

# VICTIMS RIGHTS WORKING GROUP

ADVOCATING FOR THE RIGHTS OF VICTIMS AT THE INTERNATIONAL CRIMINAL COURT

## STRATEGY MEETING ON THE DEVELOPMENT OF STRUCTURES AND PROCEDURES FOR VICTIMS AT THE INTERNATIONAL CRIMINAL COURT

6-7 DECEMBER 2002

## SUMMARY OF PROCEEDINGS AND FINAL RECOMMENDATIONS

DOCUMENT ISSUED JANUARY 2003

**The Victims' Rights Working Group (VRWG)** was established in December 1997 by organisations that have promoted the interests and needs of victims in criminal justice and human rights bodies. Its main objective has been to raise the awareness of governments and others (e.g., the press, other NGOs and the public), in all relevant fora, about victims' issues, to ensure that the Statute and the Rules of Procedure and Evidence adequately provided for victims' rights to be protected and respected, and their needs and concerns to be met throughout the judicial process of the ICC. Particular attention has been paid to the need to ensure that the Court will render not only retributive, but also reparative justice, with the aim, *inter alia*, of preventing re-victimization, breaking cycles of violence and war, and providing reparations and rehabilitation for victims

Member organisations of the Working Group issued numerous position and background papers, participated in all meetings, and proposed texts for [re]drafting the Statute and the Rules. The VRWG continues to be represented at meetings of the Assembly of States Parties, is actively promoting the development of sound operational structures for victims at the Court and will continue to advocate for the rights of victims to be respected by participants in proceedings before the Court.

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## **I. INTRODUCTION**

When the Rome Statute came into force in July 2002, it sent an important signal around the world that impunity for the most heinous crimes would no longer be tolerated. It also set in motion the immense task of translating the Statute and Rules of Procedure and Evidence into a living and breathing Court that reflects the letter and spirit of these texts. The task of rendering the Court operational is now underway. This work is of critical importance, given that the jurisdiction of the Court can now be seized.

The Victims' Rights Working Group, a collaborative initiative of NGOs and other experts coordinated under the auspices of the CICC, has been working hard to ensure that the Court is set up in a way that takes into account both the realities of victims and the clear provisions contained in the Statute and Rules of Procedure and Evidence. Ensuring proper treatment of victims from the outset will ensure that victims have a positive relationship with the Court, and that the process does not undermine their dignity. It will also ensure that the core values of the Court, which are to promote greater peace and security through accountability for crimes and to promote respect for the rights and the dignity of the victims, are respected. This is crucial, given the clear recognition of the states that drafted and endorsed the Statute that the ICC is not only retributive, but also restorative.

A strategy meeting of the Victims Rights Working Group was held in December 2002 to discuss some of the most pressing concerns of the Court in establishing structures and operational procedures for victims falling within its jurisdiction. The meeting was also attended by officials from the ICTY, ICTR and the ICC as observers. The purpose of the meeting was to develop ideas and formulate recommendations on the way forward. A range of ideas and practical suggestions were generated. These will pave the way for the continued collaboration of NGOs and other members of civil society with the Court.

## **II. SUMMARY OF PROCEEDINGS**

### **NOTIFICATION TO VICTIMS AND THEIR PARTICIPATION IN PROCEEDINGS**

The Statute and Rules of Procedure and Evidence oblige the Court to notify victims at different stages of the proceedings. In most cases, the obligation falls on the Registrar to notify victims in respect of proceedings before the Court<sup>1</sup> though in some instances, the Prosecutor is under the direct obligation to notify victims.<sup>2</sup> Firstly, there is an obligation to inform victims and to publicize proceedings irrespective of whether victims have specifically indicated their desire to participate in proceedings.<sup>3</sup> Second, there are additional rights of notification afforded to victims or their legal representatives who have already participated in the proceedings or have

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<sup>1</sup> See generally, Rule 92 of the Rules of Procedure of Evidence.

<sup>2</sup> For example, Rule 50 Paragraph 1 specifies that "When the Prosecutor intends to seek authorization 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."

<sup>3</sup> For example, Rule 96(1) provides for the obligation to *inter alia* "take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested states."

communicated with the Court about the situation or case concerned.<sup>4</sup> For example, they have the right to be notified by the Court about a decision of the Prosecutor not to initiate an investigation or not to prosecute,<sup>5</sup> or of a decision of the Court to confirm charges.<sup>6</sup> Thirdly, more particularized rights of notification are afforded to victims or their legal representatives who may participate in the proceedings in accordance with a ruling of the Chamber pursuant to Rule 89, e.g., notification of hearing and decision dates, or of requests, submissions, motions and other documents relating to same.<sup>7</sup> These shall be in writing or, where written notification is not possible, in any other form as appropriate, and the Registry shall keep a record of all notifications.<sup>8</sup>

Participants agreed that the most serious notification challenges relate to the initial stages of the proceedings, before legal representatives are involved. A strong and comprehensive outreach strategy would assist the Court in these early phases, and is essential if victim participation is to succeed (see section on outreach, below). The methods of any/all notification should be sufficiently flexible to take into account the varied situations and contexts to which notification would apply and the diverse situations and positions of victims. In each case, what may constitute 'adequate notification' will depend on the particularities of the target audience and what is reasonable in the circumstance. Moreover, the type of information relayed and the method of communicating the information would need to be carefully evaluated to ensure that investigations are not compromised and victims' privacy and security are not inadvertently put at risk.

When notifying or otherwise corresponding with individual victims who have already communicated with the Court, precautions should be used to ensure that the correspondence from the Court does not lead to added security problems for the recipient. For instance, the Court should use envelopes without the Court logo and where deemed necessary, should arrange for local delivery/postage in order not to draw undue attention to the victim.

Participants also drew attention to the need to keep victims informed regularly. It may be that years will pass before the Prosecutor decides to initiate an investigation, and several more before charges are confirmed. Basic information on the likely timeframe and the procedures of the Court should be communicated to victims in a language that they can understand (or at least in one of the six languages of the Court) so that victims can know what to expect.

### **Acknowledging all applications**

The Victims Participation and Reparations Unit should acknowledge every application for participation and/or reparations that has been received and respond with appropriate information. For example, if the application is for a crime that is not the subject of a case before the Court, a reply should be sent advising the victim that this is the case and that there is no potential entitlement to reparation unless and until the case is brought before the Court and that the information will be stored on file. On the other hand, if the application names the perpetrator as a person against whom proceedings have been started for a crime affecting the victim, the victims should be informed about the stage the proceedings have reached, how they

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<sup>4</sup> For example, Rule 59 obliges the Registrar to inform the victims who have already communicated with the Court in relation to that case or their legal representatives of any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19, paragraphs 1, 2 and 3, "in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged."

<sup>5</sup> Rule 92 (2).

<sup>6</sup> Rule 92(3).

<sup>7</sup> Rule 92(5).

<sup>8</sup> Rule 92(7).

can monitor or participate in the proceedings and that the decision to award reparations is entirely at the discretion of the Court.

## **OUTREACH**

Especially in the Court's initial stages, there will be wide public attention to the ICC and its work. The Court's media office should aim to promote the reparative role of the ICC whenever possible.

For victims to actively participate in proceedings, they need to be made aware of the Court's activities and processes in a timely and effective manner. Providing victims with clear and concise information on the structure and mandate of the ICC, what the Court is established to do (and what it will not do), and the basic procedures and timeframes relating to victims' participation, reparations proceedings and possible protective measures will help to ensure that victims have realistic expectations. This will ensure that victims develop a productive relationship with the Court over the medium to long-term. As part of its outreach services, both the Victims and Witnesses Unit and the Victims Participation and Reparations Unit should develop and disseminate to victims and witnesses clear and easily accessible explanatory materials on the Court and the functions and services of the units. The units should meet the varied needs of victims and witnesses by hiring competent specialised staff experienced in dealing with victims, and maintaining close links with specialist organisations and bodies offering services to victims on the ground. In this respect, it would be unfortunate if the job descriptions for all key positions in the two units required applicants to have extensive legal qualifications, as this will exclude many candidates with relevant qualifications and experience from applying. The composition of the units should be balanced and multidisciplinary.

**Website:** The Court's website should include a good, basic explanation about the role of victims in proceedings, in as many languages as possible. While the website may not be universally accessible, it can be a useful tool for intermediary partners of the Court, who may help in turn to reach out to those without reliable internet access. It should also provide links to other organisations and services for victims coming within the jurisdiction of the Court.

**Outreach material:** Information should be made available in other forms as well (flyers, newspaper advertisements and other paper documentation, radio segments and broadcasts) in as many languages as possible. This would include general information on the Court, its functions and operations as well as more particularised information relating to specific situations or cases before the Court, including methods and procedures for contacting the Court.

**Networks:** Cooperation with intergovernmental organisations (IGOs) and non-governmental organisations (NGOs) will be essential, particularly those working in areas of emergency and humanitarian relief and providing other services to victims.<sup>9</sup> It would be helpful to use available networks and coordination structures where they exist to facilitate the transmission of information on the Court and its activities. This will allow the Court to indirectly reach many victims with whom these organisations have contact through their work. The Court should begin discussions with such agencies at the earliest possible opportunity to develop structures for collaboration in the field, taking care to develop policies that would not place victims' privacy or security at risk.

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<sup>9</sup> Some of the international organisations cited include UN agencies with extensive field presences (UNHCR, UNDP, DPKO field missions, OCHA), ICRC and other humanitarian aid agencies providing front-line support. Additionally, depending on the situation or country concerned, local NGOs can be extremely useful in disseminating information about the Court at the grassroots level.

**Field offices:** There is a real and urgent need for the Court to establish a basic regional presence at the earliest possible opportunity. This will ensure better distribution of information about the functioning of the Court to the public at large, and also to victims and potential perpetrators alike. Once a situation is before the Court, a country field office will be absolutely crucial. Staff of such an office could ensure availability of information on Court proceedings, participation and reparations opportunities to victims, tasks that will be accomplished most effectively from within the country concerned. A field office would also serve as a base for other Court officials that will come to the country, such as investigators and prosecutors, and facilitate the groundwork for possible temporary shifts of the Court's seat and support the Court's work outside of the host state.

## **DOCUMENTATION MANAGEMENT**

Documentation management and storage was discussed in detail by participants. Victims are likely to start to communicate with the Court and there is a need to develop procedures for the proper receipt, classification and storage of such information, taking into account the sensitivity of materials. It was noted that most of the correspondence would be addressed to "the Court" in general, and not necessarily to the OTP, the Registry or the Victims Participation and Reparations Unit. There therefore needs to be a central protocol for the receipt and classification of correspondence and the routing to the relevant organs and/or units of the Court. Also, there will be instances when the information received is relevant to more than one unit of the Court,<sup>10</sup> and procedures for informing of the existence and locations of such information, and providing access to, all relevant units are key.

### **A central database**

Participants agreed on the need for a central database to keep track of all data received and details of all victims approaching the Court: many representatives of the Court will encounter victims<sup>11</sup> and it is important that access to victims for purposes of notification is as consistent and reliable as possible. It is also important to take into consideration the need for confidentiality and security measures for vulnerable victims; this will likely require a strict limitation of the number of users with access to the database.<sup>12</sup> Among the other specific suggestions made regarding documentation management, participants recommended that categorizations within the database should facilitate its usefulness, without imposing unnecessary complexity. Categorizations may include geographic or regional distinction, association with a particular situation, association with a particular type of crime, and so forth.

Standard forms would also facilitate the usefulness of the database as well as its maintenance. It should be recalled, however, that information provided by victims may not always fit neatly into standard forms and may also be submitted spontaneously, unaccompanied by a form. It was agreed that the use of a standard form would ensure the better/easier maintenance of data and information on the database, and that a victim's failure to complete a form would in no way prejudice their application to the Court. Where insufficient information had been sent by the victim, the Court would need to request further details, and the standard form might serve as a "prompt" for the type of information sought. In determining what information should be

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<sup>10</sup> The example most often cited was correspondence from victims that would be relevant to the Office of the Prosecutor in the investigation of certain cases, but equally to the Registrar, tasked with organising reparations.

<sup>11</sup> Victims may send materials directly to the seat of the Court in the Hague, which may contain information relevant to the Office of the Prosecutor, the Registry (in respect of reparations or applications for participation). Also, data will be collected by on site investigators and other staff persons of the Court that may similarly be of use for a variety of processes before the Court.

<sup>12</sup> A series of measures was proposed in this regard, including numerical classification systems, staggered access to documentation to correspond with security clearances, and the generation of electronic updates to key staff persons at the Court to inform of additions, deletions or other changes to the contents of the database.

requested in such a case, it should be made clear what evidence victims should present to prove their status, and what criteria should be devised for classification of applications from victims. In this respect, the particularities of each situation should be taken into account.<sup>13</sup>

### **Storing potential evidence**

In many instances, however, materials will not necessarily be capable of being stored electronically. There should therefore be a secondary, physical filing system that will allow for consistent and reliable access. Procedures for the physical storage of evidence would need to ensure both proper chain of custody of data and its physical preservation. It was suggested that a central physical storage facility for such evidence be created, where the respective organs and units would have access. A system for defence counsel and victims' legal representatives to apply to view materials relevant to their case would need to be built into the system.

### **Ownership of original documentation**

Another issue that the Court will need to resolve relates to protocols regarding ownership of original documentation. This will be an important issue in the Court's relations with victims and the Court should have a policy in place from the start. Documentary evidence supplied by victims in support of their claim for reparations, for instance, will often be very important to them and could also be required to pursue reparations in other fora. Wherever possible, the Court should copy the evidence and return it to the victims immediately. If that is not possible, victims should be able to claim back the evidence from the Court upon request, subject to the Rules of Evidence. A system for scanning documents and for authenticating or certifying copies pursuant to an internal system of notarisation would allow victims to keep their original documents.

## **PROTECTION, ASSISTANCE AND SUPPORT**

### **Significance of Protection**

The capacity of the Court to ensure adequate levels of protection, assistance and support to victims and witnesses will greatly determine the extent to which they will cooperate with the Court and take active part in proceedings. The priority for all contact with victims and witnesses is to ensure their physical and psychological safety, and to ensure that the processes of the Court do not contribute to secondary victimisation. Protection has to be conceived of as both physical and psychological, and extended to the direct victims, their family members, and others at risk, such as clergy, psychologists and other (mental) health professionals, teachers and caregivers (e.g., working with children).

### **Scope of Protection and Need for Adequate Follow-up**

A victim's protection begins from the first moment of contact, and must be provided throughout his or her involvement with the Court and after. Structurally this implies that the Victims and Witnesses Unit must be involved from the outset. In this regard, it is essential that the investigative teams take effective measures to ensure against re-traumatization of victims and their own vicarious traumatization. Participants also recognised that the needs of victims post-testimony and/or participation in proceedings were often acute and that special care would be needed to ensure that these needs were dealt with. The Victims and Witnesses Unit should be responsible for informing victims and witnesses about the Court's procedure, and in debriefing those that have testified. It is equally important that adequate follow up and monitoring of the well-being of witnesses is undertaken after trial, and that post-trial care is facilitated by

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<sup>13</sup> In certain contexts, it would be reasonable for victims to possess identity documents or other like data, whereas in others, a context of displacement may make this condition overly onerous and other means of identification may be appropriate. The Court should consult with specialized agencies such as UNHCR on these matters.

maintaining contact and liaison with relevant national bodies and NGOs that provide such services for victims in their country of residence. The Victims and Witnesses Unit should also monitor witnesses after their return to their jurisdiction to ensure that they receive the required security protection, health care and counselling. Realistically, the unit will find it difficult, if not impossible, to perform such tasks alone. For this reason, it will be necessary for the Victims and Witnesses Unit, at an early stage, to establish long-term collaborative relationships with NGOs and other service providers.

### **Reliance on National Authorities**

Perhaps the largest challenge to the Court will be how to provide adequate protection inside the territory of the state where the environment may well be hostile. Given the mandate of the Court, victims may be corresponding with it during periods of open armed conflict, placing added difficulties on the Court to ensure adequate protection and support. The Court must be able to realistically assess the ability of national security forces or systems to adequately provide security. Some security forces will be directly or indirectly involved with the armed conflict or particular charge before the Court and it would be extremely damaging to expect a victim to feel secure under their "protection." The Court should also promote national guidelines on witness protection to be developed by states parties in the context of ICC implementing legislation. In some cases, it will be inappropriate for national victim protection agencies to be called upon and this will need to be recognised and addressed by the Court. In this respect, it is essential to consider what measures are available to counter the non-cooperation of states, and the extent to which the Assembly of States Parties may be used to resolve these questions.

### **Risk Assessment**

The determination of the level of risk of individual victims may provide a particular challenge.<sup>14</sup> The degree of risk may fluctuate considerably with political and security situations and therefore the process of assessing risk will need to be ongoing. Field offices could be used to make primary contact with victims and take care of victims who do not testify before the Court and remain in their residential areas. The field offices would also be an important mechanism to survey how appropriate, cooperative, available, and reliable the local government and police officers are in relation to protection of victims and would be well placed to assess what alternatives are required.<sup>15</sup> The possibility of establishing an emergency fund should be considered. This fund could provide, for instance, medical service for victims with medical needs arising as a result of their injuries.<sup>16</sup> Equally, recognising that the Court's remit is limited, it should develop working relations with the range of humanitarian agencies who could assist the Court in meeting some of the longer term challenges regarding assistance and support.

### **Resettlement Agreements**

Relocation of victims/witnesses may be necessary under certain circumstances; however, relocation will always be the exception because of the onerous financial and human burdens that are associated with it. Therefore, much importance needs to be placed on protecting victims adequately in their countries and villages/cities of origin.

For the purpose of relocation of victims, agreements with third states may be necessary (again, the experiences of the *ad hoc* Tribunals will be helpful in this regard). Detailed risk assessment should be conducted to determine the necessity of relocating victims and family members, and

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<sup>14</sup> The experience of the South African Truth and Reconciliation Commission may be relevant in terms of developing an effective system of risk assessment and the outsourcing of certain protection functions to community organisations and networks.

<sup>15</sup> The experience of the ICTY and ICTR will be particularly helpful in this regard, particularly the modes of cooperation developed with other agencies and organisations to enhance protection. It may be difficult, for instance to establish a mechanism for regular cooperation with NGOs in the field of protection, since NGOs often stop their support abruptly when the funds run out. Methods to ensure NGO accountability should equally be addressed.

<sup>16</sup> The experience of the ICTR with rape victims who contracted HIV/AIDS may be relevant in this regard.

where to relocate (beyond borders or within borders) in case relocation is necessary. The regulations for safe houses also raises issues important to protection.

## **TRAINING FOR STAFF**

The prevention of re-traumatization of victims during field investigations and at the seat of the Court was understood as requiring special attention. Ideally, psychologists should be on-hand during the field missions of investigators. In this respect, specialised training for investigators and for other staff and judges of the Court was deemed crucial. Special training should be provided for all Court staff involved with victims to enable them to protect both victims and themselves. Training on the special needs and concerns of women victims and witnesses, particularly victims of rape and other sexual crimes (including men), must be available. Women should be included among the staff that deals with them. A victims' perspective should be integrated into any and all training programs for staff of the Court and service providers. The Victims and Witnesses Unit could usefully prepare relevant materials for use by external trainers to ensure consistency and accuracy of presentation.

## **CODE OF CONDUCT**

The Code of Conduct for the Office of the Prosecutor should include protections, in particular taking into account special cultural and contextual factors. For instance, special care should be taken when choosing interpreters; depending on the context, an interpreter from the same cultural or residential area as the victim could be a cause of intimidation for the victim, who may fear that the interpreter's link to their own community might result in information about them or the offence they are complaining of reaching those at home. Assurances and information should therefore be provided on interpreters' confidentiality, particularly where it is difficult to find a native-speaker outside of that community. Protection, both physical and psychological, should be extended to the Court staff. The Victims and Witnesses Unit should prepare a list of psychologists and/or NGOs with expertise in trauma training. Guidelines should be developed in regard to all Court staff for special protection for vulnerable victims, including the elderly, disabled persons, children and victims of sexual crimes.<sup>17</sup>

## **THE COURT'S PHYSICAL LAYOUT**

Participants also stressed the importance of taking into account victims' needs when determining the physical layout of the Court building.

To protect the security and well-being of victims and witnesses, the Court must provide victims and witnesses for the prosecution separate quarters from those for the defense. These quarters should be comfortable, pleasant, non-threatening or intimidating, and convenient. For example, they should include room for coats, smoking areas, have comfortable seating, refreshments, and easy access to toilets. They should also include telephones to avoid a sense of isolation. Child witnesses should be provided with games and other means to make them comfortable. A plan to designate one floor entirely to victim services is currently under consideration, and was supported by participants. Possibilities for chance encounters with the accused are to be avoided. Special furniture should be provided for children, the disabled, and the elderly. For example, children should be provided with high-chairs when they testify in Court to help counter their intimidation. The disabled and the elderly may need ramps, the Court should have wheel chairs available, and doorways wide enough to let them move around. It was also recommended that a memorial be built at the seat of the Court in recognition of the many that have suffered and continue to suffer around the world as a result of international crimes. This

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<sup>17</sup> The experience of the Inter-American Court may be useful in this regard, and the research of specialized agencies such as UNICEF should be consulted.

memorial should be included in the building plans. Participants of the meeting noted with concern that the permanent premises of the Court are in a former military barracks. Given that many victims and witnesses who appear before the Court will have suffered trauma in military barracks, significant effort must be made to remove any visible or recognizable link to the building's military past.

## **REPARATIONS FOR VICTIMS**

The Statute and the Rules of Procedure and Evidence provide the possibility of claiming reparations to victims of genocide, crimes against humanity and war crimes. The Court's implementation of these provisions promises to break new ground in international justice by seeking to address the needs of victims beyond prosecution. The possibility for reparations before the Court will mean that a single proceeding may involve tens, hundreds or thousands of victims. It is essential for victims' and others' full understanding of the Court that reparations be promoted as one of its key functions. This should be reflected in the materials created by the Court as well as the outreach and media strategy of the Court from the very beginning. Participants acknowledged that the organisation of such proceedings requires special care, to ensure maximum efficiency. Where there are numerous claims that are typical of a class of victims, with common issues of fact or law, a class action format or other means of treating such claims expeditiously, such as an administrative format, may be appropriate and should be explored.

## **CREATING GENERAL MATERIALS ON REPARATIONS FOR VICTIMS AND THE PUBLIC**

Materials explaining the reparations process should be created in an easy to understand format, including information regarding when the Court can award reparations, when the Court will publicise reparations proceedings and how victims can apply for reparations. Such materials should be realistic and should ensure that victims are aware of the limitations of the Court and therefore should not harbour unrealistic expectations.<sup>18</sup> The Court is encouraged to seek the assistance of NGOs in drafting, distributing and publicising these materials. To ensure international understanding of the reparative roles of the Court, it is important that these materials are translated into all UN languages and when necessary, other languages.

The Court should endeavour to make these materials readily available (i) to the general public and (ii) when the Court is investigating crimes in a particular situation, to victims of those crimes. To ensure that the general public, including victims, can easily access this information it should be included – in all UN languages - on the Court's website as an individual section and linked from the home page. Paper copies should also be created and distributed to civil society worldwide – NGOs may be able to assist with this process.

When the Court is conducting an investigation of crimes in a particular situation, the Court should endeavour to ensure that the materials and reparation application forms (see below) are made available to the victims. The Court should have in place a strategy to achieve this as part of its overall outreach strategy.<sup>19</sup>

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<sup>18</sup> For example, the materials should explain that reparations will only be awarded to victims of crimes where the perpetrator has been convicted by the Court and in some cases reparations may be subject to the amount of money that can be obtained from the convicted person.

<sup>19</sup> See section on outreach, above.

## **THE ROLE OF THE OFFICE OF THE PROSECUTOR (OTP)**

In most cases, staff of the Office of the Prosecutor will be the first Court staff to visit an area where crimes have been committed and to have contact with victims. A number of questions were raised by participants in this regard: should investigators for the OTP also solicit information from victims, for use by victims' units of the Court in relation to reparations proceedings? It was noted that OTP investigators may be unwilling to undertake such additional inquiries, given the tremendous burden they already face in accumulating sufficient materials to support a criminal prosecution.

Another suggestion raised was that perhaps representatives of the Court's victims' units, in particular the Participation and Reparations Unit, could undertake field research, in order to ascertain general reparation needs in a given situation, and to begin outreach in general to victims. This of course would have financial implications that should be examined, but the feeling was that there should be a needs-based approach, as with most areas of work of the Court, as opposed to allowing finances to drive determination of needs. In this respect, it is emphasised that victims are unlikely to distinguish between the different functional units of the Court, at least not when they meet an investigative officer of the Court in the field.

Another question was raised: how should OTP investigators handle victim-related information spontaneously generated in the course of criminal investigations? Surely, victims will have contact with OTP investigators and data relevant to reparations will be proffered, even without a specific request for it. OTP investigators should be prepared to catalogue this information and to convey it to victims' units. While it is accepted that it is not a primary role of the Office of the Prosecutor to advise victims on reparations, the Registrar, in advance of the first investigation, should meet with the Prosecutor to determine whether a system of distribution of reparations materials and application forms by OTP staff is possible.

## **PUBLICATION OF REPARATIONS PROCEEDINGS**

It was noted that the publication of reparations proceedings should be sufficiently broad to advise any and all victims possibly affected by the situation before the Court. The Court should establish effective systems to ensure adequate publication.

Rule 96 requires the Registrar to "take all necessary measures to give adequate publicity of reparations proceedings before the Court." This process of publicizing specific cases where reparations may be awarded will create greater expectation for victims who fall within the case than the general promotion and advertisement of the reparative function of the Court recommended above. To avoid the creation of unrealistic expectation for victims, it is recommended that the Rule 96 process of publicizing reparations in relation to specific cases should not be commenced until a decision by the Court has been made that it will consider making an award. However, it is expected that claims for reparations will be made spontaneously, irrespective of the Rule 96 process and it would therefore be prudent for the Court to plan for such eventualities.<sup>20</sup>

If the Court decides to hold a further hearing pursuant to Rule 143, the Victims Participation and Reparations Unit should (i) inform those relevant victims who have already applied for reparations of the decision and offer them the opportunity to update their application and; (ii) take all steps to inform other victims including:

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<sup>20</sup> See section on the Role of the Office of the Prosecutor, above.

- If the decision to award reparations is made at the same time as the conviction or sentence, to publicize the reparations process in media work conducted by the Court regarding the conviction;
- To issue a press release, or if necessary, advertisement in the relevant media of the country where the crime was committed and / or of the country where victims are believed to reside;
- To engage NGOs, IGOs and the ICRC in the process of notifying victims.

If the Court invites representations under Article 75(3), victims or their legal representatives should be informed.

## **CREATING EFFECTIVE APPLICATION PROCEDURES**

The Court should establish an effective mechanism for victims to apply for reparations under Rule 94. Rule 94(1) contains a substantive and complex list of information that victims must supply to apply for reparations. Since victims may find such a substantive application process difficult to complete, it is essential that the Court take all steps to ensure that the process is accessible and understandable for all victims, and that the requirements are tailored to their contextual realities.

As victims may apply for reparations at any stage, it is important that the Court establish application materials as soon as possible. The list of required information in Rule 94(1) and the fact that in many cases victims may not have professional assistance to complete their application, means that a clear and well structured application form will be necessary. The form itself should be available in all UN languages and when necessary, other languages. The form should be as clear as possible and should include comprehensive guide notes on what victims can expect from the process, such as what is meant by "restitution," "compensation," "rehabilitation and other forms of remedy" and what types of supporting evidence should accompany the application.

In order to avoid establishing any unrealistic expectation for the applicant, all application forms should be given to victims together with the materials about the reparations process recommended above.

### **Assisting victims to complete the forms**

As previously stated, in most cases, sufficient Court staff will not be present in the country where the crime occurred to assist victims to complete the forms. The Court could, however, take the following steps to assist victims in completing the process:

- Train national and international NGOs, IGOs and the ICRC that are willing to work with victims to complete the application forms;<sup>21</sup>
- Locate a staff person at any outreach office established to assist victims in completing the form – forms could include information on how to contact this person;
- Staff of the Victims Participation and Reparations Unit should review all applications and correspond with victims to facilitate the completion of forms that are incomplete or incorrectly filled out.

The information required should be flexible enough to take into account the reality that many victims will have been internally displaced, forced into exile, or had their homes burnt or destroyed. In many instances, victims will not have access to public registries where other

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<sup>21</sup> A policy would need to be developed by the Court in this respect, for victims to provide consent and/or for NGOs and others to certify that they are in fact submitting materials on behalf of certain victims.

evidence may be located. Victims may therefore not be in possession of official documentation to support their claims. The forms must be flexible enough in their requirements to respect this reality. The Court will have an important role in negotiating access to records and other evidence.

## **PRINCIPLES RELATING TO REPARATIONS**

The Court as a priority should consider establishing effective “principles relating to reparations” in accordance with Article 75(1).

The Court’s responsibility to establish principles relating to reparations will be essential to ensure that the Court effectively carries out its reparative functions. The principles, once decided, should be made public to victims and the general public. It is essential that the Court devise principles in advance of the first case awarding reparations to address a number of important issues including:

- The modes of reparation available to victims;
- The standard of proof to determine whether an applicant is eligible for reparations within the criteria set out by the judges;
- Questions of causation, especially in dealing with multiple perpetrators;
- Mechanisms for processing mass claims for reparation and for providing reparations; including the Trust Fund for Victims or other procedures or administrative arrangements;
- Principles for determining the scope and extent of damage, loss or injury to victims.

In establishing these principles, the Court should refer to the existing Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the draft Van Boven / Bassiouni Principles on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.<sup>22</sup> However, many of the issues will need to be tailored to the work of the International Criminal Court, taking into account the Rome Statute, Rules of Procedure and Evidence and differing legal systems. Subject to availability of financial resources, NGOs are considering organizing a conference of experts to examine all these issues in order to submit a report to the Court for consideration.

The Court should establish effective mechanisms for communicating its decisions regarding reparations to victims. While the Court’s decisions on conviction may receive worldwide attention, it will be unlikely that its decisions on reparations will receive the same. It will therefore be the responsibility of the Court to notify those victims that are eligible for reparations about the decision and, if necessary, the next stages in the process. Victims who are not eligible for reparations should be informed promptly with reasons why they are not eligible. In both cases the Court should include in its reasons the principles on reparations the Court relied on in reaching its decision (Article 75(1)).

In the event that an appeal against the reparations order is filed under Rule 150, the Court shall notify victims in accordance with their rights under the Statute and provide them with information of the appeals process, including the ability of the Appeals Chamber to “confirm, reverse or amend” the reparations order.

The Court should establish effective systems to freeze assets of perpetrators and to trace hidden assets. The Pre-Trial Chamber pursuant to Article 57(3)(e) and the Trial Chamber

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<sup>22</sup> 1985, General Assembly Resolution 40/34; The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Professor M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc. E/CN.4/2000/62, 18 January 2000.

pursuant to Article 75(4) may make orders to freeze assets and other protective measures for the purpose of forfeiture. The Court will of course depend on states to carry out these orders quickly to avoid disposal of assets. The Court should therefore establish effective implementation processes with all states. In particular, the Court should ask all states whether their legislation or draft implementing legislation would enable them to promptly respond to such requests from the Court. It is also recommended that the Court consider identifying experts in tracing assets, which may be necessary at a number of stages during the trial process, including locating assets for freezing, determining eligibility for legal aid and determining the amount and mode of reparations.

### **THE TRUST FUND FOR VICTIMS**

Participants underscored the need to ensure that the nomination period for the Board of Directors of the Trust Fund is opened at the session of the Assembly of States Parties in February 2003. This would allow for an election of the Board at the April session, and a first meeting of the Board in June or July. If not, this will result in an election in September 2003, meaning that the first possibility for the ASP to consider and adopt the Board members' criteria on the operation of the Trust Fund may not be until September 2004. It was noted with concern that the P-3 post accorded to the Trust Fund in the Budget for the first financial period would probably only be appointed after the Board is in place. Another reason why the prompt election of the Board of Directors is crucial is so that the principles governing reparations and the criteria for the Trust Fund for Victims are consistent from the outset. Participants noted the complexity involved in the determination of the criteria for the operation of the Trust Fund, and noted that issues including the scope of beneficiaries, the relationship between the Fund and the reparations process of the Court and the degree of independence from the Registry still needed to be resolved.

Participants stressed that candidature for the Board should take into account the important role that Board Members would play in drawing attention to the plight of victims and soliciting donations. It was noted that a bank account for the Trust Fund has already been opened. Another bank account will need to be opened to receive donations in US Dollars (especially in regard to the current fundraising activity). Pending the determination of clear guidelines for the receipt and use of funds, it was seen as desirable for the Trust Fund to receive un-earmarked donations.

It is urgent to raise awareness of the Trust Fund among state parties, and basic information on the Fund should be included on the Court's website. The existence of the Fund should be highlighted at the inauguration ceremony for the Court together with a pledge from certain governments and/or others to donate funds. Persuasive ways to raise funds were considered, including the establishment of government programmes to match donations generated by civil society.<sup>23</sup>

### **LEGAL REPRESENTATION FOR VICTIMS**

Participants noted the importance of victims' legal representatives in ensuring the interests of victims before the ICC and that every effort should be made to ensure that victims have access to qualified counsel that are from their country/region and/or speak their language.

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<sup>23</sup> The Court should seek contact with NGOs specializing in fund raising. For example, Synergos (<http://www.synergos.org/>) assists in the development of philanthropic institutions.

## **LOCATING, ORGANIZING AND LINKING LEGAL REPRESENTATIVES WITH VICTIMS**

While victims may have the right to legal representation of their choice, it may be difficult for victims to identify competent counsel who are familiar with international law and ICC proceedings. Under Rule 90(2), the Registry will maintain a list of counsel that it may use to aid victims in securing representation. This raises a number of issues:

### **Regional representation and linguistic skills**

The Registry should proactively set out to identify appropriate counsel from all regions and types of legal system, to whom it could refer victims. In so doing, where appropriate, the Registry might seek the assistance of NGOs and international, national, state, provincial and local bar and attorney associations. The requirement to be fluent in one of the working languages of the Court (English or French) is onerous and efforts should be made to ensure that victims representatives are not excluded on this basis alone. Where counsel do not have good language skills, they could either act as an assistant as provided in Rule 22(1), and/or Rule 41 should be interpreted so as to enable them to act as counsel with an assistant who does have the required language skills.

### **List of counsel**

Participants discussed how best to structure the lawyers list(s). There was discussion as to whether it would be desirable to have one or two lists. Ideally, the Registry should maintain a single list of counsel to which both accused persons and victims will be referred. The list should give a clear indication of what experience the counsel has in representing defendants or victims, and whether their interest lies in representing victims or defendants. The list should include not only lawyers but also others with relevant expertise relating to victims, who could be asked to assist as provided in Rule 22(1).

### **Quality control**

The criteria to be used to assess whether or not a counsel should be added to the list were also raised. It is important to avoid poor quality counsel. There should be a strict insistence on relevant experience and other proof of competence when assessing "established competence". There should be an onus on the Registry to perform a quality check rather than to merely add anyone to the list who requests to be added. Quality control should continue to be built into the Registry's processes even after a name is added to the list.

## **QUALIFICATION OF VICTIMS' REPRESENTATIVES**

Qualifications of victims' legal representatives are the same as for defence counsel, as set out in 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. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise."

Irrespective of whether the representative is chosen by the victim or referred to the victim by the Registry, victims' representatives should have experience that is relevant and have established competence. However, a victim's representative should also have experience representing and interacting with victims of gross human rights atrocities and possess an understanding of the unique experiences and needs of victims. This in turn raises the question of who will determine whether a representative possesses the requisite qualifications, and whether there are objective criteria that can be applied.

## **TRAINING FOR VICTIMS' REPRESENTATIVES**

It was recommended that if a counsel is added to the Registry's list, the Registrar should be required to provide certain information regarding the Court and its procedures. It was suggested that there be a requirement for a briefing, or an induction course on the applicable law and procedures and on the particular needs of victims. To assure that the trainee is prepared for the multiple situations he or she may face, the training should address the consequences of specific types of harm, such as where the victim is a child or where the victim has suffered rape or other forms of sexual violence, torture, loss or disappearance of a loved one and other types of harm or loss. The responsibility for providing such a course was also raised, and it was noted that a training budget for legal representatives should form part of the Court's 2004 budget. The International Criminal Bar (ICB) may develop such programmes over time, but realistically cannot be expected to do so in the short term (perhaps until a critical mass of potential victims representatives become members). The Registry should make every effort to provide guidance to victims representatives when they are added to the list of counsel as to where they might find support and training. For example, they might be referred to the ICB or to NGOs specializing in working with victims or other appropriate resources.

## **ORGANISATION OF COMMON LEGAL REPRESENTATION**

Where there are "a number of" victims, the Trial Chamber may request them to choose a common legal representative, with the assistance of the Registry.<sup>24</sup> If victims are unable to choose a common representative, the Chamber may ask the Registry to do so.

The Trial Chamber and Registry must take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of victims, particularly as provided in Article 68(1) (which imposes a duty on the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims), are represented and that any conflict of interest is avoided (sub-para 4).

Helping victims to choose a common legal representative while ensuring that their wishes are respected during this process will be a challenge. Unlike the accused, who will invariably be in custody, victims may be far from the seat of the Court and dispersed locally or globally. As a result of these and other practical difficulties, victims can be expected to need considerable assistance from the Registry to facilitate their organized representation. NGOs, such as organized groups of victims, humanitarian agencies and others with a presence in the areas where the victims are located, may have an important role to play and the Registry will need to develop relations with them.

Victims may come forward and seek to participate in the proceedings at different times (e.g. a small group might ask to participate at an early stage in the proceedings and later many more victims of the same crimes may come forward as the case progresses.) It would seem important to retain the flexibility to accommodate this, as it will not be reasonable to expect all victims to make their request at the earliest hearing. However this will make organizing common representation complex, with different factors (such as distinct interests between victims) emerging at different stages.

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<sup>24</sup> Rule 90 (2).

It will be difficult to ensure that any conflict of interest between victims is identified and avoided, and to determine the distinct interests of the victims. The Registry (presumably the Victim Participation and Representation Unit) will need to develop the necessary expertise to deal with these matters, and over time can be expected to develop procedures and guidelines.

## **RELATIONS WITH THE INTERNATIONAL CRIMINAL BAR (ICB) AND NATIONAL BARS**

It is unclear at this point to what extent the International Criminal Bar will provide a space within which victims representatives will be able to organise. The suggestions put forward by the Victims Rights Working Group, which would have provided specifically for victims representatives to form a sub-group, require further discussion within the ICB.

In order to carry out its role of assisting victims to appoint legal representatives, including developing a list of victims representatives, the Registry will need to develop relations with national bars and other groups, whether this is done through the ICB or independently.

## **FINANCIAL AND OTHER ASSISTANCE**

Rule 90(5) 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."

Also discussed was the basis on which the Registry should employ to assess that a group of victims lacks the necessary means to pay for a common legal representative. Presumably the same means test should be used for victims as will be used for accused persons (e.g., rather than simply leaving it to discretion). There will be circumstances when some victims in a group represented by a common legal representative do have means and others do not. Here, it will need to be determined whether those that do have means have to cover the entire cost or only a proportion (their share).

Questions were also posed regarding how victims' representatives will be compensated and how costs and disbursements incurred in the course of representation will be satisfied. Rule 90(5) *permits* the Court to provide financial assistance to victims if they cannot afford counsel where the legal representative is "chosen by the Court". The meaning of this phrase is uncertain: is it sufficient that the Court confirm counsel that an impecunious victim has chosen? Perhaps the rules that are applicable to defense counsel in such circumstances should be applied to victims' representatives. If not, will contingency fees be allowed for victims' representatives?