



Recommendations to the 15th Session of the Assembly of States Parties 16-24 November 2016, 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 landmark convictions before the ICC. The conviction of Jean-Pierre Bemba represents not only the first conviction for command responsibility but also for sexual and gender-based crimes.¹ Furthermore, the ICC, in the *Al Mahdi* case, delivered its first conviction for destruction of cultural heritage as a war crime in a trial in which the accused, for the first time in the Court's history, pleaded guilty.² Charges were also confirmed in the *Ongwen* case, with more than 2000 victims expected to participate in his trial (scheduled to begin in December 2016). In parallel, the Court is also conducting its first reparations proceedings in four separate cases.³ On 21 October 2016, Trial Chamber II approved the first draft reparation implementation plan for symbolic reparation in the *Lubanga* case.⁴ Reparations proceedings are also underway in *Katanga*, *Bemba* and *Al Mahdi*. Thus, an increasing number of victims participating in the Court's proceedings are likely to be watching closely developments (and outcomes) before the Court.

On the policy level, 2016 also saw a number of important developments: the ICC Judges released the first update of the Chambers' Practice Manual.⁵ The Office of the Prosecutor (OTP) finalised its policy on case selection and prioritisation⁶ and will shortly launch its policy on children.⁷ Finally, the Court is working towards setting clear indicators to measure how it achieves its objectives, including in relation to its victims' mandate.

The work ahead is not without challenges. The increasing number of victims seeking to fulfill their rights before the Court (through their participation in a case or by applying for reparations) will require the Court to ensure that its procedures are capable of meeting those demands. The practice of the Court's Chambers in fulfilling the Court's victims mandate remains varied and disparate which in turn impacts on the Court's effectiveness

¹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment, ICC-01/05-01/08-3343, 21 March 2016.

² *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment, ICC-01/12-01/15-171, 27 September 2016.

³ Reparation proceedings have been ongoing in Lubanga since 2012, started on 1 April 2015 in the Katanga case and were recently opened in both Bemba and Al-Mahdi.

⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, ICC-01/04-01/06-3251, 21 October 2016.

⁵ ICC, Chambers Practice Manual, February 2016, at https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf.

⁶ Office of the Prosecutor (OTP), Policy Paper on Case Selection and Prioritisation, 15 September 2016, at https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

⁷ OTP, Draft Policy on Children, June 2016, at https://www.icc-cpi.int/iccdocs/otp/22.06.2016-draft-policy-on-children_eng.pdf.

in delivering said mandate. Moreover, the announcement by some of the ICC's key early supporters that they are withdrawing from the Rome Statute might gravely impacts the possibility for those who may be victims of the gravest crimes to have access to the Court.

It may also have both moral and budgetary implications for the Court as a whole and for the functioning of the Trust Fund for Victims.

The VRWG remains solidly committed to supporting the effectiveness and efficiency of the Court's functioning generally and to giving full effect to the rights of victims as enshrined in the Rome Statute in particular. Ahead of the 15th Session of the Assembly of States Parties, the VRWG is pleased to share the following remarks and recommendations.

Increasing the efficiency and effectiveness of court proceedings through a holistic approach to victims' participation, representation and reparation

The delivery of justice without undue delays is an essential function of providing reparative justice before the ICC. Victims, as much as the accused, want to see justice delivered expeditiously.

However, despite efforts to harmonise proceedings with a view to making proceedings more effective and efficient⁸, Chambers have taken different approaches in relation to key aspects of victims' rights. For example, various application forms have been used to allow victims to apply to participate in proceedings; the appointment of counsel for victims does not follow a clear process and varies according to Chambers; the early practice on reparations also suggests that each Chamber is likely to come to its own conclusions on what process to implement. In addition, efforts to clarify these victims' related procedures have often taken place in isolation without considering the process as a whole. Decisions regarding the process to apply to participate in proceedings have not considered from the start whether and how that process will also feed into future decisions on legal representation and reparation, as appropriate. This has had a negative impact not only on the efficiency of victims' related procedures but also on the ability of victims to fully exercise their rights.

The VRWG submits that an integrated approach which considers the process and procedures as a whole on how victims are able to access the Court in relation to participation, legal representation and reparation ought to be adopted at the outset of proceedings. Discussions on the process relating to applying to participate in proceedings should be connected to those on the modalities of participation, the appointment of a legal representative and reparations. This would help clarify for victims how their rights will be realized and what to expect at the different stages of proceedings, thereby assisting victims to make decisions as to whether and at what stage they would like to participate. It would also ensure that Chambers have the necessary information to rule on victims' related issues in a timely manner. It should also help all those with a mandate to assist victims to participate or seek reparation before the Court to work together and cooperate.

The principle of complementarity also warrants a clearer and more consistent procedure for victims before the Court. Several ICC States Parties have set up or are in the process of setting up their own specialised courts or special divisions within existing courts to prosecute ICC crimes domestically. Several have recognised the rights of victims in those

⁸ For example, the Chambers' Practice Manual clarifies the preferred process on how victims should apply in proceedings.

procedures. For example, victims in Central African Republic (CAR) will be able to participate before the Special Criminal Court that is currently being established. In Uganda victims are able to participate in the International Crimes Division's proceedings in a manner similar to what the procedures of the ICC allow.

The VRWG welcomes efforts to ensure the rights of victims are an integral part of efforts to domesticate the Rome Statute and to prosecute the worst crimes domestically. However, domestic courts are likely to face challenges in accommodating the potentially large number of victims wishing to join their proceedings, similar to the challenges the ICC has already had to face. In common law countries where victims do not usually participate in criminal proceedings, authorities may look to the ICC for examples of law, procedures or best practice in order to address challenges related to fulfilling victims' rights to justice.

Lessons learnt by the ICC should prove informative for these mechanisms and the ICC should strive to exemplify best practices on which domestic bodies can draw. An integrated ICC approach to participation, legal representation and reparation before the ICC could thus play a useful guiding role for domestic courts set up to prosecute ICC crimes domestically. Likewise, a mechanism through which the ICC can learn from the experiences of domestic courts applying ICC-like provisions could prove useful to both the ICC and to domestic courts.

Victim participation and legal representation

The VRWG welcomes the release in February 2016 of the updated Chambers' Practice Manual, which now also includes a section on the procedure for admission of victims to participate in pre-trial and trial proceedings.⁹ As pointed out in previous submissions from the VRWG, the lack of consistency in the procedures regarding victims has adversely impacted victims' effective participation in proceedings.¹⁰ While these are non-binding, best practices developed by the judges can render the process more transparent, consistent and objective. Clear procedures should allow for the expeditious treatment of victims' requests for admission in the proceedings and should preclude unjustified differential treatment of victims from one case to another. Clear procedures also enable the Court and other actors to communicate with victims about the process for participation from earlier on in the proceedings. By ensuring a standard of predictability that guides victims throughout the proceedings, the management and effectiveness of victims' rights is likely to be improved.

While the updated Manual is an important step, the VRWG proposes that the Manual be amended further to clarify the criteria and process for the appointment of legal representatives. This is important as the current system of legal representation is neither transparent nor predictable. It also fails to uphold victims' rights to choose a counsel, including a common legal representative.

Victims in some cases had to face the uncertain outcome of a legal representative's selection procedure which was not announced to them in advance and in which they played no meaningful role. For example, in *Gbagbo*, Chambers requested the Registry to undertake a recruitment process with limited input from victims but ultimately decided not to follow the recommendation from the Registry, with little clarity as to the reasons.¹¹

⁹ ICC, Chambers Practice Manual, February 2016, at https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf.

¹⁰ VRWG, Recommendations to the 14th Session of the Assembly of States Parties, November 2015, at <http://www.vrwg.org/downloads/2015asp14vrwgfinal.pdf>

¹¹ *The Prosecutor v Laurent Gbagbo* Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-138, 4 June 2012.

In the Kenya cases, counsel chosen by victims was replaced altogether as a result of the legal representative selection process undertaken by the Registry and endorsed by the Chamber.¹² In contrast, in *Ongwen*, both the pre-trial and trial Chambers have recognised victims' rights to keep the counsel of their choice.¹³ However, in this case, the Chambers went further to rule that only the common counsel chosen by the Court would receive legal aid and the Chamber appointed a common counsel without any clear recruitment process; the counsel chosen by the victims thus remains without remuneration, severely restricting his ability to act in the interests of his clients. In *Al Mahdi*, the Chambers appointed the counsel chosen by victims as common legal representative without much discussion and decided that counsel was entitled to legal aid.¹⁴

The absence of a consistent procedure as to when and how common legal representatives are appointed, by whom and according to which criteria is problematic. It fails to give victims clear information on what their rights are with regards to appointment of counsel. It also prevents counsel who are directly appointed by victims from knowing how to obtain legal aid or how to be appointed as the common legal representative. The approach currently applied in *Ongwen* also creates discrepancies between groups of victims when only one group is entitled to a counsel that receives legal aid, the other not. These discrepancies and concerns are aggravated by the failure to conduct a transparent and fair recruitment process that takes into account victims' choices. The VRWG submits that the current lack of clarity also negatively affects the Court's credibility and erodes victims' right to be given a choice of who is to serve as their common legal representative, as envisaged in Rule 90 of the Rules of Procedure and Evidence.

Victims cannot enjoy their right to legal representation fully if they are not able to make a genuine and informed decision about who they would like as their counsel. The Court, especially the Registry, shares the burden to assist victims to make such an informed decision by providing them with adequate information. Information on legal representation should include:

- informing the victims that they are free to choose a legal representative and that this right is not absolute;
- the fact that legal aid is available as well as the conditions under which victims can benefit from it;
- clear information on how a common legal representative will be appointed and what that may mean for those victims who had appointed someone else.

Furthermore, the right to choose counsel also requires that victims are effectively and adequately consulted about their choice of counsel. In our view, the effective involvement of victims in the selection of their counsel is a pre-condition for their genuine participation in the ICC proceedings.

Finally, we note that one reason sometimes advanced for the lack of an appointment process is a wish not to delay proceedings. The VRWG agrees that proceedings should be conducted in an efficient manner and that ensuring the rights of victims should not negatively and unduly impact the right of the defense to be tried without undue delay. However, we submit that it is the Court's responsibility, in particular Chambers and the Registry, to prevent possible delays. We regret that appointments of common legal representatives are made at a late stage of the proceedings. This not only prevents consultations as to the choice of counsel but also leaves little time for victims and the

¹² *The Prosecutor v. Ruto, Kosgey & Sang*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-01/11-249, 5 August 2011.

¹³ *The Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015; see also *The Prosecutor v. Dominic Ongwen*, Decision on Requests Concerning Organisation of Victim Representation, ICC-02/04-01/15-476, 17 June 2016.

¹⁴ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on Victim Participation at Trial and on Common Legal Representation of Victims, ICC-01/12-01/15-97-Red, 8 June 2016.

newly appointed common legal representative to consult and to prepare an effective strategy.

Case selection

In February 2016 the OTP published a draft version of its Policy Paper on Case Selection and Prioritisation (Draft Policy). In March 2016 the OTP organised a one-day consultation meeting with civil society on the Draft Policy. Subsequently, the OTP invited interested organisations to submit written comments on the Draft Policy. In September 2016, the OTP shared its finalised Policy.¹⁵ The VRWG welcomes the adoption of the Policy. In our view, the issuance of documents that clarify how the OTP undertakes specific aspects of its work can indeed help bring clarity, transparency and credibility to the OTP's work. We also note and appreciate the openness of the OTP in seeking input from relevant stakeholders, including civil society working with victims during the drafting process.

The VRWG notes the impact case selection has on victims. For instance, only victims who can demonstrate a link between the harm they suffered and crimes faced by the accused can participate in proceedings.¹⁶ Ultimately, only victims of crimes charged and proven will be entitled to reparation before the ICC. We thus welcome the recognition in the final version of the policy that victims' views and concerns ought to be an important feature in the OTP's selection of cases. The final version recognises, the "impact of investigations and prosecutions on the victims of the crimes and affected communities"¹⁷ as a criterion in the prioritisation of cases. In our view, taking into account the impact that decisions around case selection and prioritisation have on victims and affected communities also appears to be consistent with the OTP's stated aim in the policy to represent as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure, jointly with the relevant national jurisdictions, that the most serious crimes committed in each situation do not go unpunished.

The VRWG looks forward to engaging with the OTP to see this policy put into practice and thus bringing the ICC closer to the local communities.

The Trust Fund for Victims

In light of the reparations proceedings in four different cases (*Lubanga*, *Katanga*, *Bemba* and *Al Mahdi*) the Trust Fund's activities may undergo considerable expansion over the next years. Furthermore, while the Trust Fund's assistance work in DRC and Uganda is ongoing, the Trust Fund's Board has also validated an allocation of funds to carry out project-related activities, including situational assessments, in CAR, Cote d'Ivoire and Kenya.¹⁸ However, while the demands on the Trust Fund are increasing, voluntary contributions received over the last couple of years have decreased. In our view, it is essential for the Trust Fund to develop a strong and long term fundraising capacity that enables it to attract more - but also more diverse - funding and expand its work to new situation countries while also responding positively to requests to complement reparation awards. In addition, and as the Trust Fund indicates in its budget request, it will also be important to ensure sufficient capacity in the field to oversee the expansion of assistance projects and the implementation of reparation.

¹⁵ OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016 (Case Selection Policy), at https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

¹⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Judgment, 14 March 2012, ICC-01/04-01/06, p. 17.

¹⁷ OTP, Case Selection Policy, p.16.

¹⁸ Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2015 to 30 June 2016, ICC-ASP/15/1416, August 2016, at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-14-ENG.pdf.

While the VRWG appreciates the validation of field posts at P-2 and P-4 levels, we call on States Parties to ensure that the Trust Fund is equipped with the necessary resources to fulfil its mandates.

Recovery of Assets

The need for further voluntary contributions to the Trust Fund notwithstanding, the primary duty-holder to pay for reparations remains the convicted person.¹⁹ Efforts to identify, freeze and seize assets of convicted persons are thus of paramount importance to ensuring meaningful reparation to victims, as the reparation reserve set aside by the Trust Fund will never be able to fully repair the harm suffered by victims of ICC crimes.

After holding a hearing on that matter, if it is satisfied that these have been derived directly or indirectly from the crime, Chambers can issue an order of forfeiture in relation to specific proceeds, property or assets.²⁰ Rule 217 of the Rules of Procedure and Evidence tasks the Presidency of the Court with recovering those assets. The Presidency can then seek cooperation and measures for enforcement from states where assets of property of the accused are believed to exist.²¹

Noting that discussions about cooperation have been ongoing amongst States Parties of the ICC, we call on States and relevant officials at the Court to move them forward in 2017, with a particular focus on how, under existing cooperation requirements, States can play a more active role in relation to the successful identification, tracing and seizing of assets for the purpose of reparation. We also call on States Parties to ensure that the Court, and in particular the Office of the Presidency, has the capacity to undertake this function.

We also call upon the Presidency and other organs of the Court, as appropriate, to ensure that any assets seized from an accused person are preserved for the purpose of fulfilling reparations orders. It would be inappropriate for all seized assets to be dissipated by repayments to the Registry for defense counsel fees.

The Victims Strategy and Guidelines on Intermediaries

As the VRWG noted last year, there still has been no detailed review of the ICC Strategy in Relation to Victims, despite a commitment from the Court to do so in 2014 and again in 2015. In addition, the Court adopted the Guidelines Governing the Relationship between the Court and Intermediaries in March 2014. The Guidelines provided for a review to take place in October 2015. Although some actors in the ICC indicated last year that internal review was ongoing, there was no formal process for external actors to input and no finding of that review (if it indeed was completed) has been shared. The intermediaries' guidelines were intended to be a living document and regular review, with input from intermediaries themselves and the NGOs that work with them is urgently needed. Although the Court has indicated that practice in this area has improved, we continue to receive reports of inadequate support and information sharing.

The VRWG reiterates its prior call to carry out a comprehensive review of such documents in consultation with all stakeholders and for the results of such a review to be shared with stakeholders. Such regular review ensures that the work of the Court takes into consideration in a timely manner evolving circumstances and shortcomings identified in practice. In particular, once the Guidelines on Intermediaries are reviewed, the VRWG calls for extensive outreach work to ensure their wide dissemination and their availability

¹⁹*The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeals against the Decision establishing the principles and procedures to be applied to reparations of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129, 3 March 2015, para 71.

²⁰ ICC Rules of Procedure and Evidence, Rule 147, para 1 and 4.

²¹ *Ibid*, Rule 217.

in languages understood by intermediaries. We thus call on the Court to continue efforts to make the Guidelines accessible and consider additional opportunities to communicate on the Guidelines and their applicability to particular circumstances and situations.