



## Recommendations to the 14<sup>th</sup> Session of the Assembly of States Parties 18-26 November 2015, The Hague

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

The last year has seen a number of important milestones at the ICC. On the judicial front, the Court's first convictions became final in *Lubanga* and *Katanga*; the first ever reparation plan for victims of ICC crimes has been prepared by the Trust Fund for Victims (TFV) in the *Lubanga* case; Dominic Ongwen was transferred to the Court after over a decade on the run; the charges against the first suspects accused of post-election violence in Ivory Coast have been confirmed; the first suspect in the Mali situation was transferred to the Court; and the Prosecutor has requested authorisation to open a long-awaited investigation in Georgia. At the organisational level, the Court has entered a time of transition. The Registrar submitted his final proposals to restructure his office under the ReVision Project; the judges have continued their review of how the efficiency of the proceedings can be enhanced as part of their Working Group on Lessons learnt. In the forthcoming year, the Court will face a continuous increase of its work while dealing with nine situations<sup>1</sup>, six active investigations<sup>2</sup> and six trial/pre-trial proceedings.<sup>3</sup>

Past and upcoming developments have had and are likely to have a significant impact on the work of the Court, and with it the ICC's potential to deliver *effective and meaningful reparative justice* to victims of the worst crimes. The VRWG and its members thus call on States Parties to guarantee that the Court receives the support and cooperation it needs in order to successfully deliver on this mandate. At the same time, the Court will continue to only consider a handful of cases highlighting the corresponding need for adequate mechanisms to be set up at the domestic level to prosecute ICC crimes. In that regard, **the VRWG calls on States Parties to consider how the rights of victims recognised in the Rome Statute can be replicated as part of their domestic primary duty to prosecute serious international crimes.**

Ahead of the 14<sup>th</sup> Session of Assembly of States Parties, the VRWG is pleased to share the following remarks and recommendations.

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<sup>1</sup> Central African Republic (CAR); Côte d'Ivoire (CIV); Libya; Darfur; Democratic Republic of the Congo (DRC); Mali; Kenya and Uganda. At the time of writing a decision is still awaited on whether a ninth situation relating to Georgia will be opened.

<sup>2</sup> Ivory Coast, the Central African Republic (I and II), Libya, Uganda and Sudan

<sup>3</sup> Ruto/Sang; Gbagbo/ Blé Goudé; Ntaganda; Bemba and four others (article 70); Dominic Ongwen (Uganda); Ahmad Al Faqi Al Mahdi (Mali).

## 1. The Victims Strategy

The VRWG notes that while a detailed review of the ICC Strategy in Relation to Victims (Strategy) was due to take place in June 2014, the Court decided it would be best to postpone such a detailed review by one year.<sup>4</sup> No review took place in 2015. The VRWG understands that this was partly due to a wish from the Court to wait for the new Registry structure to be established following the completion of the ReVision project.

While the VRWG agrees that the ReVision project will likely have a significant impact on how the next Victims strategy will be delivered, we believe that **a full review of the Court's Victims Strategy should not be postponed further**. Such a review also appears essential at this point in time to ensure that the new Registry structure can be fine-tuned, as appropriate, in order to successfully implement the next Victims Strategy.

The VRWG maintains its position that **a clear strategy with baseline data and performance indicators for measuring progress towards achieving set objectives is essential** to meeting the statutory obligations related to victims and to adopt adequate policies. This is consistent with the Court's ongoing efforts 'to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs'.<sup>5</sup> The VRWG also reiterates its call on the Court to ensure that external stakeholders – including victims, victims' legal representatives, victims' groups and experts and NGOs working on victims issues – are fully consulted in the review process.

## 2. Review of the Court's Guidelines on Intermediaries

The Court adopted the *Guidelines Governing the Relationship between the Court and Intermediaries (Guidelines)* in March 2014.<sup>6</sup> While the Guidelines provide for a review to take place in 2015, the Court has indicated it would be premature to do so in light of the limited experience gathered so far on how the Guidelines have been implemented.

The VRWG has long advocated for the establishment of the Guidelines. In the VRWG's view, it is now essential that their implementation be monitored with regular opportunities for reviews to take place. Despite the absence of a review in 2015 as initially scheduled by the ICC, we welcome the Court's indication that a review is planned for 2016 and that consultations with relevant stakeholders will take place.<sup>7</sup> The VRWG notes that the Guidelines themselves stress that monitoring and reviews should be comprehensive, include a large range of stakeholders, in particular 'staff from intermediary organizations, individual intermediaries, victims and witnesses' and use a variety of assessment

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<sup>4</sup> Integrated report of the Court concerning victims and reparations, Draft, 19 sept 2014, on file. The reasons stated to justify the postponement include: 1) the on-going ReVision Project within the Registry, which is likely to provide elements for evaluating the Revised Strategy and its implementation, but which is not due to be finalised until mid-2015; 2) the absence of a first final judicial decision on reparations, and therefore the lack of experience in implementation of that strategic goal; 3) the evolving jurisprudence regarding victim participation and the intention of the Working Group on Lessons Learned to address this identified cluster as its next priority, also in 2015; and 4) the ongoing landmark study by the Human Rights Center at the University of California, Berkeley School of Law in four situation countries researching the views and experiences of victims who have interacted with the Court.

<sup>5</sup> These efforts are currently ongoing as part of the Study Group on Governance, Cluster II on "Governance and budgetary process", ICC-ASP/13/Res.5, 17 December 2014, Annex I, para. 7(b).

<sup>6</sup> Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries, March 2014, available at [http://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf)

<sup>7</sup> Information shared by the Court with NGO in November 2015.

methods.<sup>8</sup> We thus call on the Court to ensure steps are taken now to ensure that the review adequately seek and incorporate the views of intermediaries themselves, in a manner that allows frank and constructive discussions.

In addition, prior to the review it **would be important for the Court to provide additional information** on:

- whether the guidelines are systematically used and shared;
- how the guidelines are explained to intermediaries;
- how many intermediaries benefitted from a contract under the guidelines since their adoption.

Finally, the VRWG recalls its recommendation that **the Guidelines be widely disseminated and made available in languages understood by intermediaries**. In that regard, we call on the Court to continue efforts to make the Guidelines accessible<sup>9</sup> and consider additional opportunities to communicate on the Guidelines and their applicability to particular circumstances and situations.

### 3. The Trust Fund for Victims

In accordance with the court decisions in the *Lubanga* case, the Trust Fund has now submitted its first implementation plan for reparations under which it sets out a three year process for the delivery of reparation to victims in that case.<sup>10</sup> This is in addition to its ongoing assistance work in DRC and Uganda, and its planned expansions of that work to the Central African Republic (CAR), Côte d'Ivoire and Kenya. At the same time, with the upcoming election of new Board members and a restructuring process for its Secretariat, the Trust Fund is entering a transition period.

The Trust Fund has received important support from many States Parties through voluntary contributions, as well as crucial backing for its vital role within the Rome Statute system and for the Trust Fund's stated objectives and achievements. Now that both mandates of the Trust Fund are activated, **it is crucial that States Parties continue their financial, political and moral support to the Trust Fund**. This year's election of the Members of the Board of Directors of the Trust Fund is also an excellent opportunity for the Assembly to demonstrate that the Fund enjoys the unmitigated support of the States Parties as well as to ensure the best quality of its leadership, reflecting global credibility as well as an authoritative voice for the benefit of victims of the most serious crimes.

**More resources are also needed to ensure that the Fund can implement its assistance mandate**. The VRWG notes that the Fund is yet to start activities in Kenya and Côte d'Ivoire despite indication in March 2014 that it would conduct assessments missions in both countries. VRWG members in these two countries continue to call for the Fund to start activities there and to keep affected communities abreast of its plans in that regard.

### 4. Increased Registry functions in the field and budget constraints

In parallel, changes to the Registry's structure regarding field services, including outreach, that were approved through the ReVision are now ready to be implemented.

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<sup>8</sup> Such as 'staff and stakeholders' surveys, semi-structured interviews with key informants, case studies, desk top review of policies and procedures and a permanent observation mechanism'. The Guidelines, page 3.

<sup>9</sup> As was done through a Q&A produced by the Court.

<sup>10</sup> *The Prosecutor v. Lubanga*, Trust Fund for Victims Draft Implementation Plan for collective reparations to victims, ICC-01/04-01/06-3177-AnxA, 3 November 2015.

The ReVision project put a welcome **emphasis on strengthening the court’s field presence. The VRWG fully supports this emphasis within the ReVision.** We have long called for the Court to have more field presence and emphasised the need for the Court to be closer to victims and affected communities. We are however **concerned at the fact that the Committee on Budget and Finance’s recommendations, if approved by the Assembly, would require a staggered implementation of the new structure,** and would not permit for the creation of several additional, new, field-based posts. This could negatively impact key functions undertaken in the field, including outreach. Proposals to stagger recruitment for both new and reclassified posts would also likely mean a delay in the provision of services to victims and affected communities. In addition, the VRWG notes that early outreach is key to ensuring the efficiency of proceedings further down the line and to combat misleading information on the ICC. The VRWG thus cautions against any staffing gaps that would undermine outreach and communications efforts, one of the main objectives of the proposed strengthened field offices.

## 5. Victim participation and legal representation

### *Application process*

Over the last few years, the VRWG has echoed States Parties’ concerns relating to the Court’s challenges to process victims’ applications for participation in a timely manner. We take note of the submissions by the Working Group on Lessons Learnt of its Report on victims’ application processes.<sup>11</sup> In our view, this report highlights two important elements:

- Chambers have constantly sought, and considered, various options to improve the management of victim’s applications to participate to the proceedings;
- There is likely no “one size fits all” solution to the victims’ participation process but it is time now to adopt a consistent, coherent and global approach to victims’ participation, from the admission stage and throughout the whole proceedings until the reparation stage bearing duly in mind the mandates and duties of the main parties involved.

The VRWG notes the WGLL’s indication that it will continue to consider the issue in the coming months. In that regard, we submit that transparency, coherence and consistency will be key elements to improve the system. We encourage the ICC to adopt a holistic approach to this issue. Ultimately, each organ of the court plays a core role in relation with the victims’ participation: the OTP when defining the scope of the charges (and thus the potential admissible victims); the Registry when conducting outreach activities and liaising with the victims (including with the duty of providing transparent, objective and accessible information to the victims, and adopting a transparent and objective process in suggesting the appointment of legal representative), and the Chambers when adopting standards in victims’ participation process (and thus contributing in managing expectations).

While the VRWG supports harmonising the application processes, we continue to call on the Court to ensure that resource considerations do not underpin, and thereby undermine, the process. We continue to encourage future discussions in The Hague Working Group to consider how to render the participation of victims before the ICC as reparative, meaningful, efficient and effective for all.

Victims’ participation is not only about reparation or serving justice to them. It is also about preventing future crimes and guaranteeing their non-recurrence by revealing the truth about past atrocities and acknowledging harm suffered by the concerned victims.

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<sup>11</sup> Report of the Working Group on Lessons Learnt to the Study Group on Governance Cluster I: Expediting the Criminal Process, Working Group on Lessons Learnt, 30 September 2015, on file; Report on Cluster D(1): Applications for Victim Participation, The Presidency, 25 August 2015, on file

## **Legal representation**

The VRWG takes note of the Revised proposal by the Registrar regarding the creation of the Victims' Office and the model of victims' legal representation.<sup>12</sup> The New Registrar's Proposal suggests, in each case, the appointment of an external counsel as lead counsel for the victims, making reference to victims' right to choose their counsel, a key principle that the VRWG has advocated for. The VRWG welcomes the decision by the Registrar to move away from a full internalisation of victims' legal representation, as was originally proposed. This procedure has now to be approved by the judges. However, in our view, the current proposal still raises some concerns that the Judges should carefully consider as the review moves forward. The new Registrar's Proposal suggests the appointment of the external counsel "for each case at the latest when moving beyond pre-trial" suggesting that victims have to change counsel throughout the proceedings. It also recommends that the "*external counsel would typically be based on the field to ensure closer ties and communication with victims*" without taking into account that counsel will usually know best where his/her presence will best serve victims' interests.

As changes to the system of victims' legal representation continue to be considered, the VRWG submits that the following principles should guide the process:

- (a) Full respect of the right of the victims to choose their counsel;
- (b) Consultation: victims should be consulted in the selection of their counsel as well as throughout the proceedings;
- (c) Quality: victims should benefit from the best possible representation and counsel should be adequately trained on what the representation of victims in ICC proceedings involves; the drafting of Guidelines on what constitutes quality representation of victims before the ICC should be considered. In addition, adequate resources should be provided to counsel who should be in charge of administering them with full accountability for the management of his/her budget<sup>13</sup>;
- (d) Flexibility: legal representation should be sufficiently flexible to fit the specific features of the case and victims concerned;
- (e) Adaptability: legal representation in a specific case should be adaptable to victims' needs;
- (f) Genuine participation: legal representation should ensure genuine victim participation in ICC proceedings;
- (g) Independence: the independence of counsel and other team members should be fully respected (including: the appearance of independence);
- (h) Transparency and predictability: counsel should be appointed for the whole duration of the proceedings<sup>14</sup> and clearly be informed of the resources available to him/her in the performance of his/her duties as well as of the mechanism supervising the use of these resources.
- (i) Assessment: The system of legal representation, should be independently assessed on a regular basis and, to the extent possible, the system's beneficiaries should be consulted during such review exercises.

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<sup>12</sup>Report on the review of the organizational structure of the Registry Outcomes of Phase 4 of the ReVision Project Decisions on the structure of the Registry, ICC-ASP/14/18, 4 May 2015, available at [https://www.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-18-ENG.pdf](https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-18-ENG.pdf) ; Report of the Registry on the outcome of the ReVision process, CBF/24/27, 10 July 2015, on file; Proposal of the Registrar on the Principles Guiding the Establishment of a Victims Office and a Defence Office, transmitted to the Coalition for the ICC on 3 June 2015 ("New Registrar's Proposal").

<sup>13</sup> This would include the ability for counsel to decide when he/she needs to be in the field or in the courtroom, in full recognition of their independence.

<sup>14</sup> Except where exceptional circumstances so command, change of counsel during the proceedings should be avoided in light of the negative impact such a change may have on the relationship of confidence between victims and their counsel.

## **Participation and case selection**

The VRWG notes the Office of the Prosecutor's (OTP) intention to release shortly a draft policy on case selection and prioritization. In light of the fact that the OTP will never be in a position to investigate and prosecute all those alleged of having committed ICC crimes, the VRWG welcomes this initiative by the OTP to clarify its approach in that regard, bringing more transparency to the process. The VRWG strongly believes that the court's cases should be responsive to the experiences of victims and reflect the full scale of victimisation on the ground. We thus call on the Prosecutor to ensure that victims' views and concerns adequately figure in the selection of cases and that specific benchmarks are included around consultation with victims. The VRWG also encourages the Prosecutor to consult with civil society as she continues to develop this policy.