, Principles 18 to 23.

- *Sustainability*: To ensure sustainability, reparation benefits may seek to address dependency reduction and the empowerment of victims.
- *Rights of third parties: Bona fide* third parties, whose ownership of proceeds, property and assets derived directly or indirectly from the crimes is recognized as a barrier to enforcement of fines and forfeiture and therefore reparation orders, should not include those who took advantage of the situation of the prior owners or who knew or ought to have known that the property was derived from crime.
- *Best interests of the child*. With respect to reparation directed at children, the best interests of the child shall be the guiding principle in developing appropriate measures,³⁵ according to the evolving capacities of the child, including support to those whom the child is dependent upon.

Principles on the issuing of reparation orders

Victims will await the outcome of the ICC's reparation process and details of reparation orders with anticipation. It is essential that orders are communicated effectively and recognize that, where orders do not provide reparation to all victims of crimes in a situation, other victims will be looking to the process with hope that it may set an important precedent that could lead to the realisation of their rights nationally. Principles should therefore be developed which include:

- *Effective communication of orders*. Orders should be issued in a language and format appropriate and understood by the victims in question, using victim-friendly language. Communication and outreach strategies should be employed to ensure that all those who applied for reparation, others who may be eligible for reparations under the order and the whole of the affected community understand the ICC's decisions.
- *Appropriate and symbolic means of communication*. In communicating decisions, the harm suffered as a result of specific crimes should be acknowledged, as should the impossibility of fully repairing such harm. Use of appropriate language to acknowledge massive trauma can provide a basis for healing when recognised at individual, community, national and international levels.
- *Recognition of the rights of all victims of genocide, crimes against humanity and war crimes to full and effective reparation*. In awarding reparation to sub-groups of victims of crimes in a situation, the ICC should recognize in each decision that all victims of genocide, crimes against humanity and war crimes have a right to full and effective reparation, including the right to access to an effective remedy before their national courts³⁶.
- *Communication between the ICC and the Trust Fund for Victims, when the ICC orders that reparation be made through the Trust Fund*. Regulation 56 of the Trust Fund for Victims states that the Board of Directors of the Trust Fund shall determine whether to complement the resources collected through awards for reparations with "other resources of the Trust Fund"

³⁵ Convention on the Rights of the Child, Article 3.

³⁶ Article 75(6) provides a specific legal basis for this extremely important component of the future jurisprudence of the ICC on reparation in so far as it specifically refers to "the rights of victims under national and international law", namely, all victims of Rome Statute crimes and not only the victims of the specific criminal acts regarding which the Prosecutor and the relevant Chambers have decided to exercise their jurisdiction. The jurisprudence of the Court shall not be prejudicial for the rights all victims under existing national and international law, including victims applying for reparation before the ICC but necessitating additional measures to be undertaken by competent national authorities to ensure the application of adequate means of reparation (e.g. reintegration of survivors of the crime against humanity of persecution into their civil, political, cultural, social and economic rights).

and shall advise the Court accordingly. In particular, the Trust Fund and the Court should communicate to ensure uniformity of decisions on reparation orders.

- *Use of information.* Procedures and mechanisms should be established to guide the coordination and verification of information with civil society and other stakeholders to ensure the best management of the reparation process and orders. This should include appropriate feedback mechanisms.
- *Review of reparation orders and processes.* Procedures and mechanisms should be established to carry out reviews of reparation orders and processes, to enhance efficiency and effectiveness of the reparation system.

Principles related to enforcement

Principles should clearly state what will be expected of states in enforcing reparation orders. Principles should include:

- *States parties have a legal obligation to cooperate in identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crime.* Article 93 (1) (k) expressly requires states parties cooperation in relation to forfeiture and Article 75 (4) provides that the ICC may seek additional measures to give effect to reparation orders under Article 93 (1) following conviction. States must ensure against provisions in their national laws that, *de facto* or *de jure*, would impede effective cooperation.
- *States parties have a legal obligation to cooperate in the enforcement of reparation orders.* Article 109, interpreted in accordance with Article 75 (5), requires states to give effect to reparation orders.
- *The ICC shall make a final decision in relation to claims by bona fide third parties.* Under Article 82 (4), third parties have the right to appeal an order in relation to property affected by an order under Article 75. States who encounter third parties that claim to be *bona fide* third parties must not make decisions on the validity of such claims – which is a decision of the ICC. If requested by the ICC, the state shall identify, trace, freeze or seize such assets pending a decision by the ICC.
- *Barriers to reparation in national law must not prevent full enforcement of the ICC reparation orders.* Although Article 109 (1) provides that orders for reparation shall be implemented in accordance with the procedure of the state party's national law, it should not allow for the imposition of barriers, including immunities, amnesties, statutes of limitations or any other *de facto* or *de jure* barriers.
- *Enforcing the monetary awards:* The Trial Chamber shall remain seized in respect of monetary enforcement. The Chamber shall ensure monitoring and oversight of implementation or enforcement of individual and collective awards made against the accused and deposited with or made through the Trust Fund for Victims.