

# **VICTIMS RIGHTS WORKING GROUP**

**ADVOCATING FOR THE RIGHTS OF VICTIMS AT THE INTERNATIONAL CRIMINAL COURT**

## **VICTIM PARTICIPATION AT THE INTERNATIONAL CRIMINAL COURT**

### **SUMMARY OF ISSUES AND RECOMMENDATIONS**

**NOVEMBER 2003**

## 1. INTRODUCTION

The Victims' Rights Working Group, a collaborative initiative of NGO's and other experts coordinated under the auspices of the Coalition for an International Criminal Court (CICC) continues to advocate for a Court that is reflective of the realities of victims. Taking into account the perspectives of victims will help to ensure that victims have a positive relationship with the Court, and that the processes will neither retraumatise them nor undermine their dignity. It will also make certain that the core values of the Court, which are to promote respect for the rights and the dignity of the individual, and to promote greater peace and security through accountability for crimes, are respected.

One of the major innovations of the ICC statute is the ability of victims to participate in proceedings, not only as prosecution witnesses but also as interested parties. Victims are able to be represented by legal counsel and to claim reparation before the Court. These opportunities should have an important impact on victims' experiences at the Court. However, for participation to be adequate and effective, careful planning by all organs of the Court, and in particular, the Registrar, is required. For instance, there may be numerous applications by victims, and the Court would need to determine how best to facilitate participation, while at the same time, maintain an efficient administration of justice. Victims need access to highly qualified counsel with relevant experience. The Court will also need to determine how to best organise legal representation for victims, including 'common legal representations' taking into account the possible conflicts of interests that may arise between different groups of victims and funding limitations. .

The Statute and Rules of Procedure and Evidence set out the basic framework for victim participation in proceedings, but their optimal application in practice needs further work. The international *ad hoc* tribunals for the former Yugoslavia and Rwanda and the internationalised courts and panels in Sierra Leone, East Timor or Kosovo have no similar provisions. The experience of claims commissions and truth commissions are helpful though they have generally operated without the added complexity of criminal proceedings. Certain domestic examples that may provide some guidance to the Court, however, only rarely have dealt with the numbers of victims, that could potentially be involved here. While every effort must be made to draw the best from other instances, the Court is called upon to be innovative and creative in establishing a model that takes into account the particularities of the ICC's legal framework and the varied circumstances of victims of crimes within the jurisdiction of the Court. Specialised measures are required to facilitate the participation of particularly vulnerable groups. For example, the Rules make specific reference to the obligation of the Registrar to take "gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings."<sup>1</sup>

Members of the Victims Rights Working Group met in the Hague on 21 October 2003 to discuss issues and options relating to victim participation in proceedings of the Court. This was followed on 22 October by a meeting organised by the Registrar, attended by certain members of the Victims Rights Working Group and other experts with experience of truth commissions, claims commissions and the participation of victims in national legal systems. The purpose of these meetings was to develop ideas and to strategise on how to make operational the provisions in the Statute and Rules of Procedure and Evidence regarding victim participation. Future meetings should involve national as well as international experts in trauma and trauma care of victims of crimes within the jurisdiction of the Court including gender-related violence and other maltreatment, culture- and age-specific, and all disabilities – both physical and psychological.

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<sup>1</sup> Rule 16(1)(d).

This document summarises some of the main issues that were raised in these two meetings, as well as by the questions put forward by the Court as part of its online public consultation process.<sup>2</sup> It provides a number of concrete suggestions and recommendations on behalf of the Victims Rights Working Group.

## **2. OUTREACH TO VICTIMS ABOUT THE POSSIBILITY OF THEIR PARTICIPATION IN VARIOUS STAGES OF PROCEEDINGS**

Outreach is crucial to the Court and its work. Victims must know what the Court is, what it is designed to do and how it operates if they are to interact with it effectively. They must also understand what the Court cannot possibly do: the limits of the Court's mandate. The more that is known, the more the victims can prepare themselves. The less that is known, the less often will victims apply to participate, and the less effective will that participation be. Outreach is not only about reaching out to victims or disseminating information to them. It is an interactive process – the information that the Court receives through the outreach process will be as important, if not more so, than the information it disseminates. Central to the outreach process is the receipt of information from victims and others working with them. This exchange of information will help to ensure that the procedures ultimately set by the Court keep the victims in mind and meet their needs.

But information, particularly sensitive in nature (e.g., gender-related crimes), will only reach the Court if a trusting relationship is established with victims by staff especially trained for this purpose (e.g., gender-related and other trauma). Both in the mode of outreach, the form and context of the message, particular care must be taken to avoid physical and psychological retraumatisation. Of equal importance, staff must be trained on, and adequately prepared for the real potential of vicarious traumatisation. This is of particular importance for Court investigators and staff of the Victims and Witnesses Unit and Victims Participation and Reparations Unit, who will have the most frequent encounters with victims. Adequate programmes to counsel staff who suffer from vicarious traumatisation and burnout must be developed.

On the dissemination of information, the issues that require careful consideration by the Court include: *What information must be communicated, of what nature (sensitive information), by whom, to which target audiences, and at what times?* Several stages of outreach can be envisioned:

1. Information on the ICC's mandate, in particular, the different roles envisioned for victims under the Statute and Rules of Procedure and Evidence, must be widely disseminated to different sectors of society in all parts of the world as part of the overall media and outreach strategy of the Court;
2. When the Prosecutor determines, even provisionally, that a particular situation merits investigation, more detailed information must be provided to victims and others affected by that situation; and
3. Once a formal decision is taken to go forward with an investigation, this too must be communicated in the appropriate way to victims and others with an interest in proceedings.

On the information flowing to the Court, the Court must determine how to establish effective and secure channels of communication, with clear objectives, and in the most efficient way.

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<sup>2</sup> The Court has recently announced an online public consultation on issues relevant to the draft Regulations of the Court. The questions that relate to victims issues appear on the Court's website at: [http://www.icc-cpi.int/php/show.php?id=oph\\_victims](http://www.icc-cpi.int/php/show.php?id=oph_victims), last accessed 11 November 2003.

### **3. INCORPORATING A VICTIMS' PERSPECTIVE IN THE OVERALL MEDIA AND OUTREACH STRATEGY OF THE COURT**

At the macro-level, it is important for the Court as a whole to develop an overall message or mission statement to explain in very clear and simple terms, its mandate and orientation. A comprehensible mission statement will impact upon both external and internal perceptions of the Court. From an external perspective, such a statement would help create an identity for the Court and leave it less vulnerable to misinformation or even negative propaganda. From an internal perspective, taking fully into account the independence of the Prosecutor, such a statement could also serve to bring greater cohesion to the various organs of the Court in respect of its broadest policy objectives. It could also curb contradictory approaches that would otherwise undermine the overall goals of the Court.

Such a mission statement should, among other messages, convey that there is a will to engage positively with victims and to address their concerns. The message should indicate the existence of trained specialists to deal with trauma victims in general and e.g. women and men victims of sexual crimes in particular. The message must be realistic, in terms of what the Court can achieve within its mandate, as it is translated into policies and practices that mirror the level of commitment that is expressed. This message should be widely disseminated in as many languages as possible.

It must also be recalled that the procedures of the Court, as set out in the Statute and Rules of Procedure and Evidence, might be rather foreign to individual victims, civil society groups, and others around the world. Certain victims groups, particularly those coming from rural or less accessible areas, may have very little experience even with their own national justice systems. Others who may be familiar with their own national legal system, because of the differences between the systems, may not see the relationship between the procedures of their national system to that of the International Criminal Court. . Both cases may find the idea of 'international justice' difficult to comprehend. In addition, victims may have a variety of assumptions about what 'international justice' and the International Criminal Court is or should be. The more information they are provided with, the more likely it is that they will develop a positive relationship with the Court.

### **4. MORE DETAILED OUTREACH TO VICTIMS AND OTHERS AFFECTED BY A PARTICULAR SITUATION**

When the Prosecutor determines, even provisionally, that a particular situation merits investigation, or when investigations are triggered by a State or Security Council referral, more detailed information should be provided to victims and others affected by that situation. Presently, for example, there is a need to provide detailed outreach to victims in Ituri, Democratic Republic of Congo.

The tension between competing aims and objectives is notable at this stage in particular. A focused and active outreach strategy to target those affected in a particular situation will be extremely helpful to the Office of the Prosecutor and other organs of the Court in the medium to long-term. Providing those affected at the earliest possible opportunity with accurate information on the Court, its procedures and activities would help to dispel any misinformation or rumors, and would encourage the local community to become involved, by actively assisting and supporting the Prosecutor's early investigations and encouraging victims to organise themselves. Here, the Office of the Prosecutor needs to conduct direct outreach by sensitive and especially trained interviewers. Detailed information may also deter would-be perpetrators or

prevent the further commission of crime. However, given the preliminary nature of the investigations, it is also possible that the prosecutorial strategy may be shifted or radically amended, potentially impacting on victims' rights of participation. For example, if, as part of the earliest investigations, the Prosecutor's investigators interview victims in 5 villages, but the eventual indictment relates to events which occurred only in one, it may be that only the victims from the one village will have a right to participate in later proceedings. It is even possible that too much focus on the reparations process at the earliest phases may interfere with the Prosecutor's preliminary investigations, particularly if individuals come forward with the sole interest of being recompensed.

It is therefore important to identify certain priority goals for such an outreach campaign. These goals should reflect the diversity of victims and the differing nature of their victimisation. The Court's message should be clear, simple and modest, and take into account the early work that is being undertaken and the likely contact that local individuals and groups may have with staff of the Office of the Prosecutor or other organs of the Court. For example, *what is the mandate of the Court; why is the Office of the Prosecutor enquiring about certain crimes but not others; what will happen with the information that is provided to the investigators; what is the Courts' policy on confidentiality of information*, etc. It would be appropriate for the Court to seek the advice of local NGOs and other actors, including experts in trauma and gender issues, on the most pressing concerns of the population, and how best to phrase messages so that they are easily understood.

Approaching and interacting with victims and other beneficiary groups to advise and explain their rights can be a complex process. It would therefore be appropriate for the Court to consult widely with local actors before embarking on any detailed campaign. The Court should undertake a detailed mapping of the targeted communities in order to understand fully the beneficiary groups. This should include the language and dialects that are most commonly spoken, prevailing cultural practices, levels of education and literacy rates and the degree of access to various forms of media. Contingency plans must be devised if the Court does not have access to the territory. Those developing the outreach campaign must study thoroughly the infrastructure in the area concerned. For instance, a lack of road and communication links within a country will necessitate decentralised activities. Victims might be poor, living outside of the city, with very little access to media. Perhaps they speak a different dialect or language that may not even be the official language of their country. Particularly, victims who come from the most marginalised or vulnerable groups, may have no experience with access to justice in their own countries.

Experience with large numbers of victims coming from rural areas, suggests that a decentralised outreach campaign would work best. Radio communication, and other mass media approaches may be useful, however, they should not replace other local measures that will attract greater visibility and understanding. It is preferable for those who are identified as formal and informal leaders in their communities will disseminate the message of the Court. The Court would need to understand the political, cultural and structural dynamics within communities, and be able to assess which individuals or groups have influence and how this influence can be best put to the use of the Court. For instance, it may be that religious leaders, grass roots NGOs, exiled communities, organisations of victims, bar associations or others will be helpful in certain circumstances though completely inappropriate in others. Special approaches may be needed to reach women and men who experienced sexual violence. Individuals or groups may be perceived as leaders or with influence over certain sectors of society, though not over all sectors. If preliminary investigations commence while there is an ongoing conflict, the Court may need to work with other 'front-line' medical and humanitarian organizations or those providing services to refugees and displaced persons. Each situation will be different. In most cases, local groups will not have built-in resources or expertise to assist in the manner required, and therefore training and capacity building would need to be factored in at an early stage. It is important to ensure that these interlocutors are provided with clear and adequate information.

While it is understood that the Court may have only limited means for full time personnel in the field particularly in the earliest phases, it is important to organise site visits of Court officials to raise the Court's profile and help to give it a 'face'. These site visits should be made with female and male staff who are gender sensitive so that the face of the Court also reflect the concerns of women and the specificity of crimes committed against them.

## **5. OBLIGATIONS ARISING FROM THE OFFICIAL COMMENCEMENT OF AN INVESTIGATION**

One of the first indications that an investigation is being pursued seriously is when the Prosecutor seeks authorisation of the pre-trial chamber to initiate an investigation. Rule 50 Paragraph 1 of the Rules of Procedure and Evidence provides that "When the prosecutor intends to seek authorisation from the Pre-Trial Chamber to initiate an investigation pursuant to article 15, paragraph 3, the Prosecutor shall inform victims, known to him or her or to the Victims and Witnesses Unit, or their legal representatives, unless the Prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses. The Prosecutor may also give notice by general means in order to reach groups of victims if he or she determines in the particular circumstances of the case that such notice could not pose a danger to the integrity and effective conduct of the investigation or to the security and well-being of victims and witnesses. In performing these functions, the Prosecutor may seek the assistance of the Victims and Witnesses Unit as appropriate."

For victims to be in a position to apply for participating in the proceedings, it is important that they be made fully aware of this possibility at the earliest possible opportunity. Once the Prosecutor has advised the Pre-Trial Chamber that s/he intends to proceed, it is fair to say that the Prosecutor is serious in going ahead, which warrants a full notice of all the specific rights and possibilities. The Registrar should make available materials for this purpose in accordance with Rules 16(1)(a) and 92.

Given that the information to be relayed is very detailed and sensitive, a major issue is how to give notice without threatening security, both physical and psychological. Paragraph 1 of Rule 50 refers to this when it states that the Prosecutor shall inform victims "unless the Prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses." This does not provide any guidelines to assist in its interpretation. Under a conservative reading, most notifications would potentially qualify as posing such a danger. For example, victims of sexual assault and rape may need additional protective measures as well as special encouragement and support to participate. It should be stressed that, while sufficient care must be taken to avoid any and all such dangers, the ways and means to effectuate notice amidst heightened security concerns must be further explored.

As victims receive more information from the Court and become more involved in its processes, they and their legal representatives will undoubtedly have even more questions. It would be appropriate for the Registrar to prepare for this eventuality by ensuring that concise and easy to understand materials on victim participation are available to them in languages that they can understand. The availability of such materials may cut down on other drains on Court resources, such as repeat queries and faulty applications. This information could be updated as the procedures of the Court become more precise, or to advise of certain deadlines. Furthermore, depending on the beneficiary group, it would be appropriate to provide effective direct access to the Court, through telephone hotlines, web-based applications and/or with in-country walk-in services. The Registrar would benefit from the establishment of an in-country steering group to assist in determining how best to approach these issues, taking into account local realities and the differing forms of victimisation.

## 6. APPLICATION OF VICTIMS TO PARTICIPATE IN PROCEEDINGS

Paragraph 3 of Article 68 of the ICC Statute provides that “where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” Paragraph 1 of Rule 89 provides that: “In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber....” Paragraph 3 of Rule 89 further specifies that “An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.”

The Statute and Rules of Procedure and Evidence are silent as to the exact time when victims may apply to participate in proceedings. It may be that victims will indicate a desire to participate at a very early stage, even before the Prosecutor seeks authorisation from the Pre-Trial Chamber to initiate an investigation. Victims may also apply to the Court at much more advanced stages, for instance, after a formal indictment, or when the reparations phase is announced. It would be appropriate for the Registrar to develop mechanisms to take delivery of these applications, at whatever stage they are made, and for the Court to determine how such applications are dealt with<sup>3</sup> once received by the Registrar.

In some cases, victims will need to apply within a certain timeframe for their applications to be meaningful. For instance, victims will only be able to participate in an interlocutory hearing or in respect of any issue that is live before the Court if the application is received sufficiently in advance of the hearing of that issue. This would also be the case with reparations proceedings, where the Court would need to be made aware of the number and nature of all claims in order to decide the form and scope of the award(s). Therefore, the Court must ensure adequate notice of any timeframe having an impact on victim participation. The Rules of Procedure and Evidence set out this requirement in detail: the Registrar is obliged to inform victims that have already communicated with the Court or their legal representatives of the decision of the Prosecutor not to initiate an investigation or not to prosecute,<sup>4</sup> the decision to hold a hearing to confirm charges,<sup>5</sup> of any question or challenge of jurisdiction or admissibility,<sup>6</sup> or of motions or requests affecting a particular witness or victim.<sup>7</sup>

The Court also needs to assure itself that adequate notice was provided to all, including particularly vulnerable, victims about the existence of a deadline, and that sufficient opportunity was given them to submit applications within those deadlines. Where the notification of the Court was determined to have been inadequate, deadlines should be extended appropriately. The Court must keep in mind that the most severely traumatised and affected victims often are least able to take any action on their own behalf, and therefore devise special measures to ensure their participation.

Paragraph 4 of Rule 92 of the Rules of Procedure and Evidence would appear to suggest that the Court would determine which applicants may participate in any subsequent proceedings (aside from reparation proceedings, dealt with separately) at the time of confirmation of charges.

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<sup>3</sup> For example, the Court may decide to hear such applications at a single time or at specific intervals, depending on the nature of the application.

<sup>4</sup> Paragraph 2 of Rule 92, Rules of Procedure and Evidence.

<sup>5</sup> Paragraph 3 of Rule 92, Rules of Procedure and Evidence.

<sup>6</sup> Paragraph 1 of Rule 59, Rules of Procedure and Evidence.

<sup>7</sup> Paragraph 2(c) of Rule 87, Rules of Procedure and Evidence.

It states that “when a notification for participation as provided for in sub-rules 2 and 3 has been given, any subsequent notification as referred to in sub-rules 5 and 6 shall only be provided to victims or their legal representatives who may participate in proceedings in accordance with a ruling of the Chamber pursuant to rule 89 and any modification thereof.” It is therefore advisable that the Court develop procedures for how it will deal with later applications to participate in hearings during the trial or sentencing phase.

Regarding the receipt of initial applications for participating in proceedings, experience in mass claims processes suggests that it would be simplest for the Registrar to produce a single comprehensive claim form for victims (or their representatives). This would help the Court receive all of the information it needs to proceed with the application and to make a determination, without requiring the Registrar to revert to the victim for further details. In developing the standard form special care should be taken to ensure that any data to be collected is suitable to be inserted into an electronic database. This would facilitate the sorting and grouping of applications and thus simplify the decision-making process.

Another view suggests that a very detailed form would discourage victims from using it, and would also increase the likelihood of mistakes and other inaccuracies. Therefore, that a very simple form, covering only such issues as would obviously be required (e.g., formal requirements such as identity, contact details, and relationship with the events or situation that is been dealt with by the Court), would be preferable and that the Court should revert to claimants with respect to any additional details that would be required at later stages. This latter approach considers that victims may need the assistance of legal representatives to complete some of the more technical details, and that legal representatives may not have been on board from the outset. In addition, the most sensitive information is difficult to convey in a standardised form and the information required will differ, depending on the type of participation victims are seeking and the stage of proceedings. It would also be difficult for all of these variables to be adequately reflected in a single form.<sup>8</sup>

A draft claim form should be tested on victims groups to determine how user-friendly it is. To a certain degree, the approach to be taken (whether comprehensive applications should be sought at the outset) should be consonant with the one the Court adopts for the application decision-making process. For example, will the Court make a single determination regarding the extent to which victims can participate, according to the criteria set out in paragraph 3 of Article 68 of the Statute at the commencement of proceedings, or will it decide on the extent of participation in respect of individual issues or hearings as they arise? One might imagine, for example, that an initial ruling on participation may specify the exact terms of participation for a specific hearing or phase of proceedings, but may include only a general clause or proviso alluding to participation in later stages of proceedings, e.g., that the victim may participate in a matter deemed to be appropriate by the Court, taking into account the various interests at stake. In particular, a Chamber may not wish to preclude participation at trial, but may not be in a position to specify the nature of such participation, or if it can be achieved “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial,” without having more information on the extent or form of victims legal representation.

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<sup>8</sup> For instance, a victim interested in participating in interlocutory or pre-trial hearings may not need to present the same type of information as victims interested primarily in the reparations process which, in accordance with Rule 94(1), must include “... a description of the injury, loss or harm; the location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm; where restitution of assets, property or other tangible items is sought, a description of them; (e) Claims for compensation; claims for rehabilitation and other forms of remedy; to the extent possible, any relevant supporting documentation, including names and addresses of witnesses.”

Also, as the case progresses and the prosecutorial strategy becomes more refined, victims may be required to demonstrate a link to the alleged actions of a specific perpetrator. The Registrar may not be in a position to request that the victims make this link until much later in the process.



Irrespective of the format that is ultimately adopted, the Registrar would need to determine how to deal with applications that fall outside of its parameters. For instance, if the data that is initially supplied needs to be supplemented, the Registrar would need to develop a methodology for communicating deficiencies to and collecting the missing information from victims. Where extraneous details are provided, procedures for their storage will be adopted and implemented.

General rules on the submission of supporting documentation should be drafted and widely disseminated at the outset. Victims will be required to provide some evidence of identity and address. Furthermore, lawyers, NGOs, family members or others may submit applications on behalf of others, which will require evidence of authorisation. Examples of the type of documentation that would satisfy the Court's requirements would greatly facilitate the application process. Furthermore, the Court should adopt principles of 'best available evidence', having due regard to the need for legal certainty, once problems emerge and claimants are unable to produce the appropriate documentation.. Also, the Court would need to decide whether it accepts original documentation and if not, what rules would be appropriate for the authentication of documentation (or would simple copies be sufficient). There is much to be learned from the experience of mass claims bodies where, in many instances, rigid rules were abandoned in favour of flexible approaches that took into account the resources victims actually had at their disposal.

## **7. ORGANISATION OF THE DECISION-MAKING PROCEDURE OF THE COURT ON VICTIM PARTICIPATION**

In order to participate in proceedings, victims must satisfy a series of criteria. The level of involvement of the Registry and/or the Chambers may differ, depending on the type of criteria that are needed to be satisfied:

1) **Formal application:** "In order to present their views and concerns, victims shall make written application to the Registrar..."<sup>9</sup>

At the formal application stage, the Chambers may not need to be involved at all. The Registry would receive the application and enter it in a database with other pending applications. Sufficient security measures to preserve the confidentiality of victims and of the details disclosed would need to be in place. Staff in the Registry could, at this early stage, conduct an administrative check of the application to determine whether it is complete: does it contain the applicant's signature and all authorisations or proxies; does it provide the name of the applicant; is all of the supporting material attached? The Registry will then send the applicant an acknowledgement letter confirming the documents received.

A second level review (most likely also by the Registry) would include a cursory appraisal of the substance of the application. Is this indeed an application for participating in proceedings as envisioned by the Statute and Rules? Does it relate to a situation that is before the Court or that is being provisionally investigated by the Prosecutor? Does the applicant have legal counsel? The Registrar could group the applications along criteria to be established (e.g., by situation; by form of participation). A series of responses could be prepared to deal with the range of queries and correspondence from victims, for example: explaining the functions of the Court and/or that the evidence will be submitted to the Office of the Prosecutor; to indicate that the matter will be kept on file until an investigation is initiated; a request for missing information to be completed; information on the likely procedures and an indication of the time frame; information on the organisation of legal representation for victims.

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<sup>9</sup> Rule 89(1).

2) **Basic Criteria:** The Court must decide whether an applicant is a victim in accordance with Rule 85<sup>10</sup> and whether their personal interests are affected.<sup>11</sup>

This stage requires certain policy and/or interpretive decisions of the Court. In particular, a determination has to be made of how closely connected a victim needs to be to the situation that is under investigation to fall within the definition of Rule 85.

At this stage, the Court will also need to permit other views. Rule 89(1) provides that “the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber.” The Rules do not specify when or how the Registrar shall provide such information, though it would seem that it would only be incumbent on the Registrar to provide a copy of the application when it has passed the formal review [para 1) above].

Processing the formal application, will enable the Registrar to present groups of applications to the Chambers for determining whether the ‘basic criteria’ are complied with. For example, the Registrar could provide a list of all applications made by organisations or institutions, which would need to fulfil the criteria in Rule 85(b); or all claims from individuals of village X alleging physical or mental injury, for a determination as to whether their personal interests are affected. The Registrar would include any views provided by the defence or the Prosecutor with the application.

In a situation of mass applications from victims, the Chambers may consider providing detailed criteria to the Registrar to facilitate the decision-making process. On the basis of such criteria, the Registrar could, for example, classify applications as those that fit fully within the criteria and those that require additional analysis by the judges.<sup>12</sup>

3) **Balancing of Interests:** The Court will permit the views and concerns of those who satisfy the ‘basic criteria’ “to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”<sup>13</sup>

Paragraph 2 of Rule 89 specifies that “The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.”

The Court will need to determine whether it undertakes this ‘balancing test’ at the same time that it determines whether the basic criteria have been met, or at a later stage. Even if it attempts to decide on both matters simultaneously, in order to expedite matters, it is likely that certain aspects, particularly the extent of participation at trial, will need to be revisited at later stages.

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<sup>10</sup> For the purposes of the Statute and the Rules of Procedure and Evidence: (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

<sup>11</sup> Article 68(3).

<sup>12</sup> Rule 89(4) provides that “Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.”

<sup>13</sup> Article 68(3).

## 8. VICTIM PARTICIPATION DURING THE TRIAL PHASE

Adequate procedures for victim participation during trial are of utmost importance. A designated space (e.g., not in the public gallery) for victims and their legal representatives must be reflected in the plans of courtrooms. Separate, comfortable facilities and waiting areas must be provided as well.

Victims would need to be prepared for what to expect by the process, in whatever role(s) they are to play: prosecution witness, participants or applicants for reparations. The practice of the *ad hoc* tribunals illustrates some of the challenges that victims have faced as prosecution witness; the treatment they received by various parties to the proceeding, and the degree of their preparedness for giving evidence, and in being subjected to cross-examination. While this is the case for all victims called upon to testify, it is particularly so for victims of sexual violence, child victims and others who suffered major trauma. While the possibility to be legally represented may impact positively upon the process, it is advisable that victims are provided in advance with as much information on the nature of the process as possible. The role of the Victims and Witnesses Unit in providing protection and support to victims participating in proceedings would also need to be further explored.<sup>14</sup> All staff of the Court, including judges and prosecutors, should be especially trained to interact with victims in such a way as to prevent retraumatisation and revictimisation throughout the Court process.

The impact on the particular role of victims participating in proceedings in the sense of Paragraph 3 of Article 68 of the Statute has to be further clarified. Would such participants lose the possibility to be questioned under Oath by the Prosecutor or would the evidence they give be of lesser weight?<sup>15</sup> It would seem that this factor needs to be taken into account by the judges (and possibly the Prosecutor) in respect of the balancing test – “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

## 9. VICTIM PARTICIPATION IN THE REPARATIONS PHASE

The importance and complexity of the issue merits a separate discussion on the reparations process and the relationship with the Trust Fund for Victims. These are touched upon in his report only in a cursory manner.

The framework for reparations is dealt with in Article 75 of the Statute and Rules 92 – 99 of the Rules of Procedure and Evidence. Similar to other forms of participations, those interested in participating in the reparations phase of proceedings must apply to the Registrar.<sup>16</sup>

One of the earliest issues that the Court may be faced with is the freezing of assets with a view to victims' reparations. The Office of the Prosecutor has acknowledged the need for further analysis on this issue, in light of the recommendation “that the Office develop policies and practices to seek orders freezing assets as soon as possible after confirmation of charges.”<sup>17</sup> The Office of the Prosecutor may apply to the Court for such an order, but it is also foreseeable

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<sup>14</sup> Paragraph 6 of Article 43 of the Statute provides that the Victims and Witnesses Unit “shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.”

<sup>15</sup> In France, for example, it is generally understood that the role of “partie civile” is incompatible with that of prosecution witness testifying under oath (art. 335(6) of the French Penal Code), however it is possible for a victim to testify under oath and later in the process, to become a “partie civile”.

<sup>16</sup> Rule 94(1) specifies that a victim's request for reparations under Article 75 shall be made in writing and filed with the Registrar. It also lists the particulars that must be included with the application.

<sup>17</sup> Comments and conclusions on the first public meeting of the Office of the Prosecutor, ICC-OTP 2003, at p. 3, available at: [http://www.icc-cpi.int/otp/ph1\\_conclusions.pdf](http://www.icc-cpi.int/otp/ph1_conclusions.pdf).

that victims' legal representatives will approach the Court similarly for such purposes. Further discussion is needed, as well on the eventual role of the Court in overseeing the enforcement of reparations awards and in providing any assistance to 'beneficiaries' when there has been a failure to enforce an order of the Court.

The Registrar has broad notification responsibilities associated with the reparations process. If the Court proceeds on its own motion, the Registrar will be asked by the Court "to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States."<sup>18</sup> Rule 96 provides that "...the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned. The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparations proceedings before the Court, to the extent possible, to other victims, interested persons and interested States." In so doing, it may seek the cooperation of relevant States Parties and intergovernmental organisations.<sup>19</sup> It is therefore incumbent on the Court to allow sufficient time for the publication of reparations proceedings, and sufficient resources for an adequate information campaign.

Conflicts of interests among individual victims and groups of victims are likely to be more pronounced during the reparations phase. It is foreseeable that victims will have different views on the categorisation of harm for the purpose of setting levels of compensation and differing perspectives on the form and content of any reparation award.

## **10. LEGAL REPRESENTATION FOR VICTIMS**

One of the important tasks of the Registrar is "assisting them [victims] in obtaining legal advice and organising their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91."<sup>20</sup> Rule 21(2) refers to a "list of counsel who meet the criteria set forth in Rule 22 of the Regulations," and while this provision falls within Subsection 3 of the Rules of Procedure and Evidence (Counsel for the Defence), a single list which includes both counsels interested and experienced in representing victims and those with interest or experience in defence would be preferable. It would be advisable for it to include, in addition to other formal criteria, any ICC proceedings that the counsel is already retained for (this will help to avoid conflicts) and a brief history of detailed relevant experience (e.g., massive trauma, gender crimes, children) in the representation of either victims or accused or both.

One difficulty is how beneficiaries (be it victims or accused) can assess the quality of those named on the list. Possible suggestions are of providing the Registrar with a role in vetting counsel on the list; assigning this role at least in part to national or other independent associations of counsel. This would be difficult for the Registrar in that it may impinge on the independence of counsel. Also, it would not always be possible to rely on national bar associations to undertake such a sensitive function. Counsel appearing before the Court would need to act in compliance with the Code of Conduct to be adopted, and those in breach of same could potentially be struck from the Registrar's list.

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<sup>18</sup> Rule 95(1).

<sup>19</sup> Rule 96(2).

<sup>20</sup> Rule 16(1)(b).

The Registrar has to interact actively with counsel from all parts of the world, with different linguistic profiles and legal traditions. The ‘skills’ requirement set out in Rule 22<sup>21</sup> may be onerous for some potential counsel, particularly the requirement of “an excellent knowledge of and be fluent in at least one of the working languages of the Court.” The Registrar should encourage counsel with different sets of skills to work together.

Rule 90 Paragraph 2 provides that “where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.” The Registrar may be requested to appoint a common legal representative if victims are unable to do so, though this type of intervention by the Registrar should be avoided where possible. Particular care would be required in choosing a common legal representative – not only would this person need to be respected by a wide group of victims, but this counsel would need specialised skills to liaise effectively with victims and to represent their concerns to the Court adequately.

Paragraph 4 of Rule 90 notes that all reasonable steps would need to be taken to ensure that in selecting common legal representatives, the distinct interests of the victims are represented and that any conflict of interest is avoided. In certain circumstances, it would be possible for a common legal representative to express the interests of ‘sub-groups’ as part of a larger group that he or she represents. This would be most feasible where the range of views is consistent though different. Every effort should be made to encourage such arrangements. There would be instances, however, when conflicts would be unavoidable. In some cases, difficulties would simply have to do with the nature of the conflict – there would not necessarily be a ‘legal’ conflict, though to place certain groups of victims together may in certain circumstances, undermine their dignity. In other cases, a group may have a unique perspective that requires distinct treatment, such as victims of sexual violence. Also, groups of victims may hold completely opposing views regarding the legal classification of groups in order to assess heads of damage. In these latter cases, separate legal representation would be unavoidable.

Paragraph 5 of Rule 90 provides that “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. 6. A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1.” The low allotment for legal representation for victims in the budget for the 2<sup>nd</sup> financial year of the Court is of serious concern, which questions the commitment to paragraph 5, above. The Registrar must undertake significant preparation in advance of the next meetings of the Committee and Budget and Finance, to ensure that the role of legal representatives is properly understood.<sup>22</sup> The possible adoption of a ‘public defender’ type system for legal representatives for victims is of concern as well. Should such a system be adopted, it would be important to consider how the independence of such counsel can be best preserved. Given the possible conflicts among groups of victims, it would appear that such a system could only ever hope to be a partial solution. At an initial phase, the emphasis would need to be on in-country legal assistance, in bringing groups of victims together and advising them of their rights under the Statute.

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<sup>21</sup> Rule 22(1) : « A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.... »

<sup>22</sup> The Committee on Budget and Finance specifically requested such clarification in its report to the Assembly of States Parties. It emphasized « the need for the Court to proceed carefully and in consultation with the Assembly, given the potential for these areas [victim participation and reparations] to become costly. The Committee recommended that the Court provide a separate report to the Assembly, through the Committee, on its plans for participation of and reparations to victims. » ICC-ASP/2/7 at p. 10.

The potential reality that there would never be an unlimited sum for legal representation of victims, may require practical solutions in order to ensure at least a modest level of representation. But the idea to create a separate trust fund for legal aid for victims would potentially encourage the Assembly to further reduce the contribution in the Court budget when, in fact, it should be encouraged to increase its contribution. The establishment of such a fund could also detract from the recently established Trust Fund for Victims.

## **SOME RECOMMENDATIONS**

Effective systems and working practices are required to guarantee that all victims of crimes within the jurisdiction of the Court (including women and men victims of sexual violence, children and the disabled), regardless of whether they participate in proceedings, are treated with compassion and respect for their dignity and human rights. Appropriate measures must be taken to ensure their safety, physical and psychological well-being and privacy, as well as that of their families in all phases of proceedings.

The following measures are highlighted as essential for the fulfilment of this central mission of the Court:

**1. Developing a Court culture that is responsive to the perspectives, needs, and concerns of victims**

- All staff members who have any contact with victims should be fully trained and experienced, and in particular, on the needs of especially traumatised victims;
- This training should be extended to both defence counsel and legal representatives for victims;
- The Court should conduct an ongoing evaluation of the treatment of victims. Any complaints relating their treatment of victims should be examined carefully, addressed appropriately and followed with measures to prevent recurrence;
- Staff must be trained on, and adequately prepared for, the likelihood of vicarious traumatisation and burnout. This is of particular importance for Court investigators and staff of the Victims and Witnesses Unit and Victims Participation and Reparations Unit, who will have the most frequent encounters with victims. Adequate programmes to counsel staff who suffer from vicarious traumatisation must be developed.

**2. Disseminating information on the role of the Court and the unique provisions regarding victim participation and reparations**

- A clear statement on the role of victims, in particular, their participation in proceedings and reparations, should be incorporated into the overall media and outreach strategy of the Court;
- The Court should prepare clear and easy to understand materials on its role and procedures for all victims within the jurisdiction of the Court. These materials should include detailed information on how to communicate directly with the Court, including submitting information about crimes to the Prosecutor, applying to participate in proceedings and applying for reparations. The materials should equally explain the limitations of the Court's mandate;
- This information must be disseminated widely to victims of crimes within the jurisdiction of the Court in all regions of the world. The Court should seek the assistance of governments, international governmental and nongovernmental organisations and national groups to assist with the dissemination;
- Materials should be translated into all UN languages and States parties and NGOs should be encouraged to translate them further into all national languages and dialects.

**3. Providing more detailed outreach to victims and others affected by a particular situation**

- The Court should consult widely with national experts in order to develop an effective outreach strategy specific to the local situation;
- Situation-specific materials should be prepared by the Court for dissemination to victims. Methods for communicating with victims (e.g., telephone hotlines, web-based applications, walk-in centres) should take into account what would work best in the particular location;

- Situation-specific strategies must be designed to engage national and regional actors in the promotion of the work of the Court, including its systems for victims. The use of the local media, NGOs, local leaders and humanitarian agencies to complement other forms of outreach to victims should be explored further.
- 4. Incorporating a victims' perspective in investigations**
- Investigations should be carried out by multi-disciplinary teams that have expertise and experience in, and are sensitive to, the needs of especially traumatised victims, in particular, victims of sexual violence and child victims;
  - Investigators must have sufficient time and specialised resources to be able to engage effectively with victims of sexual violence and other crimes within the jurisdiction of the Court when interviewing them to gain their trust and avoid their retraumatisation.
- 5. Promoting the safety and security (both physical and psychological) of victims throughout proceedings**
- The long-term physical, psychological, economic and social effects of crimes within the jurisdiction of the Court, in particular, gender crimes, must be fully reflected in all policies and practices of the Court;
  - Full evaluation of security considerations for victims should be conducted before determining how to notify them in accordance with the Rome Statute and the Rules of Procedure and Evidence;
  - Extreme care must be taken to ensure confidentiality in all dealings with victims, including those participating in proceedings and the reparations process.
- 6. Participation of victims in proceedings**
- Effective procedures must be established to receive, process and respond to victims' communications. They must also reflect their right to be kept regularly informed and to be treated with dignity;
  - It is of utmost importance that proper mechanisms are in place to notify victims that the Prosecutor intends to seek the authority of the Pre-Trial Chamber to initiate an investigation, in accordance with Rule 50. Victims must be fully informed of their right to make representations in writing to the Pre-Trial Chamber;
  - If the Court rejects an application for participation, pursuant to Rule 89(2), the victim should be informed of the full reasons for the decision;
  - Application forms for participation (described in Rule 89) and for reparations (described in Rule 94) and other guidelines regarding the submission of information to the Prosecutor should be distributed as widely as possible by all organs coming into contact with victims, including the Office of the Prosecutor. They should also be widely disseminated to organisations, agencies and other actors who may be well placed to assist victims to complete the forms. Training should be provided to such organisations and individuals on how to assist victims in this task;
  - These forms should be easily understood by victims. They should set out clearly what documents or other information needs to be supplied to the Court and whether originals or copies are required. Drafts of the form(s) should be tested with victims to ensure that they are user-friendly;
  - The Registrar should develop workable procedures to respond to victims who supply incomplete information;
  - Adequate protections must be in place to ensure the security and confidentiality of all information received. The Victims and Witnesses Unit must be prepared to intervene in the event that those who submit information become at risk on account of their submission.



**7. Victims should be allowed to participate in the trial and all proceedings in order to present their views and concerns, in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.**

- Victims should be provided access to the Court to follow the trial and other proceedings. In particular, there should be a space designated in the Courtroom for them and their legal representatives that will be both safe and comfortable;
- Special facilities to view television footage of the trial or proceedings should be made available for victims that are unable to travel to the Hague;
- Adequate resources and facilities should be provided for victims who are unable to attend the trial in person to submit their views and concerns directly to their legal representative;
- Where appropriate, victim representatives should be provided with resources to appoint expert witnesses to support victims views and concerns.

**8. Ensuring legal representation for victims**

- Victims' legal representatives should be allowed to challenge during the trial any methods of questioning by the Prosecution or Defence which affect the dignity, safety, physical and psychological well-being and privacy of victims;
- Victims who wish to submit representations to the Pre-Trial Chamber should be provided with legal advice should they require it;
- The Court has an obligation to ensure that effective means are provided to enable victims to be represented;
- Victims representatives should be given adequate time and facilities to prepare submissions on reparations issues, including for experts to make submissions on the extent of the suffering and damage caused and appropriate forms of reparation;
- In the absence of such experts, the Court should consider appointing experts to assist them in assessing the most appropriate forms of reparation.