



Recommendations to the 12th Session of the Assembly of States Parties 20-28 November 2013, The Hague

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 (CICC). 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.

The VRWG is pleased to share these remarks and recommendations ahead the 12th Session of Assembly of States Parties. This year, the ASP will include a dedicated Plenary session on Victims. The VRWG welcomes this as a clear indication of States Parties' wish to keep victims' concerns at the centre of discussions regarding the International Criminal Court. The VRWG encourages all States Parties to come prepared to actively engage in the plenary discussions, by, for example, delivering statements in the debate following the panel presentations. States Parties could consider using their statements to express their commitment to victims and victims' issues; note the importance of consolidating the impact of the Court in affected communities in situation countries and ensuring the effective exercise of victims' rights under the Rome Statute. States Parties could also highlight what measures they are already taking or plan to take in order to realise the full reparative potential of the Rome Statute system, and reflect on what they can do to use the ICC's victims' mandate to promote victims' rights at the domestic level. Interventions could also support the call for adequate resources for the implementation of the Court's victim mandate. Key conclusions and outcomes of the session should be included in the Resolution on Victims to be adopted at this Assembly's session and should help guide the continued attention of the Assembly and States Parties to victims and victims' issues.

In the context of the special plenary session entitled 'Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation', the VRWG calls upon all States Parties to consider the harmful effects denial of justice has on victims; to strongly reaffirm their commitment to the fight against impunity; and to refrain from supporting any proposals or amendments, which would undermine the Rome Statute and/or condone immunity from prosecutions for alleged perpetrators of ICC Crimes.

1. Key Recommendations

The VRWG recommends that States Parties should:

- Participate actively in the **plenary discussion on victims** to be held during the upcoming Assembly session in order to increase awareness of and express a heightened sense of commitment to victims and victims-related issues.
- Encourage the Court, in its monitoring of and reporting on the revised **Victims' Strategy**, to provide information in relation to indicators attached to the strategy and make sure these are not gender-blind.
- Welcome the Draft **Guidelines on intermediaries** and request the Court to report at the next ASP session on their implementation. Ensure adequate resources are in place for their implementation.

- Provide the Court with full cooperation in relation to proceedings involving alleged attempts to influence and/or **threaten victims and witnesses**. Participate actively in the **plenary discussion on cooperation** regarding protection to understand the protection and support needs of victims and witnesses and how States Parties can assist the Court in providing that protection and support.
- Recognise the benefits that **victims' participation** in the proceedings bring for victims themselves and for their communities, but also for the legitimacy and mandate of the Court and for international justice as a whole.
- Acknowledge the importance of judicial independence in relation to the victim participation scheme, particularly in light of the fact that the first full trial cycles are yet to be completed and the Court's own review of the system is still underway. Continue to engage in constructive discussions with the Court, international and local civil society experts and legal representatives of victims on how to improve the current system **for victims' participation** in order to render their participation before the Court reparative, meaningful, efficient and effective for all.
- Provide only general directions regarding any revision to the victim participation regime, requesting expert advice and delegating implementation to the Court.
- Give due consideration to the challenges associated with **collective applications** and **participation** processes and recommend that the Court examine the concept thoroughly, engaging in the process with all stakeholders and avoiding a perspective that is only budgetary.
- Contribute to the Trust Fund for Victims.

The VRWG recommends that the Court should:

- Ensure consultation with relevant stakeholders, including victims, victims' groups, experts, legal representatives of victims and international and local NGOs working on victims' issues, in the lead up to and during the 2014 review of the **Victims' Strategy**.
- Ensure that the finalised **Guidelines on Intermediaries** are made public, widely disseminated and made available to intermediaries in a language they understand. Allocate necessary resources to implement them.
- Ensure that all instances of alleged **threats, bribes, violence, or undue influence against victims and witnesses** are duly investigated and, as appropriate, prosecuted.
- Organise itself and devise strategies to thoughtfully meet the challenges posed by the reality of the **high number of victims** wanting to engage with proceedings before the Court through a consultative process.
- Ensure that any **review of the Court's policy on victims-related issues** aims at ensuring effective and meaningful procedures, not merely less costly ones, and that such review is based on a careful analysis of how the system has worked to date.
- Ensure that all policies of the ICC treat victims as rights bearers and active participants and not as passive beneficiaries. Give due consideration to the drawbacks associated with **collective applications and participation** processes including protection risks, challenges in determining the most 'legitimate' voice or voices to represent victims' groups, the potential to silence divergent or dissenting voices and the fact that Article 68(3) of the Rome Statute and related rules appear to require an individualised application process.

2. The Victims' Strategy

The VRWG welcomes the submission by the Court of its *Report on the implementation in 2013 of the revised strategy in relation to victims*.¹ The VRWG has consistently expressed its view that a clear strategy with baseline data and performance indicators for measuring progress towards achieving set objectives is essential to meet the statutory obligations relating to victims and adopt adequate policies.

¹ *Report of the Court on the implementation in 2013 of the revised strategy in relation to victims*, ICC-ASP/12/41, 11 October 2013.

The VRWG stresses that the Court's report would have been stronger with the inclusion of such indicators with a note on methods of verification.

The VRWG remains concerned that the objectives identified in the Strategy most of which relate to Statutory obligations, are "phrased, in part, as aspirations", and that "it is not always possible to achieve these ambitious goals." While we agree that constraints (internal and external) will impact the full delivery of the Strategy, individual objectives must be "SMART", namely, specific, measurable, achievable, relevant and time-bound. The Court should also commit to their implementation.

The VRWG notes that a detailed review of the Strategy is due to take place in June 2014. We call on the Court to continue to engage external actors in relation to the implementation of the Strategy and to ensure adequate consultations in the lead up to and during the 2014 review, including with victims, victims' groups, experts and NGOs working on victims' issues.

3. The Court's Guidelines on Intermediaries

The VRWG welcomes the finalisation by the Court of the draft *Guidelines Governing the Relationship between the Court and Intermediaries (Guidelines)*, and that these have been shared with States Parties and the Committee on Budget and Finance (CBF).² We note the Court's indication that "in 2013, the Court has been implementing the Draft Guidelines to the extent possible within existing resources."³ Due to resource limitations, the Court and, in particular, VPRS, has not been able to implement them fully.⁴ The VRWG strongly supports the Court's call for them to be "fully implemented, once officially adopted, in order to protect the interests of the Court, the parties, participants and intermediaries."⁵

The VRWG acknowledges the finding by the CBF that "it did not have sufficient information to evaluate the [financial] implications" of the Guidelines⁶ and the wish of the Bureau to "further consider the issue of intermediaries" in 2014.⁷ The VRWG underscores that the Court has now provided additional information on the financial implications and support its statement that "[w]hile there are unavoidable costs for the Court in implementing the draft Intermediaries Guidelines, [...] the use of intermediaries is ultimately cost effective for the Court [as they] undertake work that would be extremely costly for the Court to perform."⁸

The VRWG urges States to welcome the Guidelines in the Omnibus Resolution so that the Court may immediately begin to fully implement and monitor them and, if further dialogue is required, to encourage the Bureau to continue to engage with the ICC on this matter. The VRWG also notes that the finalised Guidelines are yet to be disseminated and made available online. We call on the Court to ensure that, as soon as possible, they are made public, widely disseminated and made available in languages understood by intermediaries.

² The Guidelines, which have benefited from extensive consultations between the Court and civil society, provide the much needed basis upon which to establish clear mutual responsibilities and entitlements between the Court and intermediaries. They reflect up-to-date best practices as well as judicial requirements at the Court. They also seek to address some concerns about the role and use of intermediaries raised both during legal proceedings by Defence lawyers and later by Judges themselves, who criticized the Prosecution's lack of supervision over the work entrusted to them. In addition, they recognise *inter alia* the need for intermediaries to be trained in relation to key aspects of the work they are asked to undertake, to benefit from protection on a case by case basis and, upon prior agreement with the Court, for certain expenses to be reimbursed., See *VRWG submission ahead of the discussions on intermediaries to take place in The Hague Working Group*, 11 March 2013, http://www.vrwg.org/downloads/2013_March_VRWG_HWG_Intermediaries.pdf.

³ *Supra* n.1, at 44.

⁴ *Ibid.*

⁵ *Second Report of the Court on the financial implications of the draft Guidelines governing the relations between the Court and Intermediaries*, ICC-ASP/12/53, 30 October 2013.

⁶ *Report of the Bureau on victims and affected communities and the trust fund for victims, including reparations and intermediaries*, ICC-ASP/12/38, 15 October 2013, para 4; The Bureau's report also stresses that there "may be a need for further discussions [...] taking into account any developments in the case law, the duty of overseeing the functions carried out by intermediaries, the possible liability of the Court if an intermediary suffers harm or damage as the Court discharges its mandate and, *inter alia*, the consequences its use could have for a fair and expeditious trial."

⁷ *Ibid.*

⁸ *Ibid.*, para 19.

4. Protection of Victims, Witnesses and Intermediaries

Article 68 of the Rome Statute establishes the Court's obligation to protect "the safety, physical and psychological well-being of victims and witnesses". The VRWG notes last year's reports on the Kenya cases of alleged threats against witnesses, attempts at identifying possible witnesses, and/or bribing those perceived as possible witnesses (for both the Prosecution and the Defence).⁹ As well, Prosecutor Fatou Bensouda has deplored the "climate of fear [which] is being created for witnesses who do not want to come forward to give evidence".¹⁰ We note that in 2013, for the first time (publicly), an arrest warrant was issued against an individual for allegedly corruptly, or attempting to corruptly, influence three ICC witnesses.¹¹

The VRWG strongly condemns any attempts to intimidate or otherwise influence victims and witnesses, both for the Prosecution and the Defence, as well as those representing them, and calls on the Prosecutor to ensure that all those alleged to do so are promptly investigated and, where appropriate, brought to trial. The VRWG also calls on States Parties to fully cooperate with the Court in relation to such proceedings. Only by sending a strong message that such offences cannot and will not be tolerated, can the ICC ensure that witnesses will come forward and that the integrity of the criminal justice process is upheld.

In addition, the VRWG notes that the Plenary discussion on cooperation at this year's Assembly session will focus on protection. States Parties should use this opportunity to increase their understanding of the protection and support needs of witnesses, victims, and intermediaries. They should acknowledge the challenges faced by the Court in delivering that protection and support, including the need for the Court to reform its own practices following the conclusion of planned reviews of the Victims and Witnesses Unit. States Parties should also reflect on how to cooperate fully with the Court in relation to obstruction of justice proceedings. As discussed above, this would include the conclusion of framework agreements for relocation, the adoption of ad hoc arrangements for protection, or other means.

5. Victim Participation

The high number of victims seeking to engage with the Court should be seen as a measure of the Court's success. We share some of the recurring concerns that have been voiced by States and some Court officials with regards to the current inability to process large numbers of applications for participation. We submit that it falls upon the Court, with the support of States Parties, to devise its strategies to thoughtfully meet the challenges posed by this reality. In that context, we welcome the increased attention given to the way victims apply to and participate in ICC proceedings in 2013. We also note that the current draft Resolution on Victims foresees further discussions on "victim participation" in 2014 within the context of the Hague Working Group's facilitation on **Victims, Affected Communities, the Trust Fund for Victims and Reparations**. In the lead up to further considerations on this issue, the VRWG calls on States Parties and the Court to recognise the benefits that victims' participation in the proceedings bring for victims themselves, but also for the legitimacy of the Court, the fulfilment of the ultimate object and purpose of the Rome Statute and its centrality to international justice as a whole.¹²

⁹ *Statement by ICC Prosecutor on the Notice to withdraw charges against Mr Muthaura*, 11 March 2013, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/OTP-statement-11-03-2013.aspx.aspx; *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Warrant of Arrest issued against Walter Barasa*, 2 October 2013, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement-OTP-02-10-2013.aspx; The defense for Mr Kenyatta also alleged wrongful interference with witnesses in its request for the trial to be permanently stayed, Defence Application for a Permanent Stay of the Proceedings due to Abuse of Process, 10 October 2013, ICC-01/09-02/11-822-Red.

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

¹¹ Warrant of arrest for Walter Osapiri Barasa, 2 August 2013, ICC-01/09-01/13-1-Red2.

¹² VRWG Submission on the importance of victims' participation, 8 July 2013, http://www.vrwg.org/VRWG_DOC/2013_July_VRWG_HWG_ParticipationFINALrevised.pdf. In it, the VRWG stressed that:

- **Victims' participation in ICC proceedings undoubtedly brings benefits to the victims themselves.** These include the possibility to be heard, to voice views and concerns and to request reparation. Participation also provides

We also call on future discussions in the context of The Hague Working Group to consider how to render the participation of victims before the ICC reparative, meaningful, efficient and effective for all.

We note that reviews of the way victims apply to and participate in proceedings are on-going. We welcome the fact that in the draft Resolution on Victims, States have refrained from calling for amendments to the legal framework of the Court and, instead, mentioned them only as a possible consequence of the ongoing review processes. The VRWG restates that in our view, changes to the legal framework of the Court in relation to the participation of victims are premature and that any proposal to that effect must be preceded by a Court-led *comprehensive evaluation* of how the system has worked to date. We urge States Parties to offer only general directions regarding any revision to the victim participation regime, requesting expert advice, and delegating implementation to the Court. In doing so, States should strongly call on the Court to continue its review processes relating to the victim participation system through a consultative process and to ensure that such discussions seek out relevant expertise and include consultations with relevant stakeholders, including victims themselves, NGOs and victims legal representatives.

In this regard, suggestions were made this year to explore collective approaches as a possible solution to ongoing challenges faced by the system. As previously stated,¹³ the term “collective” carries multiple meanings and is in itself a complex concept. A collective approach may be suitable only for some, but not all, victims. We believe that there is a need for more reflection around what is meant by this term, and to whom it might apply, and recommend that the Court thoroughly examine the concept, and engage all stakeholders in the process, including victims’ groups, civil society, experts and the diplomatic community.

6. The Trust Fund for Victims

The VRWG re-emphasises that the ability for the Trust Fund for Victims (TFV) to deliver on its reparation mandate is likely to have a dramatic impact on the credibility of the ICC as a whole. Now more than ever, the TFV must be given the resources it needs from the Assembly if the Court is to have the lasting reparative impact States Parties envisaged when they created it. More resources are also needed to expand activities under the Trust Fund’s assistance mandate.¹⁴ Notwithstanding generous contributions by a limited number of States Parties, the VRWG calls on States, and other organisations and individuals, to generously donate to the Fund.

The VRWG remains appreciative of the continuing opportunity to exchange views with the Court and States Parties on these important issues and looks forward to further discussions during the ASP and thereafter.

acknowledgement of the harm suffered by the victim, and recognition that the victim is “part of” the legal process meant to provide him/her with redress. Victim participation in seeking justice is also key to enabling the restoration of victims’ dignity, which is the “ultimate objective in the provision of redress.”

- **Victims’ participation in proceedings brings crucially valuable benefits to the Court itself.** Victim participation helps bridge the gap between the Court and affected communities, thereby reinforcing the Court’s legitimacy by providing local ownership over the process and creating confidence in the system. In addition, victims who participate in proceedings can bring to the attention of the Judges important factual and cultural elements that assist the Chambers to understand the context in which crimes took place. The participation of victims can also contribute to the establishment of the truth which, in turn, can be a form of satisfaction for affected communities. Finally, judgments that take into consideration victims’ views and concerns may play a positive role in changing the narrative of what happened and, as a result, reinforce the social rejection of such conduct and further contribute to the prevention of international crimes.

¹³ *Ibid.*

¹⁴ As of November 2013, the TFV is implementing assistance activities in the DRC and Uganda only (activities in CAR were due to start in 2013 but were postponed following the change in the security situation in the country).