

FIVE MYTHS ABOUT VICTIM PARTICIPATION IN ICC PROCEEDINGS

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,



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Introduction

The International Federation for Human Rights (FIDH) has been closely monitoring the implementation of victims' rights before the International Criminal Court (ICC) since the entry into force of the ICC Statute (Rome Statute). FIDH, together with its local member organisations, has also supported victims of international crimes to exercise their rights both before international or hybrid tribunals (ICC and the Extraordinary Chambers in the Court of Cambodia – ECCC) as well as before national tribunals in Guinea, Côte d'Ivoire and Mali, among other countries, and through the use of universal jurisdiction. This work has allowed FIDH to get relevant experience on victims' needs to achieve justice.¹

Over the years, FIDH has noted with concern a series of common mistakes made in relation to the purpose and exercise of victims' rights in judicial proceedings. We have observed that only a very limited number of experts, who have direct experience in support to victims in judicial proceedings, are acquainted with the object, advantages and limitations of victim participation in the context of a criminal trial. Victim participation is a new feature in international criminal law and its contours are still in the process of being determined. Yet, we have repeatedly seen conclusions arrived at –in our view at too much of an early stage- in relation to the detriments of victim participation for ICC proceedings. We noted that observations are not always based on a direct and first-hand experience of how victim participation operates in practice, in particular in the field. They appear, rather, to be based on misconceptions or even myths.

This report collects some of the most prominent statements that we have heard and read in relation to victim participation and provides a response from our first-hand experience in support to victims of international crimes, and monitoring practice. We understand that some of our conclusions could be debatable, but we provide them with the aim to contribute to what should be a richer debate in relation to the implementation of some of most unprecedented provisions of the Rome Statute.

In developing this document, we have taken note of the discussions held by the Assembly of States Parties in relation to victims and affected communities since the Kampala Review Conference. The most recent debate was held including during the 12th session of the Assembly where a plenary dedicated to victims' issues was organised for the first time in history. During the plenary, States Parties expressed overwhelming support to the implementation of victims' rights and renewed their commitment to ensuring meaningful participation. In the resolution issued following the debate, States Parties recalled that they are “[d]etermined to ensure the effective implementation of victims' rights, which constitute a cornerstone of the Rome Statute system.”² When preparing this report, we have also taken into account recent initiatives that have discussed implementation of victims' rights, including the recent expert initiative launched with the support of the Swiss government which concluded with a retreat in Glion, Switzerland. We have considered the Expert Initiative on Promoting Effectiveness at the International Criminal

1. See *i.a.* the following FIDH reports and papers: Enhancing Victims' Rights Before the ICC – A View from Situation Countries on Victims' Rights at the International Criminal Court (November 2013), <https://www.fidh.org/en/international-justice/international-criminal-court-icc/14259-fidh-report-enhancing-victims-rights-before-the-icc-a-view-from-situation>; FIDH Comments on the Proposed Changes to Legal Aid Before the ICC (September 2012), <https://www.fidh.org/en/international-justice/international-criminal-court-icc/FIDH-Comments-on-the-Proposed-12208>; Cutting the Weakest Link: Budget Discussions and their Impact on Victims Rights to Participate in Proceedings before the ICC (November 2012), <https://www.fidh.org/en/international-justice/international-criminal-court-icc/Cutting-the-Weakest-Link-Budget-12398>; Victims' Rights before the ECCC: A Mixed Record for Civil Parties, <https://www.fidh.org/en/asia/cambodia/eccc/Victims-Rights-before-the-ECCC-A-12533>; Ivory Coast: the fight against impunity at a crossroads (October 2013), <https://www.fidh.org/en/Africa/cote-d-ivoire/14160-ivory-coast-the-fight-against-impunity-at-a-crossroads>; Mali: la justice en marche (March 2014), <https://www.fidh.org/fr/afrique/mali/14985-mali-la-justice-en-marche>.

2. ICC-ASP/12/Res.5

Court's (Expert Initiative) report, dated May 2014.³ In addition, this report has been prepared at the time the ICC Registrar is undertaking a process of re-organisation and restructuring of the Registry (*ReVision* project).⁴ FIDH considers that the structure put at the service of victims who wish to participate in proceedings, in particular as much as it affects their legal representation, has a very substantial impact on their capacity to exercise their rights. Therefore, we have included in this report concerns and recommendations in relation to the *ReVision* proposals.⁵

The methodology used for this report consisted in collecting findings made by FIDH through its experience of support to victims of international crimes, as well as through its monitoring of the implementation of victims' rights before the ICC. We also conducted supplementary research as well as interviews with judges, victims' legal representatives (both external Counsel and members of the Office for Public Counsel for Victims) and other members of legal representation teams, representatives of non-governmental organisations (NGOs) and other experts. FIDH expresses its sincere appreciation to those who agreed to be interviewed for this report.

3. Expert Initiative on Promoting Effectiveness at the International Criminal Court (Advance Copy, May 2014) (Expert Initiative), p 175-201.

4. Basic Outline of the Proposals to Establish Defence and Victims' Offices (October 2014) (Basic Outline).

5. See also the FIDH Comments on the Registry's *ReVision* proposals in relation to victims, annexed to this report.

MYTH #1

The participation of victims constitutes a burden to the proceedings, creates delays and leads to supplementary costs

While the notion of victim participation and introduction of victims' rights in the ICC Statute may have been contested at the time of adoption of the Statute, it is generally accepted by now. In addition to contributing to strengthening the Court's credibility and legitimacy, the recognition of victims' rights pays tribute to the centrality of victims' experience and their potential to contribute to the justice process. It also recognises that respect for the rule of law plays a central role in rebuilding societies and that having members of the communities individually engaged with rule of law processes can significantly contribute to social reconstruction.

Even if the right to participate in proceedings is no longer questioned, concerns have been expressed about the implementation of that right and its impact on the criminal trial.⁶

But that view is not widely shared. In this regard, it is relevant to note that Judge Adrian Fulford, who was the presiding judge of the ICC's first trial, the Lubanga trial, noted at the outcome of the trial:

"The experience of Trial Chamber 1 has been that the involvement of victims has not greatly added to the length of the case. Their submissions and questioning have been focused, succinct and seemingly relevant to the issues in the case. Whether it is said their role has undermined the fairness of the trial will be revealed in closing submissions, but purely from the point of view of time, they have not significantly extended the proceedings. These are early days, but I am cautiously optimistic that their participation can be accommodated effectively in the individual trials."⁷

6. Expert Initiative, *supra* note 3, p 176; C. Van den Wyngaert, Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge, Case Western Reserve Journal of International Law 44: 475-495; C. Chung, Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?, Northwestern Journal of International Human Rights, 6(3):459-545; War Crimes Research Office (American University), Victim Participation at the Case Stage of the Proceedings (February 2009), <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonVictimParticipationattheCaseStageofProceedingsFebruary2009.pdf>.

7. Judge Sir Adrian Fulford, The Reflections of a Trial Judge (2010), available at: http://www.iccnw.org/documents/Reflections_of_a_Trial_Judge_ASP_New_York_6_December_2010.pdf, para 20.

A. Need to differentiate between the application process and participation as such

It appears as though ‘victim participation’ is sometimes equated with the process for victims to apply to participate in proceedings (application process). The ICC has faced difficulties over the years to manage the application system in an effective manner.⁸ This has been made evident by the backlogs in treatment of applications and the great amount of time spent by the Chambers and the parties to review victims’ applications. Over the last two years, different chambers of the Court have implemented measures in an attempt to streamline the application process. While those measures appear to have brought some level of improvement, there is an acknowledgement that more needs to be done.⁹

At the outset, it is important that the problems with the application process not be confused with challenges related to victim participation as a process unfolding throughout the proceedings. The application process is but the entry point of actual participation in proceedings. FIDH is committed to contributing to further improvements to the application process in a manner that is satisfying both to the Court’s demands and victims’ needs. We look forward to further engaging with the different initiatives in place where discussions on the victims’ application process are ongoing, and to comment on specific proposals. In the meantime, we offer the following considerations for reflection:

- It is important that any consideration for reform of the application process carefully considers where the problems with the current system lie, and that it evaluates the models put in place in recent cases and their impact (including both positive and negative aspects).
- The evaluation must also consider the underlying difficulties that may have caused some of the problems that are faced at present. Some of these may include: overreliance on intermediaries (that leads to incomplete or inaccurate applications), lack of adequate database, etc.¹⁰
- In seeking to free up time and reducing workload for the Chambers and the parties, careful consideration must also be given to understanding the application process from the victims’ perspective. This can only be achieved through consultations that bring to light views from the field (this must necessarily include persons and organisations outside the Court, including legal representatives, NGOs and surveys with victims themselves).
- A balance needs to be found between collecting the information needed for the Chamber to verify the victims’ *locus standi*, and aspects of the application process that may be important to victims. For example, in its work with victims FIDH has observed that many victims find it important to tell their stories. Others also find it important that their stories reach the judges and they are ruled upon by them. However, all these matters may need to be investigated further, in relation to specific situations and based on specific experiences. In short, it is important that conclusions on what victims need or want are based on studies that collect views from the field and recognise that some experiences may be personal and that victims’ approach to the idea of participation may vary in accordance to context and personal history, among other factors.
- A distinction needs to be made also between the information that is needed to establish the victims’ *locus standi* and the information needed by legal representatives to elicit victims’ interests. Legal representatives will invariably need much more information from the victims, including in relation to specific issues that cannot be anticipated in the application form. It is important that direct and regular communication between legal representatives

8. Independent Panel of experts report on victim participation at the International Criminal Court (July 2013) (Independent Panel report), <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf>, para 63. See also Assembly of States Parties’ Resolution ICC-ASP/12/Res.5, para 3.

9. The matter is on the agenda of Chambers’ Working Group on Lessons Learnt.

10. *Ibid.* See also Avocats sans frontières (ASF), Modes of Victims’ Participation and Legal Representation (2013), http://www.asf.be/wp-content/uploads/2013/11/ASF_IJ_Modes-of-participation-and-legal-representation.pdf, p 3.

and clients is preserved. The application forms can help the legal representative understand some of the victims' concerns. However, is that really the purpose of the application form? Should an application form replace the need for consultations? We do not think so.

- It would also be relevant to seek to understand the importance that victims attach to telling their own individual personal story and be recognised individually as victims. How can a balance be established between the sum of similar stories that create a collective account and recognition of the individual victim?
- In designing a new system, it is important to maintain flexibility. While victims from different countries and cultures and of different crimes may share concerns, they are essentially different. A system that works in one context, may not work in another context. A balance needs to be stricken between need for consistency and need for flexibility. The Court could explore having guidelines on how the application system should look like, which could nevertheless be adapted to the circumstances of the case, and the traits of the specific country or conflict and victim community. In this regard, it is relevant to recall that the Court has so far only had experience in relation to one continent, where victim communities may share some traits (for example in relation to education, social status, location, etc.). However, the Court must be prepared to operate and adapt to the reality of other continents.
- The question of judges' power and what can (and cannot) be delegated to the Registry also needs to be taken into account. Furthermore, in addition to overwork at the level of the Chambers, the situation of the Registry should be considered. The Registry has been overloaded with the amount of work related to processing applications and has indicated that it had significant backlogs of applications at various opportunities. What can be done at the level of the Registry to streamline processing of applications? What lessons have been learned over the past 10 years? Are the Registry's data entry processes and databases adequate? In this regard, we wonder how the Registrar's *ReVision* process will contribute to solving some of these problems. The proposal for a joint Victims' Office is based, among other considerations, on the assessment that currently different offices "collect and generate similar information that is stored in separate databases. A merger of the two would allow for integrated information systems..."¹¹ The question is how will this reform specifically solve problems with backlogs?
- Special attention needs to be given to avoid problems that may arise as a result of a "registration system" similar to the one implemented in the Kenya cases at the trial stage. Several criticisms have been made. These include delegation of assessment of victims' *locus standi* on the common legal representative,¹² the danger of having victims self-select¹³ and risk that victims could turn into an "amorphous category".¹⁴
- Care should be applied to any consideration to implement a collective approach to the application process.¹⁵ It should be recognised that participation takes a collective form in many ways: victims participate through collective meetings with the legal representatives and they may receive collective reparations. In some cases, they were victimised collectively as well. However, every person's experience is unique and victims' concerns may vary according to different factors. Victims' participation and legal representation should recognise the heterogeneous character of victims' experiences and views.¹⁶

11. Basic Outline, *supra* note 4, p 3.

12. A. Sehmi, New victim participation Regime in Kenya, in ACCESS – Victims' Rights Working Group Bulletin, Issue 22 (2013), <http://www.vrwg.org/downloads/130617EnglishVersionFinal.pdf>, p 6. See also ASF 2013, *supra* note 10, p 7.

13. References to a speech by former ICC judge Sir A. Fulford in S. Linehan, International Criminal Court: Progress Made, Progress Needed (November 2014), <http://ilawyerblog.com/international-criminal-courts-progress-made-progress-needed/>.

14. S. Kendall & S. Nouwen, Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood (2014), *Law and Contemporary Problems* 76: 235-262, p 249-250.

15. For previous considerations expressed by FIDH on the application of a collective approach, see Enhancing Victims' Rights Before the ICC – A View from the Situation Counties on Victims' Rights at the International Criminal Court (November 2013), <https://www.fidh.org/en/international-justice/international-criminal-court-icc/14259-fidh-report-enhancing-victims-rights-before-the-icc-a-view-from-situation>, p 17-18.

16. "Put in another way, a collective approach assumes not only levels of homogeneity in victimisation, but also in the interests of victims when seeking participation" (D. Taylor, Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual (2014), Impunity Watch, http://www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf, p 11). "The assumption that victims have a collective, uniform story to recite, leads to the essentialisation of victimhood" (*Ibid.*, p 19).

B. Why victims do not duplicate the work of the Office of the Prosecutor

Opponents of victim participation have raised concerns about the likelihood that victims may duplicate the work of the Prosecutor, impinge upon her role and functions and/or act as a *de facto* “second prosecutor” in detriment to the rights of the accused.¹⁷ These observations appear to arise from what are considered to be too broad prerogatives recognised to victims by the Chambers and from victims’ interventions on matters such as questioning of witnesses, introduction of evidence and statements on guilt or innocence of the accused. This opinion, however, seems to disregard both the analysis of victims’ rights in the jurisprudence of the Court and essential aspects of victims’ interests for participation in judicial proceedings. Chambers’ decisions that have recognised victims’ ability to introduce evidence and victims’ interests in the guilt or innocence of the accused have carefully assessed and interpreted victims’ interests and ensured respect for the rights of the accused. When interpreting victims’ interests, the Chambers have established victims’ interests go beyond the establishment of the nature and extent of harm for the purpose of reparations. On the contrary, the Chambers have recognised victims’ right to contributing to establishing the truth about the events and to obtain justice for the crimes they suffered.¹⁸

It is important to recall that the different Chambers of the Court have applied strict restrictions to victims’ interventions, for example in relation to their right to tender evidence¹⁹ and to question witnesses.²⁰

FIDH’s consultations, including with members of the Chambers, have revealed that no problems have been encountered in relation to the intervention of legal representatives in questioning of witnesses, that the restrictions are generally respected and that victims have not intervened beyond their role.

When it comes to evidence tendering, the role of victims has also been limited to matters that concern their interests and have not overloaded the Chambers with excessive or irrelevant pieces of evidence. In the Katanga case, victims introduced 5 pieces of evidence over a total of 643 items tendered by the parties and the Chamber. They called 2 witnesses over a total of 54 witnesses.²¹

Legal representatives do not generally have the capacity or expertise to conduct investigations (there are limitations in team composition and team expertise as per the conditions of the legal aid scheme). While they have the ability to tender evidence and call witnesses, that serves the purpose of supporting specific arguments that they may be making (as opposed to conducting a full investigation parallel to the Prosecutor’s). Essentially, the role of victims is one of filling in gaps, and that does not need to be done by introducing evidence. Legal representatives may identify and highlight gaps in the way the evidence is presented or in the factual or legal interpretation. Another way of filling in gaps is to present a different perspective (the victims’) or communicating concerns that victims may have in respect to issues being decided upon by the Court.

Confusion as to victims impinging on the Prosecutor’s role may have arisen in some cases as a result of repeated calls for justice principles to be respected and motions that introduce questions

17. E.g. Expert Initiative, *supra* note 3, p. 178. A similar argument is made by Zappalà: “it is as though the Office of the Prosecutor, which already has many officials working on a case, is additionally assisted by other teams. This certainly affects the balance between the parties and the principle of equality.” (S. Zappalà, *The Rights of Victims v. the Rights of the Accused* (2010), *Journal of International Criminal Justice* 8:137-164, p 150. A similar argument in terms of the impact on the defence is made by Chung (Chung 2008, *supra* note 6, p 489-491).

18. ICC-01/04-01/07-474, paras 31-44.

19. ICC-01/04-01/06-1432, paras 100-101.

20. ICC-01/05-01/08-807-Corr, para. 37.

21. ICC-01/04-01/07-3436, para 21-22.

go to the core of victims' interests.²² In such cases, rather than impinging on the Prosecutor's actions, victims have filled gaps left by the Prosecutor and they have done so in accordance with their interests. While a prosecutor may take into account the interests of victims when making litigation decisions, s/he will always also need to consider other interests, including "the need to obtain cooperation from various actors, protection of witnesses and sources, the constraints of evidence gathering and the urge to obtain convictions."²³ In some cases, given lack of regular first-hand contact with the victims' communities, the Prosecutor may not be aware of matters that are of concern to victims. Victim participation is then the avenue that is provided to victims to raise those concerns. In this way, they not only have the possibility to make their voice heard in relation to how proceedings are conducted, but they also act as allies of the Chambers in order to give judges a more complete picture of the events and the context, and share the possible impact and implications of upcoming decisions.

In order to avoid any type of identification between the role of the Prosecution and the role of victims, it is crucial that legal representatives communicate adequately and frequently with the represented victims and convey their messages. Motions or interventions based upon the general interest of victims (as opposed to the actual interest of victims expressed through consultations) could resemble the Prosecution's position based on the general interest of society.

It is also important to recall that victims do not always align with the Prosecution but that they can and should be critical of Prosecutor's action. For example, victims of crimes committed by Jean-Pierre Bemba in the Democratic Republic of Congo (DRC) disagreed with the Prosecution's decision not to investigate such crimes (and only prosecute him for crimes committed in the Central African Republic - CAR).²⁴ Furthermore, there are matters on which victims may very well align with the defence. These include calls for adequate and sufficient investigations²⁵ and calls for trials to be conducted without undue delay.²⁶

Victim participation is a novel issue in international criminal proceedings. Sufficient time must be allowed for it to take shape and develop. Victims' legal representatives in the first ICC cases had no previous experience in representation of victims before international criminal tribunals simply because there had not been any similar experience in the past. All lawyers come from a national legal tradition, and this means from a tradition where victims' intervention in criminal trials is not allowed (common law) or where it is allowed but with a different objective (e.g. *partie civile* system in civil law countries). The same can be said about ICC judges, who have been very careful in interpreting the Statute's rules on victim participation in accordance with the limits established by the texts and in respect of the spirit of the Statute.

C. Should victims be allowed to respond to every filing and be present in all hearings?

The participation of victims and/or presence of legal representatives at all stages of the trial have been contended.²⁷

According to the Statute, victims shall be allowed to express their views and concerns at "stages of the proceedings determined to be appropriate by the Chamber and in a manner that is not

22. For example, motions by the legal representatives in the Kenya cases in relation to insufficient cooperation by the government (ICC-01/09-02/11-904-Corr; ICC-01/09-02/11-731) and request for amendment of the charges (e.g. ICC-01/09-01/11-333). On the latter point (victims' potential to contribute to determination of the charges), see also Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/HRC/27/56 (2014), para 96(b).

23. M. Pena & G. Carayon, *Is the ICC Making the Most of Victim Participation?*, International Journal for Transitional Justice (2013) 7(3):518-535, p 535.

24. ICC-01/04-564.

25. E.g. ICC-01/09-01/11-367.

26. See e.g. ICC-01/09-01/11-T-15-ENG, p 11 lines 7-21

27. Expert Initiative, *supra* note 3, p. 183.

prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”²⁸ In interpreting this provision, the Chambers have also stated that, in order to be allowed to participate in specific proceedings, victims must prove that it is in their personal interest to do so.²⁹

While the role of victims is not necessarily to intervene in every single proceeding, respond to every filing and make interventions at all hearings, it is not possible to foreclose that possibility in abstract and at the outset. Care must also be applied in relation to requests that the legal representatives justify that the personal interest of the victims are at stake in relation to every proceeding they seek to be involved in. While this is in accordance with the letter of the Statute, it could turn out to be impractical if interpreted too strictly. Moreover, requesting the legal representative to file additional motions to justify the victims’ interest to participate could certainly add more work to the legal representative, the judges and the parties. There may be ways to ascertain the victims’ personal interest without requesting a specific statement or filing in relation to every proceeding. For example, it has been argued that the victims’ interest to participate in interlocutory appeal proceedings could be inferred from their participation in the proceedings leading to the impugned decision.³⁰

Access to records and presence of the legal representative at all hearings may save resources, rather than imply further costs for the Court. In order for legal representatives to be in a position to plead that a matter is relevant to the interest of victims, they must be in a position to access all relevant information about the case, including by requesting access to confidential information where necessary, and participating in hearings. The Court works at a rapid pace and sporadic participation could have a detrimental impact on both the Court and the parties. Having a legal representative participate only in certain hearings would also not represent significant savings for the Court in terms of time and resources. For example, a legal representative that is absent from the courtroom would still need to follow proceedings very closely in order to identify matters that can impact on victims’ interests, have an acute understanding of the evidence and be in a position to respond to questions from the Chambers. Not being readily available to do so, requesting more preparation time or filing irrelevant motions because of a lack of sufficient acquaintance with the proceedings or the evidence would be prejudicial to the Court and the parties.

Victims’ interventions should focus on alerting the Chamber to matters that they feel have not been adequately or sufficiently considered (by the parties or the Chambers) from the perspective of their interests. In principle, victims’ motions should not introduce notions based merely on a legal interpretation but need to be linked to actual consultations with the victims. In order for this to be possible, it is important that the system for legal representation is structured in such a manner that it allows for direct and regular communication between legal representatives and their clients. This is also the essence of participation: to allow victims to be part of the proceedings by making their voices heard, including to and through their counsel. FIDH has cautioned against the risk of a legal representation system that neglects giving sufficient consideration to the field aspect of victim participation.³¹

28. Article 68(3) of the Rome Statute.

29. This has been specifically regulated in decisions on modalities for participation (i.a. ICC-01/04-01/06-1432, para 101; ICC-02/05-03/09-545, para 24). The Appeals Chamber has also established that victims must demonstrate their interest to participate in relation to specific interlocutory appeals (ICC-01/04-01/06-824, paras 38-45);

30. See ICC-01/04-01/06-824, Separate Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims, para 8.

31. FIDH Comments on the Registry’s *ReVision* proposals in relation to victims (annexed to this report).

D. Is victim participation really that costly?

It has been argued that victim participation is expensive.³²

The costs involved in victim participation are the following: staff and travel costs for the Victims' Participation and Reparations Section (VPRS) (cost of outreach to victims and processing of application forms) and for the Office for Public Counsel for Victims (OPCV) (partial costs for legal representation, including consultation with victims, and assistance provided to victims' legal representatives), and legal aid for victims (partial costs for legal representation in specific cases, including costs for consultations with victims). The total amount proposed for these three items in the 2015 budget proposal is € 5,624,000,³³ for a total ICC budget of € 135,391,700.³⁴

This means that the budget of the VPRS, OPCV and legal aid for victims altogether represents only 4,15% of the total ICC budget. Significantly, the total amount of expenditure related to victim participation related services is lower than the amount spent in judges' salaries and entitlements.³⁵ Overall it must be taken into account that a significant cost driver for the ICC budget (for all services, including victim related services) is the high costs of staff benefits and salaries. For 2015, these amount to 68,39% of the total budget.³⁶ Staff costs represent a steady annual increase for the ICC budget of about 2.5%.³⁷ When looking at the overall ICC budget, annual built-in increases, staff and judges' costs, the amount spent on victim participation – a very relevant feature of the Rome Statute – is in fact minimal.³⁸

It must also be noted that the VPRS makes extensive use of intermediaries in its activities to reach out to victims and collect application forms. This increases the VPRS' capacity to reach out to and collect application forms in "wide-spread and hard to access" victim communities³⁹ at a much reduced cost.⁴⁰

It is erroneous to believe that the number of victim participants is what determines expenditure, i.e. the more victims participating, the more costs. Victims are represented collectively and therefore the cost of legal representation - as far as the core team is concerned - remain the same irrespective of the number of victims. The number of victims may have an impact on resources spent on collection and processing of applications. However, such a cost depends also on other factors including the quality of data entry and databases, and training and specific dynamics of collaboration with intermediaries. In terms of legal representation, it is rather the location of victims – and not the number *per se* – that may affect costs. Victims are generally consulted collectively. If they are widespread over a large area, either the legal representative's or their travel cost may increase. These are, however, local travel costs at a very low rate whose impact on the overall ICC budget is almost imperceptible. Different measures can be adopted to make communication with victims more effective and less costly (for example, identifying existing community networks and family links among victims, so that some members of the community/family can serve as reference contact points for others in the group). While other victims in the group take part in meetings with legal representatives and can always get in touch with them

32. Expert Initiative, *supra* note 3, p 183; Van den Wyngaert 2011, *supra* note 6, p 492-493. In discussing, victim related-costs, Judge Van den Wyngaert refers to the time spent by parties and by the Chamber in victim-related matters. We have addressed these questions in sections above.

33. VPRS: € 1,999,400; OPCV € 1,527,900; Counsel for victims € 2,114,700. See ICC-ASP/13/10, p. 113, 115, 120.

34. ICC-ASP/13/10, p 6.

35. For 2015, that is € 5, 727.6 (ICC-ASP/13/10, p. 161).

36. Permanent staff costs for € 66,406,900 and temporary staff costs for € 26,193,300. Total: € 92,600,200 (ICC-ASP/13/10, p. 163). This amount is exclusive of judges' salaries and benefits.

37. ICC-ASP/13/10, footnote 6.

38. This is an argument that FIDH has presented in previous reports. See Cutting the Weakest Link – Budget Discussions and their Impact on Victims' Rights to Participate in Proceedings, *supra* note 1.

39. ICC-ASP/11/40, para 39.

40. In 2013, such costs involved reimbursement of expenses "when necessary" and training on specific issues. See ICC-ASP/12/41, para 45.

or their team, contact points may be used to pass on relevant information or notify decisions in between meetings. If that type of communication works well, meetings can be organised less often (although it is important that they are organised several times per year).⁴¹

In relation to any potential efficiencies or cost-savings that could be achieved through implementation of the *ReVision* proposals, FIDH has observed that the Registrar's outline fails to provide information on the cost implications of the reform process and the new structure.⁴² FIDH has recommended that States request that the Registrar conducts and shares a study of the financial implications of the *ReVision* proposals, while considering also how they will specifically affect effectiveness of the Registrar's services and the Court's activities.

41. For a description of victim participation dynamics in the field, see below.

42. See Appendix.

MYTH #2

Victim participation does not add anything to the proceedings nor helps victims

Opponents to victim participation have also claimed that victims' intervention in proceedings does not add anything meaningful to the proceedings and that it does not make a significant contribution to victims either, or question whether any such benefits are real and tangible.⁴³ We contest this point in the following sub-sections by identifying specific added-value elements that victims have already provided to the proceedings and that participation in proceedings has provided to victims.

In this regard, we recall that, when delivering the judgment in the Katanga case, Judge Bruno Cotte, on behalf of Trial Chamber II, observed:

“Here, the Chamber wishes to commend the contribution made by the legal representatives and their teams throughout the proceedings. In the Chamber’s view, they were able to find their rightful place during the trial and in their own way, by, at times, taking a different stance to the Prosecution, they made a meaningful contribution to establishing the truth in relation to certain aspects of the case. The Chamber extends its gratitude for their contribution.”⁴⁴

A. Benefits for the proceedings

Victim participation can contribute to providing factual and cultural information that can help understand the context of the events the Court is called to rule upon.⁴⁵ In this way victims assist in the Court’s function to establish the truth⁴⁶ and ensure that the historical record of the crimes as established by the judicial decisions corresponds to the way in which the events unfolded. Victims can thereby provide invaluable assistance to the Chamber. Such assistance is particularly relevant in view of the role, functioning and policies of the Office of the Prosecutor. As explained above, an international prosecutor has a variety of interests and while s/he represents the general interest of the international community to prosecute the crimes that “deeply shock the conscience of humanity” and obtain convictions, s/he must also consider other - and at times conflicting - interests. In addition, the ICC Office of the Prosecutor does not normally employ investigators from the situation countries and has been criticised for its investigative methods, including insufficient field presence and overreliance on intermediaries.⁴⁷

43. E.g. Van den Wyngaert 2011, *supra* note 6, p 489.

44. Transcript ICC-01/04-01/07-T-343-ENG, p 4 line 25 to p 5 line 5.

45. Independent Panel report, *supra* note 8, para 33.

46. Article 69(3) of the Rome Statute.

47. C. De Vos, Investigating from Afar: The ICC’s Evidence Problem, *Leiden Journal of International Law*, Vo. 26, p 1009-1024.

Victim participation prevents the criminal trial from operating in a vacuum. Through their intervention victims bring the attention of the chambers to the reality on the ground and matters that the Court may be unaware of given the physical and cultural distance between the Court and the affected communities.

These are some of the important contributions that victims have made in some of the ICC cases:

- In the **Bemba** case, legal representatives brought the attention of the Chamber to the local languages spoken in the CAR. This was a matter contended by the Defence and the Prosecution did not have sufficient information. Only the legal representatives, who were from CAR, could provide clarity on the issue.⁴⁸
- In the **Lubanga** case, victims assisted the Chamber to understand Congolese habits in relation to attribution of names. Name composition had a significant relevance to ascertain the identity of witnesses in the case.⁴⁹
- In the **Lubanga** case, following testimony by witnesses, the legal representatives requested that the charges be extended to cover sexual slavery and inhuman or cruel treatment (which had not been contemplated in the arrest warrant or decision on the confirmation of charges).⁵⁰ The motion was successful at the Trial Chamber level,⁵¹ but rejected in appeals.⁵² However, the fact that legal representatives highlighted this phenomenon led to increased attention by the Prosecution in other aspects of the case⁵³ and could have contributed to the enlargement of charges against Bosco Ntaganda. Ntaganda had originally been sought the same crimes as Lubanga but a supplementary arrest warrant including crimes of sexual violence was issued later.⁵⁴
- In the **Ruto & Sang** and **Kenyatta** cases, victims made useful contributions in relation to matters including the date for opening of the trials,⁵⁵ the possibility of holding parts of the trial *in situ*⁵⁶ and the presence or absence of the accused during the proceedings.⁵⁷ In these filings, the legal representatives brought to the attention of the chambers specific views and concerns that the victims had on the issues at hand and that were of relevance to guide the Chamber's ruling.⁵⁸
- Over the last year, the legal representative in the **Kenyatta** case has made a number of relevant submissions. These submissions relate to problems regarding adjournment of the trial date,⁵⁹ lack of cooperation by the Kenya government⁶⁰ and the position to adopt by the Chamber in view of the lack of sufficient evidence to proceed to trial. The filings have brought light to the interest of the victims at a critical juncture of the case.⁶¹

48. ICC-01/05-01/08-T-12-ENG, p. 97-98.

49. ICC-01/04-01/06-1793; ICC-01/04-01/06-1934; ICC-01/04-01/06-2015-Anx1.

50. ICC-01/04-01/06-1891.

51. ICC-01/04-01/06-2049.

52. ICC-01/04-01/06-2205.

53. For example, a relevant discussion on sexual violence was included in the decision on sentence (ICC-01/04-01/06-2901, paras 60-76), where the Chamber criticised the Prosecution's approach to sexual violence and observed that despite being in a position to introduce relevant evidence, it had failed to do so.

54. ICC-01/04-02/06-36-Red.

55. ICC-01/09-02/11-T-18-ENG, p 25; ICC-01/09-01/12- 752.

56. ICC-01/09-01/11-620; ICC-01/09-02/11-629.

57. ICC-01/09-01/11-749-Corr; ICC-01/09-02/12-686; ICC-01/09-02/11-819; ICC-01/09-02/11-959.

58. At the pre-trial stage of the case, legal representatives had also made relevant filings in relation to gaps in the Prosecution's presentation of the case, which could potentially undermine the possibility of convictions and reparations. See C. Tenove, *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda* (2013), Africa Portal, <http://dSPACE.africaportal.org/jspui/bitstream/123456789/33510/1/Backgrounder%20No%20%2052%20-%20The%20International%20Criminal%20Court%20Challenges%20of%20Victim%20Assistance%20Participation%20and%20Reparations.pdf?1>, p 29.

59. ICC-01/09-02/11-752; ICC-01/09-02/11-840-Red.

60. ICC-01/09-02/11-731; ICC-01/09-02/11-946-Red

61. At the time of writing, the Trial Chamber is considering how to proceed in light of the Prosecution's information that it is unable to go to trial at this stage due to lack of sufficient evidence as a result of witness interference and insufficient cooperation. The options the Chamber is considering include terminating or suspending the case. For victims who have no other jurisdiction where they can obtain justice for the crimes they suffered, decisions as to whether the ICC will continue make the difference between impunity and accountability.

Victim participation also plays a very relevant role to gather **social support** for the ICC in the countries concerned. When victim participation is meaningful and victims feel genuinely involved, they develop a sense of ownership on the institution and the justice process⁶² that can have spillover effects and contribute to increased impact of ICC proceedings at the local level.

B. Benefits for victims and their communities

Participation provides an avenue for victims to exercise the right to access justice for violations, which is an internationally recognised human right.⁶³ Realisation of this right can have significant effects on victims and victim communities, as long as such participation is meaningful.

“... providing recognition to victims, fostering trust and strengthening the democratic rule of law. None of this can happen on the backs of victims, without their meaningful participation.”⁶⁴

It is relevant to note that little research has been conducted among victims and affected communities on the specific benefits that they have drawn from participation.⁶⁵ The observations contained in this sub-section have been collected through consultations and FIDH’s own experience working with victims in their search for justice. Further research on this matter would allow for participation mechanisms to improve and adapt so that they can better serve victims and victim communities.⁶⁶

In a recent report, the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence observed:

“Victim participation implies the recognition of victims as rights holders, which is tremendously empowering for them and others... This contributes to victims gaining a space in the public sphere... Such participation manifests and strengthens the right to truth... Formalising methods of victim participation represents an acknowledgement that victims have played a crucial role not only in initiating procedures, but in collecting, sharing and preserving evidence... Victim participation increases the likelihood that the needs of victims will be taken seriously in processes that have had a long tradition of treating them solely as sources of information, as “mere” witnesses...”⁶⁷

According to FIDH’s experience and research, victim participation can contribute to empowering victims and affected communities through candid exchanges with their legal representative⁶⁸ about concerns that they may have on the proceedings.

“[R]esearch on the role that victims would like to have in the criminal justice system consistently shows that victims generally seek consultation and consideration... By providing victims with the recognition that they seek and giving them, through legal counsel, a clear understanding of how the criminal system works, victim

62. Taylor 2014, *supra* note 16, p 16.

63. United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34 (1985); United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (2005).

64. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/HRC/21/46 (2012), para 54.

65. Taylor 2014, *supra* note 16, p 14, 17, 29-30. See also C. Tenove, Victim Participation at the ICC – What’s the Deal? (2013), Justice in Conflict, <http://justiceinconflict.org/2013/11/22/victim-participation-at-the-icc-whats-the-deal/>

66. See UN Doc. A/HRC/27/56, *supra* note 22, para 95.

67. *Ibid.*, para 94.

68. Exchanges between victims and legal representatives are conducted under the ICC Code of Professional Conduct for Counsel (see article 15(1) of the Code).

participation in criminal justice process can help empower victims and combat the sense of powerlessness that many victims feel during criminal proceedings.”⁶⁹

According to Fergal Gaynor, legal representative of victims in the Kenyatta case, “as those who suffered as a result of the events, victims inevitably feel concerned about all aspects of the legal process and genuinely appreciate it not only when they are informed in person about developments in the proceedings, but also when they receive legal advice about how those developments might affect them. In countries where information and misinformation about the ICC circulate through different channels, regular contact with legal representatives allows victims to receive first-hand information about the case. Victims genuinely appreciate having an opportunity to discuss proceedings, provide their views and have their concerns considered. Asking what they think, taking notes of their views and providing candid answers which are responsive to the questions raised are important ways to ensure that victims feel that they have been treated with dignity and respect.”⁷⁰

“The right to participate in decisions which affect one’s life is both an element of human dignity and the key to empowerment – the basis on which change can be achieved. As such, it is both a means of enjoyment of human rights, and a human rights goal in itself.”⁷¹

Feeling part of the justice process can have a profound empowering effect.

According to a member of an ICC legal representation team, “by expressing their views and concerns, victims are provided with the opportunity to shape the justice process.”⁷²

“Victimhood leads to disempowerment, as the crimes ordinarily put victims in a situation where they lose control and are subject to perpetrators’ will. Allowing victims to make decisions for themselves can play a role in reversing that situation.”⁷³

Participation also serves a learning purpose.⁷⁴ In exchanges with their legal representatives, victims learn about the rule of law, their rights and the mandate of judicial institutions. It may be the case that victims never heard about their rights and possibility to claim for them.

According to Silke Studzinsky, former civil party lawyer before the ECCC, “explanations on the rule of law and the rights afforded to victims by international law may eventually empower them to claim for their rights in different contexts.”⁷⁵

“By empowering victims in situations where impunity exists to engage in the judicial process, participation also has the potential to inspire more victims and affected communities to demand justice, truth and reparation at the national level

69. J. Wemmers, Where do we belong? Giving Victims a Place in the Criminal Justice Process, Criminal Law Forum (2009) 20: 395-416, p 411-412.

70. Interview with Fergal Gaynor, legal representative for victims in the Kenyatta case, 28 October 2014 (notes in file with the author).

71. K. Kenny, The Right to Participate in International Human Rights Fieldwork (2000), International Human Rights Network, p 18.

72. Interview with member of ICC victims’ legal representation team, 18 October 2014 (notes in file with the author).

73. M. Pena & G. Carayon, *supra* note 23, p 534.

74. “[T]he representation of victims is better seen as a relationship rather than a snapshot. By consulting and communicating with victims over time, representatives can better understand victims’ evolving views, and victims can better understand the opportunities and limits of international criminal justice processes.” (Tenove 2013b, *supra* note 66)

75. Interview with Silke Studzinsky, former civil party lawyer at the ECCC, 22 October 2014 (notes in file with the author). She referred to a recent development in Cambodia, where victims demonstrated to claim for individual monetary compensation (see Victims Call for Money from ECCC, Cambodia Daily, 17 October 2014, <http://www.cambodiadaily.com/news/victims-call-for-compensation-from-eccc-70135/>). This is a right that they have in accordance with international legal instruments (e.g., UN Doc. A/RES/60/147 (2005), *supra* note 64). As a civil party lawyer, Ms. Studzinsky had informed civil parties on a number of occasions about the full range of reparations recognised in international law, including monetary compensation.

which can contribute to complementarity efforts. Victims and affected communities who can access justice effectively and invoke the rule of law will have greater protection against further human rights violations.”⁷⁶

Through regular exchanges with their legal representatives, victims also come to understand the limitations of the Court⁷⁷ and can be assisted to identify other institutions that may and should be in a position to help them obtain redress. Through this process, victims can gain some appreciation of how the crimes are perceived by the international community and how they ought to be perceived within their local boundaries (i.e. that the crimes constitute violations to their human dignity and that such violations are of great concern, for which accountability ought to be swiftly and justly secured.⁷⁸ This may have a healing impact. Some have argued that participation, when meaningful, can have a healing effect on victims.⁷⁹ In addition, understanding how a criminal trial works (including the prerogatives of the Court, the weight of the evidence and the rights of the accused) may help them come to terms with the outcome of proceedings when such a result is not favourable to them.⁸⁰

In addition, the fact that victims participate collectively⁸¹ can foster a sense of belonging and solidarity, and reinforce ties among members of the victim community.⁸² This, in turn, can have a positive impact in post-conflict reconstruction. In other words, realising that their suffering and claims are shared by others in the communities and being educated and involved collectively can help victims go from passive individual actors to active players in their community.

In order for these benefits to be realised, participation must be truly meaningful.⁸³ Meaningful does not necessarily and always have to do with the actual influence that they may exercise in the justice process, including its outcome. Having that potential and, significantly, being treated with dignity and respect also contribute to victim participation having positive results.⁸⁴ For this to be achieved, keeping victims informed and understanding their culture and context are crucial. The legal representatives’ qualifications and skills and role played by them are essential to make this a reality.

Furthermore, as referred to above, in order for participation to be meaningful victims must be engaged through genuine dialogue and effective legal representation. In order for that goal to be achieved, consideration must be given to the system for and resources allocated to legal representation, as well as to the identification and selection of legal representatives’ competences. This will be discussed in the next section.

76. Independent Panel report, *supra* note 8, para 34. See also A/HRC/27/56, *supra* note 22, para 94(f).

77. Interview with member of ICC victims’ legal representation team, 22 October 2014 (notes in file with the author).

78. Interview with member of ICC victims’ legal representation team, 18 October 2014 (notes in file with the author).

79. See e.g. Independent Panel report, *supra* note 8, para 32; Taylor, *supra* note 16, 12, 14, 18, 30-31. It has also been argued that it is the manner in which victim participation is implemented and not victim participation *per se* that can have such an effect.

80. *Ibid.*

81. While they fill in individual application forms and may have individual contacts with their legal representatives, they are often consulted in groups.

82. Interview with Silke Studzinsky, former civil party lawyer at the ECCC, 22 October 2014 (notes in file with the author).

83. In 2014, the Independent Panel observed: “However, the Panel found that, despite significant efforts and investment, the ICC’s participation system is currently failing to achieve this potential and there are concerns regarding its sustainability, effectiveness and efficiency, as well as its meaningfulness for victims” (Independent Panel report, *supra* note 8, para 36).

84. Taylor 2014, *supra* note 16, p 33.

MYTH #3

Victims can be better represented through internalised legal representation

Legal representation is an essential component of participation. It is the main way in which victims exercise their right to participate before the ICC. Ineffective legal representation makes participation meaningless. Effective legal representation has two very essential components: 1) to represent victims' interests genuinely in Court, and 2) to ensure that victims actually "participate" through regular opportunities for them to give views and instruct lawyers.

When considering the ideal system for representation of victims, it is important to take into account specific aspects of representing large groups of victims living in distant and/or wide-spread locations. This makes victim representation different from representation of the accused, especially in relation to counsel-client consultations. The departing point of any analysis on the best system for legal representation must be how victims can best exercise their rights. This must essentially be done from the perspective of the victims. We must stop considering that "victims are too far" and realise instead that it is rather the Court that is too far from the communities where the crimes were committed.

FIDH has provided comments on the ongoing *ReVision* project, where we raised a number of concerns in relation to the proposals for internalisation of victims' legal representation (see Appendix). The analysis provided in the sub-sections below is complementary to those observations.

A. Representation: external, internal or mixed?

Because of the two components of victims' legal representation referred to above, the competencies required to exercise such representation are different from the ones needed for representation of the accused. Both knowledge of the Court, and understanding and capacity to interact with the victim clients on a regular basis are crucial.⁸⁵

Victims cannot normally afford a lawyer and must therefore receive assistance from the Court.⁸⁶ When the ICC legal aid system for victims' representation was designed, there was no previous experience of victim representation in international criminal law. Therefore, the Court adopted elements of the legal aid system for the defence and gave the Registrar and Chambers flexibility to adapt the level of resources as needed.⁸⁷ As a consequence, the legal aid scheme, as initially

85. The essential character of the latter is not always recognised. For example, the Expert Initiative only recognises the importance of "strict requirements of competence and knowledge of international (criminal) law and procedure" for eligibility to represent victims (Expert Initiative, p. 187).

86. Rule 90(5) of the Rules of Procedure and Evidence.

87. ICC-ASP/6/4, paras 52-58.

conceived, failed to adequately consider the need for frequent contact with participating victims. This problem was partially⁸⁸ resolved through the evolution of the victims' legal aid scheme and the Court's jurisprudence.⁸⁹

In addition to the system put in place for external independent legal representation, the Regulations of the Court – adopted by the plenary of judges in 2004 – established the Office of Public Counsel for Victims (OPCV).⁹⁰ Initially, the OPCV had as a primary mandate the provision of assistance to external legal representatives.⁹¹ The role of the OPCV was expanded and consolidated through an amendment to the Regulations of the Court that entered into force in 2012.⁹²

Through the practice of legal representation and Chambers' decisions, the Court has recognised that a combination of "understanding of the local context with experience and expertise of proceedings before the Court"⁹³ is relevant for victims' legal representation before the ICC. Such a combination can be achieved through a variety of ways. In particular, it is important that legal representation teams are composed of persons that can provide both types of competences. An adequate balance needs to be established so that both skills are used effectively and equally. A system that excessively prioritises knowledge of the context and victim communities, without adequate understanding and/or support about the Court's system and jurisprudence, would be detrimental to both the Court and victims (especially in the beginning and until the lawyers get acquainted with the Court's functioning). A system that excessively prioritises knowledge of the Court and the jurisprudence would be highly problematic as it could seriously risk rendering participation merely symbolic and meaningless.⁹⁴

While the *ReVision* project appears to recognise the need to combine both knowledge of the Court and interaction with the communities, it makes a proposal that results in internalisation of legal representation for victims. In particular, the presence of "external" lawyers from the situation

88. It was solved only partially because the changes were introduced through interpretation rather than through changes to the legal aid scheme (despite legal aid was reviewed in 2012, the Registry failed to take this opportunity to adapt aspects of the legal aid system for victims). For example, victims' legal representatives have an "investigations budget". Unlike the defence, the legal representatives do not often conduct investigations (at least prior to the reparations phase – there is no experience on legal representation needs at the reparations stage yet). The budget is therefore used for missions to interact with the victims, to pay the fees of field-based assistants and, where justified, to reimburse expenses made by intermediaries who assist the legal representation team. In addition, it is foreseen that the legal representative be assisted by a case manager. Because of the differences between defence and victims' representation, a legal representation team is far less involved in disclosure. In practice, persons hired under the "case manager" position fulfil a variety of tasks including legal research, coordination of field activities and management of victims' records, among others (the "case manager" denomination is therefore inadequate).
89. ICC-01/04-01/07-1328; ICC-01/05-01/08-1005; ICC-02/05-03/09-337; ICC-01/09-01/11-249; ICC-01/09-02/11-267; ICC-02/11-01/11-138; ICC-01/09-01/11-460; ICC-01/09-02/11-498; ICC-01/04-02/06-160; ICC-01/04-02/06-211; ICC-02/11-02/11-83; ICC-02/11-02/11-111.

90. A similar office was created for the Defence, the Office of Public Counsel for the Defence (OPCD).

91. Regulation 81(4) of the Regulations of the Court (original wording, as adopted by the Fifth Plenary of Judges, Official Document ICC-BD/01-01-04): "The Office of Public Counsel for victims shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate: (a) Legal research and advice; and (b) Appearing before the Chamber *in respect of specific issues* (emphasis added)." The jurisprudence in the first ICC case also established: "This is the first trial to come before the International Criminal Court and the Chamber [...] In line with the submissions of the victims' legal representatives, in the opinion of the Trial Chamber, during this early stage in the Court's existence it is critical that the Office concentrates its limited resources on the core functions given to it under the Rome Statute framework which, as set out above, is to provide support and assistance to the legal representatives of victims and to victims who have applied to participate (rather than representing individual victims)" (ICC-01/04-01/06-1211, para. 32). See also ICC-01/05-01/08-1005, para. 29.

92. The text of Regulation 81(4) was amended (Official Document ICC-BD/01-03-11) as follows: "The tasks of the Office of Public Counsel for victims shall include: (a) Providing general support and assistance to the legal representatives of victims and to victims, including legal research and advice, on the instruction or with the leave of the Chamber, advising on and assisting with the detailed factual circumstances of the case; (b) Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues; (c) Advancing submissions, on the instruction or with the leave of the Chamber, in particular prior to the submission of victims' applications to participate in the proceedings, when applications pursuant to rule 89 are pending, or when a legal representative has not yet been appointed; (d) Acting when appointed under regulation 73 or regulation 80; and (e) Representing a victim or victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice."

93. ICC-02/11-01/11-138, para 45.

94. Judge Van den Wyngaert considers that legal representation can only be symbolic. She asks the question: "And if it is only symbolic, how meaningful can it be?" (Van den Wyngaert 2011, *supra* note 6, p 489).

countries is included as a mere option and the “external” quality is eroded by the fact that such lawyers would have an employment or consultancy arrangement with the Court. For more details on the concerns that this raises for victims’ legal representation and participation, see Appendix.

B. Conditions for a mixed system of representation to operate effectively

A system that combines both expertise on the ICC and knowledge of and proximity to the victim communities (“mixed system”) can adopt multiple forms. Success of such a system would depend on a number of considerations. We list below a series of recommendations that, in our view, should be considered when putting in place any (mixed) system for victims’ legal representation:

- Consultation and regular contact with victims should be the cornerstone of any system. The system should be organised in such a way so as to serve the interest of the victim clients in the case at hand (as opposed to the interest of individual lawyers, the interest of the system, the interests of a victims’ office at the ICC or the interest of future/eventual cases or victims in other cases). Victims should be consulted on the choice of counsel⁹⁵ and the specific skills that they believe their legal representation team should have in order to genuinely represent their interests before the Court.⁹⁶
- A mixed system should not prioritise internal knowledge about the Court over knowledge from the field. Both are important. In particular, knowledge of the cultural, historical and social context, and views from the victims constitute the added value of victim participation. Any legal representation provided by the victims’ legal representatives should be based on those and on consultations with the victims, as opposed to being based on abstract notions or assumptions on the “general interest” of victims.
- A mixed system should encourage participation of external counsel, not restrict it. It should also allow and encourage their involvement in litigation strategy. It should give external counsel sufficient autonomy and, while promoting respect to the texts of the Court, should not pre-empt creative initiatives that could help advance interpretation of the rights of victims under the Statute.
- Decisions as to the lead counsel’s nationality and where s/he should be based should be taken following consultations with victims in the relevant cases. Among other considerations, security of the legal representative and ability to act independently should be taken into account.
- In addition to the lead counsel, close attention should be paid to the team composition. A relevant field component, with field-based staff working on a full-time basis on liaising with victims, is crucial.⁹⁷ A multidisciplinary approach, combining social work and psychological support in addition to legal expertise, is recommended. In this regard, taking into account the limited resources of legal representation teams, it is important

95. Rule 90(1) of the Rules of Procedure and Evidence. “In relation to *ReVision*, there is certainly a case for structural change to reduce duplication of work and confusing among victims. However in its current form, the proposal is for OPCV to decide on representation. This will compromise the key element of choice of counsel, and in turn the lawyer-client relationship. This has unfortunately been foreshadowed by the Kenya model. In all, the original vision of victims as a third arm of the Court is obscured, and a central element of the Court may be undermined. If change is necessary, it should not be predicated only on streamlining of process and budget.” (References to a speech by former ICC judge Sir A. Fulford in International Criminal Court: Progress Made, Progress Needed, *supra* note 13).

96. Given the difficulties inherent in consulting large numbers of victims on individual legal representatives, the Registry adopted a practice in several cases of identifying the criteria that a lawyer should meet to represent victims before the Court (see e.g. ICC’01/09-01/11-243-Anx3). Criteria may vary from one case to another and victims could be consulted on those.

97. Independent Panel report, *supra* note 8, para 100.

that different members' skills are used wisely. For example, while members based in the field should primarily focus on contacts with the represented victims, they should not be prevented from being involved in legal tasks when they have a legal background and can provide meaningful assistance.⁹⁸

- While lawyers representing victims should act independently, it is recommended that a forum be set up for victims' representatives to exchange experiences (with due respect to confidentiality obligations). The purpose of such exchanges should not be to ensure consistency in legal representation, but rather to allow legal representatives to benefit from the experience of one another on matters such as consultations with large groups of victims, communication with traumatised victims, interaction with intermediaries, etc. This would allow legal representation teams to learn from and build upon the experiences of other victims' lawyers. The current system in place at the ICC does not provide for any such opportunity (except for the practices developed by the OPCV and established across different cases in which OPCV members have been assigned as principal counsel). When transitioning into a new legal representation system, it would be appropriate to ensure that the good practices developed and put in place by legal representatives that have represented victims in the proceedings so far (both external counsel and OPCV) are not lost but collected and shared with future legal representatives.

98. It is our understanding that the Registry's Counsel Support Section has applied a policy affecting at least some legal teams, according to which field assistants will not be compensated for involvement in drafting of motions. We are not advocating for that type of task to be the primary focus of field assistants' work because the main purpose of those positions is to be in touch with the victims. However, we recommend that a more flexible approach be adopted.

MYTH #4

Victim participation is a matter solely for the Court and for the courtroom

Most reports discussing victim participation in ICC proceedings and initiatives to reform victim participation tend to focus almost exclusively on only one side of the victim participation experience: the Court and the courtroom. For example, when it comes to initiatives aiming at streamlining the victims' application process, discussions tend to focus on reducing the Chambers' and parties' workload and the legal requirements for participation. This is particularly the case when it comes to initiatives by the Chambers and by States Parties. The only exceptions to this have been some considerations of victims' needs or field dynamics offered in some reports filed by the Registry.⁹⁹ The Chambers have at times - but not always - taken these into consideration.¹⁰⁰

A. Heavy focus on court proceedings and overlook of actual participation dynamics

“There is a real risk that without better comprehension of the dynamics of victim participation on the ground, this core component of [Transitional Justice] policymaking may become a hollow principle or an empty ritual.”¹⁰¹

As explained in this report, it is our view that a very relevant value of victim participation lies in providing victims with an opportunity to express their views through meaningful consultations organised on a regular basis and easy access to their legal representative. This aspect of victim participation presents relevant challenges given a series of factors including the number of victims involved, security considerations that may affect contact between victims and legal

99. E.g. ICC-01/09-01/11-243-Anx2; ICC-02/11-01/11-45-AnxA, paras 26, 34-35; ICC-01/04-02/06-57, paras 8, 17. In the Kenya cases, the Registry has been ordered to submit “statistics and reports on the victims’ population” every two months (ICC-01/09-01/11-460, para 39; ICC-01/09-02/11-498, para 38). Interestingly, those reports also include relevant information on the situation of victims and victims’ concerns (reports available on the ICC website at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/registry/Pages/index.aspx for the Ruto & Sang case and http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/court%20records/registry/Pages/index.aspx for the Kenyatta).

100. For example, decisions on the victims’ application system in the Gbagbo case (ICC-02/11-01/11-86) and the Ntaganda case (ICC-01/04-02/06-67) took into consideration proposals made by the Registry in relation to grouping of victims and use of intermediaries. However, in the Gbagbo case, the Registry’s proposal on legal representation – which was based on consultations with victims – was dismissed by the Chamber (ICC-02/11-01/11-138, paras 25-35). When it comes to the Registry bi-monthly reports in the Kenya cases, it appears as a good initiative to include information on the situation of victims on the ground. However, it is unclear whether and, if so, how this information is/will be considered by the Chambers. It is also noted that very few actors outside the Court have focused on victim participation dynamics in the field. A few examples include academic initiatives such as Tenove 2013 (*supra* note 59), and an ongoing project by the Human Rights Center of the University of California, Berkeley.

101. Taylor 2014, *supra* note 16, p 4.

representatives, and the need to allow for sufficient time and resources for legal representatives (and their teams) to conduct meaningful consultations.¹⁰² While some consideration has been given to these matters through reforms to the legal aid scheme for victims, most discussions on improving victim participation focus almost exclusively on their role in the proceedings and their intervention in the courtroom.¹⁰³ This contrasts with some resolutions of the Assembly of States Parties which have recognised the importance of dialogue with victims and have encouraged increased field presence to optimise the implementation of victims' rights.¹⁰⁴

It is imperative that any assessment on successes and challenges and/or proposals for improvement of the victim participation regime considers both the legal aspects of victim intervention *and* victim participation dynamics on the ground. Such comprehensive understanding is necessary to avoid that victim participation develops as an abstract concept detached from its true added value for victims and for the proceedings.

Given that there is generally little information as to how victim participation unfolds in the field, we provide a brief description in the next sub-section.

B. Victim participation in the field: how does it work?

The description provided in this sub-section is based on consultations with some legal representation teams, as well as FIDH's experience in support to victims of international crimes participating in judicial proceedings. It does not intend to provide a comprehensive review of practices for engaging victims in the field, but rather seeks to give readers an understanding of some of the practices put in place by some of the legal representation teams in the situation countries.

- A key tool for consultation with victims is the organisation of **meetings with groups of victims**. Considering the numbers, organising one-on-one meetings is not feasible. However, individual meetings with some victims may be organised in margins of a group meeting to discuss special or confidential matters that concern the individual victim. The number of victims that will be brought together for a meeting will depend on a series of factors, including the timing, location of the victims, venue of the meeting, security considerations and the issues to be discussed. Some legal teams aim not to meet more than a certain number of victims (e.g. 50 victims) at a given time, so as to keep the meeting manageable and allow for sufficient interaction. Depending on victims' location and security considerations, meetings are organised either in the area where victims live or elsewhere. Therefore, in order to meet with their legal representatives, some victims may need to travel outside of their areas of residence. Meetings may be organised with a specific purpose, for example, to discuss an issue which is going to be decided upon in the proceedings, or to keep victims informed of developments in the case and ask for instructions. It is important that victims meet with their legal representative regularly, even when the pace of developments in the proceedings is low. If legal representatives do not meet with victims over a relevant period of time, victims may lose hope in the process or feel that they have been forgotten. It is also likely that misinformation will start circulating and that they will have no way to verify that. The pace of the proceedings may be very different from the pace of developments on the ground. Victims may want to raise security or other concerns with their legal representative, even if there are no relevant

102. *Ibid.*, p 32, 37.

103. E.g. Expert Initiative, *supra* note 8, p 175-201.

104. See e.g. Resolution RC/Res.2, adopted at the Kampala Review Conference (2010), para 2.

developments in Court.¹⁰⁵ Through interaction with legal representatives victims obtain accurate information about judicial developments, and get an opportunity to ask questions and receive clarifications. Meetings with victims should not be confused with regular ICC outreach meetings. The purpose of the meetings is to discuss specifically matters that are relevant to victims' rights in the proceedings (including their right to contribute to establishment of the truth and to receive reparations in case of a conviction). During the meetings, victims obtain explanations on the proceedings and implications that those have for them, and receive legal advice. Meetings normally include a presentation by the legal representative or another member of the team and an opportunity to make comments or ask questions (either as a reaction to the presentation or in response to specific questions).

- In between meetings, victims and the legal representation teams keep contact through **remote communication** (telephone and in some rare cases e-mails). While the legal representative and members of their team can be based in the situation country, they will not always live in the same location as the victims. For example, the legal representatives in the Kenya situation are based in Nairobi, while victims are spread over several locations in the Rift Valley (Ruto & Sang case) or live around Naikuru and Naivasha (Kenyatta case). In the Bosco Ntangada case, the local lawyers assisting the OPCV are based in Kinshasa, while victims reside in Ituri (however, they travel often to eastern DRC). In addition to telephone communication with individual victims, decisions can be notified and information can be spread to groups of victims by **using established networks in the communities**. For example, OPCV identifies victims belonging to the same family group. Other structures used by other legal teams include religious or other established groups in the communities. Communication can also be channelled through persons with a certain standing in the communities, for example *chefs de village*. In addition to helping spread information within their respective networks, religious or other community leaders may also help contact victims who cannot be reached by other means.
- **Victims** have the telephone number of the legal representative and members of their team, and **can contact them any time** with questions or if they have concerns.
- **Intermediaries** may assist with notification of some (non-confidential) decisions, monitoring victims' security and mobilisation of victims for meetings with the legal representation team. However, the need to resort to intermediaries is significantly reduced when legal representatives have a field team on the ground. The experience of the Court in use of intermediaries has highlighted the need not to abuse resort to intermediaries, to limit their intervention and not to use them to undertake core functions. The use of intermediaries in the context of legal representation should be limited (for example for logistical support). The relationship between victims and legal representative implies privileged client-counsel communication, which should be exercised directly to the extent possible. FIDH has expressed concerns that reducing support to legal representatives in the field will result in an increased need to use intermediaries.¹⁰⁶

105. When commenting on a proposal for changes to the legal aid system, two former legal representatives observed: "there seems to be an assumption that phases of reduced work before the Court are phases of reduced work in general. It is reminded that, when it comes to legal representation of victims, in particular, the pace of work is often determined by developments in the field." See S. Chana and M. Anya, Addendum to the Comments by the Legal Representatives in the Kenya cases (September 2012), [http://www.iccnw.org/documents/Addendum_to_legal_aid_comments_\(Sept2012\)_FINAL.pdf](http://www.iccnw.org/documents/Addendum_to_legal_aid_comments_(Sept2012)_FINAL.pdf), p 3.

106. See Appendix.

MYTH # 5

Discussions on victim participation are a matter for experts in court proceedings and States; consultations with victims and those who represent them do not add anything meaningful

The substantial focus on developments in the Court and in the courtroom discussed in the previous section has relevant consequences in consultation processes. Decisions that significantly affect victim participation are often taken without consulting victims and/or those who represent them.

A. Constant disregard for consultation with those who actually work with victims in most victim participation reform processes

FIDH has noted an alarming level of lack of consultations both in relation to judicial and institutional processes that fundamentally affect the rights of victims.

When it comes to judicial decisions, a relevant example is the decision at the trial stage of the Kenya cases which did away with the application system for the purpose of accepting victims to participate in proceedings and put in place a registration scheme.¹⁰⁷ The same decisions also made relevant findings on victims' legal representation.¹⁰⁸ The decision makes very substantive changes to the implementation of victims' rights, but victims and victims' legal representatives were not consulted prior to that decision. Nor were the Registry or the OPCV (at least there was no public and transparent consultation through judicial filings).¹⁰⁹ The decision appears to be in breach of the

107. J. Rozenberg, UK's first ICC judge attacks proposed restructuring of international court (4 November 2014), <http://www.theguardian.com/law/2014/nov/04/uks-first-icc-judge-attacks-reforms-court-adrian-fulford>. See also ASF 2013, *supra* note 10, p 7.

108. ICC-01/09-01/11-460; ICC-01/09-02/11-498.

109. ASF 2013, *supra* note 10, p 5.

procedural right to be heard before a decision affecting one party/participant's interests is taken.¹¹⁰

Institutional initiatives that have failed to (adequately) consult with legal representatives (and Counsel in general) include those aimed at the adoption of the Guidelines Governing the Relations between the Court and Intermediaries,¹¹¹ reforms to the legal aid system,¹¹² and the recent *ReVision* project.¹¹³ Legal representatives (and counsel in general) are also not frequently invited to meetings with States Representatives in the framework of the Hague Working Group.¹¹⁴ All these are issues that not only fundamentally affect the manner in which both legal representation and participation are organised, but also on which the Registry would benefit from the views of victims and those directly involved in interaction with victims.¹¹⁵ While the Registry's VPRS and, in some cases OPCV, may have been consulted or involved in the design of new institutional policies, that cannot be construed as sufficient for the purpose of consultations with victims and their representatives. Similarly, while consultations with civil society organisations are normally organised, those cannot replace inquiries made directly with victims and their legal representatives.

Victims' legal representatives have a direct experience of interaction with victims on the ground on a regular basis and can make very useful contributions to policy development and improvement of processes on the basis of their own experience. Their contribution can be complementary to that of entities within the Court and will certainly bring a different perspective.

When it comes to matters that, by their very nature, concern those outside the Court, it is crucial to obtain the views of those who assist victims throughout proceedings and have an outside perspective and direct field experience. In some cases, considering specific practical aspects of the legal representation experience is key to development of new policies.¹¹⁶

B. Importance of putting victims and those who represent them at the centre of reform processes

Lack of (sufficient) consultations with victims and those who represent them raises questions as to the reasons why they are systematically omitted. It raises questions as to whether the work of legal representatives lacks sufficient visibility and/or whether the views of victims who may be significantly affected by judicial or institutional processes are considered irrelevant.

110. The right to be heard in this context is a manifestation of the victims' right to access justice (UN Doc. A/RES/40/34, *supra* note 64, para 6(b)) as well as a principle of procedural law recognised by most legal systems around the world. For more information on the decisions affecting victims' rights in the Kenya cases, see M. Pena, What about the Victims of the Post-Election Violence? (March 2013), <http://www.ijmonitor.org/2013/03/what-about-the-victims-of-the-post-election-violence/>

111. Although legal representatives may have been consulted at the beginning of the process in respect of specific issues, the consultation process that led to the adoption of the Guidelines lasted several years. Legal representatives were not consulted after the word "Counsel" was added to the Guidelines in a late draft, making all provisions applicable to Counsel in the same manner as to Court organs and units. Consulting Counsel prior to finalising the Guidelines would have made it possible to identify inapplicability of certain provisions to Counsel or inconsistency between the Guidelines and other rules Counsels are to comply with, for example those resulting from the legal aid policy.

112. See e.g. references to a low degree of consultations with defence teams, which is also applicable to legal representation teams, in D. Hooper, Response to the Discussion paper 'Review of the ICC Legal Aid System' (February 2012), http://www.iccnw.org/documents/8212_D_Hooper_Q_C_response_legal_aid.doc, p 1.

113. While we understand that some legal representatives may have been consulted informally and on a one-to-one basis (FIDH is aware of only one counsel having been consulted in such a manner), there has not been a structured, open and transparent consultation process with victims' legal representatives.

114. For example, this year's Report of the Bureau on victims and affected communities, Trust Fund for Victims and reparations states: "A. Consultation process... Eager to benefit from the views of different stakeholders, States Parties, the Court, the Trust Fund for Victims (TFV), observer States, as well as NGOs were invited to attend all meeting." (ICC-ASP/xx/xx, para 5). *In process of adoption, official number not yet assigned; check text once published.*

115. ASF 2013, *supra* note 10, p 35.

116. For example, understanding how legal representation is organised in the field is key to any modification of the legal aid system and/or reforms that may affect the level of support that legal representatives receive in the field.

The *ReVision* process may provide an opportunity to increase visibility of the work of legal representatives, particularly in the field. We recommend that this be taken into consideration when implementing the proposed reform measures, especially those related to increased field presence.

There are few entities and persons that interact with victims throughout the participation experience (i.e. beyond the application process) and most of that interaction happens in the field. No decision, process or reform affecting victims' rights should be taken without ensuring that those entities and persons have been adequately consulted. Beyond the principle requirement that they should be consulted because they may be affected, there are basic practical considerations that make such consultations critical. Consulting those who actually interact with victims and are outside the Court would allow judicial and institutional processes to benefit from concrete insight as to whether a specific proposal could (or could not) work in practice. This would allow the Court to benefit from concrete advice and, in some cases, avoid loss of time and/or funds, or that measures designed out-of-touch with the reality on the ground turn out to be ineffective.

Conclusions and Recommendations

This report demonstrates that a series of “myths” regarding victim participation are unfounded. Such myths appear not to have taken into account decisions made by the Chambers of the Court that adequately regulate victims’ intervention, and neglect to carefully consider field dynamics and the positive impact of victim participation. In particular this report has shown that:

- 1. Victim participation does not constitute a burden to the proceedings nor creates delays or supplementary costs. Its impact on the ICC budget is minimal.**
- 2. Victim participation provides significant benefits both the proceedings and to victims.**
- 3. Both knowledge of the Court and the jurisprudence, and knowledge and understanding of the victim communities are necessary to represent victims. External independent legal representatives must be adequately involved in representation.**
- 4. The content and impact of victim participation go beyond the Court and the courtroom. It is important to adequately recognise the field aspect of victim participation.**
- 5. Victims and their legal representatives must be adequately consulted in all judicial and institutional processes that affect victims’ rights. They can make very significant contributions.**

This report argues that a fundamental shift of perspective is required when analysing victim participation. The dynamics of victim participation in the field must be incorporated in any assessment of the participation system and victims’ legal representation. Such dynamics should also be considered carefully in reform processes that affect the manner in which victims exercise their rights. The report also exposes that arguments made on the ineffectiveness of victim participation may be failing to consider a range of aspects including effective limitation of victim participation in court proceedings as per Chambers’ decisions, benefits that both the proceedings and victims themselves draw from the process and the impact that participation could potentially have for long-term establishment of the rule of law in the countries affected by the crimes.

A series of recommendations are made throughout the report. The list below summarises the most relevant recommendations.

To all actors concerned:

- More in-depth studies should be undertaken on the impact of victim participation so that processes and practices can be adequately adjusted in order to ensure that victim participation can be meaningful for all those involved.
- Assessments on victim participation should consider all relevant aspects of what participation entails and not limit themselves to considerations regarding the Court and the proceedings, but also assess the field engagement aspect of participation.

To the ICC:

- Ensure that victims and those who represent them are consulted in all judicial and institutional initiatives that might affect the interest of victims.
- Ensure that all reform processes that affect victim participation give adequate consideration to both the needs of the Court and those of the victims.

To the ICC Registry:

- Reconsider the proposals contained in the *ReVision* Basic Outline of October 2014 so as to ensure that legal representation can be exercised independently and adequately supported in the field.
- Contribute to enhancing the visibility of legal representatives and their participation in all relevant processes across the Court.
- Considering facilitating a forum that would allow legal representatives to exchange practices about legal representation; and ensure that good practices put in place over the last eight years are not lost due to the *ReVision* reforms.

To States Parties:

- Understand that the impact of victim-related services on the total ICC budget is minimal and refrain from introducing cuts to the budget that may affect the quality of victims' participation or legal representation.
- Request further information from the Registrar as to the financial impact of the *ReVision* project proposals.
- Closely and carefully monitor the *ReVision* process in order to ensure that the proposed changes do not impact negatively on victims' rights to exercise their rights.
- Invite legal representatives to meetings of the Bureau Working Groups where matters related to victims are discussed, in the same manner that that is done with other external actors (e.g. NGOs); and invite them to share experiences with States Parties as appropriate.

To legal representatives:

- Ensure that victims are at the centre of all representation practices through regular and meaningful consultations.
- Continue to develop practices to engage high numbers of victims throughout the proceedings in an effective and meaningful manner.

Appendix :FIDH Comments on the ICC Registrar's ReVision proposals in relation to victims

Mr Herman von Hebel
Registrar of the
International Criminal Court

18 November 2014

Dear Mr Registrar,

The International Federation for Human Rights (FIDH) has been following developments around the *ReVision* process. We would like to take this opportunity to congratulate you on such initiative. We believe that enhancing the efficiency, effectiveness and sustainability of the Registry's performance by reconsidering its vision, mission and values, and revisiting its structure and managerial framework is a laudable effort. As external stakeholders we have also observed fragmentation, predominance of a bureaucratic approach and poor internal communication, and acknowledge that this must be addressed. We would like to express our support to this process and emphasise our will to contribute on matters on which we have expertise in order for this to be a successful endeavour.

We have met with you and members of your team on 2 September and 15 October. In those meetings, we heard about the *ReVision* project in general and the proposals envisaged on victims and defence. We received the document "Basic Outline of Proposals to Establish Defence and Victims' Offices" (Basic Outline) on 28 October and attended the Hague Working Group meeting where you gave an update on the *ReVision* project on 30 October, where we shared some of our concerns. The comments contained in this letter are based on information received in those meetings as well as that contained in the Basic Outline.

Because of our experience in support of victims of mass atrocities to access justice, we have taken a keen interest in the change proposals that you are envisaging with regard to the Registry structure to support applicant and participating victims. We express our sincere disappointment that, despite numerous requests made by our non-governmental organisations (NGO) colleagues on behalf of our organisations and repeated promises from your staff, we received the document outlining the proposals regarding victims only recently. When it comes to matters touching upon the restructuring of the units supporting victims to exercise their rights, we understand that you have only held some consultations with Registry staff and in particular with the units concerned. We also note that, to the best of our knowledge, none of the members of the Project Board have direct experience working and interacting on a daily basis with victims of mass atrocities. We regret that external stakeholders, including NGOs and external Counsel representing victims in cases currently before the Court, were not meaningfully involved from an earlier stage in the process. While some external Counsel may have been involved in individual consultations, **there has not yet been an open, transparent and structured consultation process.** We believe that this is regrettable because, as we will explain below, victim participation is a matter that, by its very nature, concerns those who are outside the

Court. Therefore, benefiting from the view of those who support victims and outside observers acquainted with the realities of victims in the situation countries is crucial. We see dissemination of the Basic Outline to NGOs and States Parties as the starting point for consultations. However, we worry that the process is moving quickly and that there may not be sufficient time to give adequate considerations to relevant concerns in relation to the proposals. We understand that you foresee that you will be presenting proposals for amendments to the Regulations of the Court as soon as this month.

These comments aim to contribute to the debate by providing further points for reflection. We believe that the *ReVision* project provides a valuable opportunity to reinforce victims' access to the Court and our contributions aim to help attain that. We realise that the road ahead for implementation of the reform proposals will require more detailed adjustments and fine-tuning. The aim of this paper is two-fold:

- a) To share concerns that we have in relation to the proposals and advocate for adjustments at this point; and
- b) To contribute to fine-tuning of the proposals on the way towards implementation.

Specific comments on the proposals

We understand that the proposal for changes concerns a number of areas, including *inter alia* the merging of two structures supporting victims, namely the Victim Participation and Reparations Section (VPRS) and the Office of Public Counsel for Victims (OPCV). **We will focus in this document on what we believe is the most fundamental aspect of this reform and that is the system for victims' legal representation.** With regard to the areas that we do not address in this paper, we consider that we have little information at this point and that the impact of those on the ability of victims to exercise their rights will depend upon how they will specifically be implemented.

Unlike other proposals for reform, which may be structural and alter mainly the way in which the Registry is organised without necessarily having an impact on those outside the Court, reforms to the legal representation system crucially affect victims' fundamental rights. According to the Rome Statute, victims have a right to participation. Legal representation is the channel that victims use to express their views and concerns. This is why effective representation is necessary for participation to be meaningful. As will be argued below, **effectiveness of legal representation must be analysed not only from the perspective of the Court and the courtroom, but also and fundamentally, from the perspective of victims.** Their right to participate will only be realised if legal representation is exercised in such a way that it puts victims at the centre of consultation initiatives and allows them to practically and really be part of the proceedings, even through remote non-physical intervention. We respectfully disagree with the Basic Outline's statement: "The proposals do not adversely impact... the rights of victims to participate in proceedings before the Court."¹¹⁷

We have understood the reform as far as it concerns legal representation as follows:

- Legal representation will be "internalised", in the sense that it will be primarily conducted by lawyers who are staff members of the Court.
- External Counsel from the situation countries or having sufficient knowledge of those countries may be hired for each case. They will become staff members or consultants for the Court and their main task will be to ensure contact with the participating victims. Legal aid for victims will be eliminated.
- The proposal for such a model of representation is based in the case-law of the Court.
- The intervention of external Counsel would facilitate transfer of knowledge and capacity-building of the latter through their involvement in the cases together with ICC staff lawyers.

We would like to note at the outset that the question of victims' legal representation presents challenges that are specific to the nature of the crimes (high numbers of victims) and the distance between the Court and the situation countries. In this regard, we have observed that discussions

117. Basic Outline, p. 1.

around a legal representation system at the ICC have often considered the fact that “victims are (too) far” as a challenge. Actually, the victims are where they ought to be, they are where the crimes were committed, they live in the areas where they have always resided (with the exception of internally displaced people and victims in exile). What is far is not the victims, but the seat of the Court. We believe that this change of perspective is important. The premise must be that the Court needs to adapt to victims; it is not for the victims to adapt to the Court. In short, victim participation (and legal representation) must be understood from the perspective of the situation of the victims, not the perspective of the courtroom.

Scope of the revision

Our first observation concerns the scope of the *ReVision* project as far as it is related to modifications in the legal representation system. According to the Overview of Planned Activities for the *ReVision* project, the project scope covers: a. Organisational design; b. Delegations, roles and responsibilities; c. Policies and regulatory documents; d. Work processes, workflows and work methods; e. Internal communication and coordination; f. Key performance and workload indicators; g. Management and operational systems; h. Leadership and management development; i. Staff and personnel issues; j. Staff morale and engagement. Overall, the *ReVision* project covers very relevant structural and managerial matters within the Registry. Legal representation is a substantial matter that fundamentally affects the rights of victims under the Rome Statute: the right to legal representation and the exercise of their right to participation. **FIDH is concerned that, in proposing such changes, the Registrar appears to be going beyond the scope of the *ReVision* project** and encroaching on matters that fundamentally affect victims’ trust and relationship to the participation process, and management issues that fall within the responsibility of the judges.

While the Registry is in charge of administration of legal aid and while the Offices of Public Counsel, including the OPCV, fall within its remit, it is important to distinguish between administrative powers, on the one hand, and interpretation of the rights of victims under the Statute, on the other hand. We note that the Basic Outline states:

Within the Victims Office, there will be a pool of independent lawyers [*sic*] would be available for assignment to (groups of) victims at all times, much like a Public Defender’s Office. Furthermore, an *ad hoc* “external” counsel could also be added in each case, either as a lead or co-representative and would form an integral part of the team. Preference would be given to a lawyer from the situation country or with sufficient knowledge of that country (or particular group of victims) in order to complement the inhouse capacity. This Counsel would typically be based in the field to ensure closer ties and communication with the victims.¹¹⁸

FIDH is concerned that the reform measures as envisaged would practically have the effect of depriving victims of the option of having external independent counsel represent them. The presence of external counsel is foreseen as an option, to top up internal capacity. In our view, the presence of external counsel at lead counsel level should be maintained as a matter of priority. While we understand that certain limitations need to be established by the Registry given that victims generally cannot afford the cost of legal representation (such as, for example, grouping and common legal representation),¹¹⁹ we are not convinced that victims should be deprived of the possibility of benefiting from legal advice of external independent counsel because they are indigent. That reasoning would also lead to internalisation of representation for indigent defendants.

Reasons for change

According to the information that we have received, the reason for the proposed measures in respect of victims’ legal representation is the case-law of the Court’s Chambers. In this regard, we would like to make the following observations:

118. Basic Outline, p. 5.

119. As per Rule 90(2) of the Rules of Procedure and Evidence.

- There have been different approaches in the case-law through the different cases. The following models have been put in place:
 - o *Lubanga case*: Two teams of external legal representatives (various lawyers who originally assisted victims to fill out applications gathered together in two teams), and one small group of dual status victims represented by the OPCV.¹²⁰ Direct representation by OPCV was an exception, as Trial Chamber I ruled that the main function of OPCV should be to provide support to legal representatives rather than representing victims.¹²¹
 - o *Katanga case*: Two common legal representatives representing groups of victims with a conflict of interest. The concept of a support structure in the field was introduced (one legal assistant).¹²²
 - o *Bemba case*: Initially, two common legal representatives representing very large numbers of victims in different locations. After one of the representatives passed away, all victims have been represented by one legal representative. Each legal representative had the assistance of one case manager and minimal support in the field (one legal assistant).¹²³
 - o *Banda case*: External lead counsel and associate counsel, with the support of one assistant and one case manager.¹²⁴
 - o *Ruto & Sang case at pre-trial*: An external common legal representative selected through a competitive selection process, with support of one legal assistant, one case manager, and 2-3 field assistants in the field.¹²⁵
 - o *Kenyatta case at pre-trial*: An external common legal representative selected through a competitive selection process, with support of one legal assistant, one case manager, and 2-3 field assistants in the field.¹²⁶
 - o *Gbagbo case at pre-trial*: Principal counsel from the OPCV; external counsel based in Côte d'Ivoire; and a case manager.¹²⁷
 - o *Ruto & Sang case at trial*: Lead external counsel based in the field, assisted by the OPCV, one case manager and four field assistants.¹²⁸
 - o *Kenyatta case at trial*: Lead external counsel based in the field, assisted by the OPCV, one case manager and four field assistants.¹²⁹
 - o *Ntaganda case at pre-trial*: Two teams of counsel from the OPCV to represent two groups of victims with conflict of interest. Each counsel is assisted by an assistant to counsel based in the field.¹³⁰
 - o *Blé Goudé case at pre-trial*: Principal counsel from the OPCV; a team member based in Côte d'Ivoire; and a case manager.¹³¹
- The fact that there have been different approaches shows that there has been an evolution in the conceptualisation of victims' legal representation before the Court. However, it is difficult to state that that evaluation has come to a halt, especially considering that the legal representation systems that have been put in place - including in the most recent cases - vary from one case to another.
- In relation to the case law on which the proposals for change are based (namely, the Gbagbo case, the Ntaganda case and the Blé Goudé case), it is noted that this has emanated from only two (pre-trial) chambers. Decisions have been made in the pre-trial phase of the respective cases only. When making a decision about the appointment of OPCV, Pre-Trial Chamber I's Single Judge justified her decision "in light of the short time remaining until

120. As recalled in ICC-01/04-01/06-2842, para. 20.

121. ICC-01/04-01/06-1211, para. 32. See also ICC-01/05-01/08-1005, para. 29.

122. ICC-01/04-01/07-1328.

123. ICC-01/05-01/08-1005; ICC-01/05-01/08-2964.

124. ICC-02/05-03/09-215; ICC-02/05-03/09-337.

125. ICC-01/09-01/11-249.

126. ICC-01/09-02/11-267.

127. ICC-02/11-01/11-138.

128. ICC-01/09-01/11-460.

129. ICC-01/09-02/11-498.

130. ICC-01/04-02/06-160; ICC-01/04-02/06-211.

131. ICC-02/11-02/11-83; ICC-02/11-02/11-111.

the scheduled date for the confirmation hearing.”¹³² In another case, she noted that the decision to appoint counsel from the OPCV was “based on considerations of efficiency and expertise that the OPCV can offer in the representation of victims *at this stage of the proceedings*” (emphasis added).¹³³ It is at this point too early to gather data and come to conclusions as to the impact and benefits of such a system.

In our view, **the question of the ideal system for legal representation of victims requires a thorough analysis and evaluation of the various systems that have been put in place so far, and the benefits and disadvantages that each of them has offered.** No such assessment appears to have been undertaken as a basis to develop the proposed reform. Victim representation in international criminal trials is a new feature in international law and we dare to say that none of the systems put in place so far has been perfect. We believe that a critical evaluation should be made and that such an evaluation should go beyond concluding that one or another system has been inefficient. It should look at the reasons why the different models have operated in different ways and in particular, evaluate the limitations that each of them faced and how those could be addressed. For example, the Basic Outline identified the following problem:

The possibility for assignment of either OPCV and external Counsel (under the Court’s legal aid system) as common legal representatives of victims has in instances led to competition and tensions between these two groups, in addition to sometimes conflicting views on how to approach the representation in a specific case...¹³⁴

This is but one of a number of factors that may have affected the quality and effectiveness of victims’ legal representation in past cases. We note that conflicts may also arise as a result of diverse views of victims with different interests. We submit that in order to optimise legal representation, the Registry should undertake a comprehensive evaluation. This would require a critical approach to decisions made by the Registry in the past in relation to legal representation, including regarding selection of lawyers, quality and amount of training, availability and use of legal services support, and functioning of legal aid for victims, among other issues.

Structural issues: independence and hierarchy

The proposal to internalise legal representation raises, in our view, fundamental principle issues. First of all, it **does away with the idea that victims have a right to independent legal advice. Lawyer’s independence is a fundamental principle of the legal profession.** This is why in certain countries around the world (for example, France) lawyers are not allowed to take employment as per their code of ethics. We note that the Basic Outline establishes that

The Chief of the Victims Office would not supervise the Counsel within the Office nor would he or she be able to give them instructions on how to conduct representation. The Counsel would be independent in the performance of their representation role and subjected to the Code of Professional Conduct.¹³⁵

While it is possible for structures to be designed in such a way that they are independent within the Registry, we submit that a lawyer that is an employee of the Court could nevertheless be limited in its ability to act fully independently. We believe that restrictions to independence do not necessarily and always arise as a consequence of specific structural limitations, although they may (for example, if the lawyers’ unit must have its budget approved by the Registrar). Limitations to independence may also arise as a consequence of belonging to an institutional culture and perception limitations. **We submit that victims’ views about the ICC and the proceedings, including harsh criticism, could not be understood fully and be acted upon in a fully independent manner by persons**

132. ICC-02/11-01/11-138, para. 42.

133. ICC-02/11-02/11-111, para. 14.

134. Basic Outline, p. 3.

135. *Ibid.*, p. 5.

who are employees of the Court. Furthermore, we recall that it is of utmost importance that the interest of victims should be the primary concern that guides all of the lawyer's motions and interventions. **We are concerned that lawyers who are staff members of the Court may at times have in mind other interests, such as policies of the Court or of their own office or (actual or possible) interests of clients in other (present or future) cases.** We are concerned that such other priorities may detract the lawyer's attention from strictly and solely following the clients' instructions. This could lead both to motions that are not necessarily in the victims' interests or at least not prioritised by the victims (for example, specific ways of approaching cases that the office follows systematically in all cases as a matter of policy) or lack of action to act upon the victims' interests including by introducing innovative motions.

The experience of the cases so far shows that independence also allows Counsel to undertake actions which may be seen as going beyond their strict legal representation mandate in proceedings, but that are nevertheless in connection with the ICC cases and in the interest of the victims. For example, the legal representative in the Kenyatta case addressed a letter to the United Nations' Security Council in relation to matters on which the victims he represented had a keen interest on (request for suspension of prosecutions in the case in accordance with article 16 of the Rome Statute).¹³⁶ Other legal representatives have made use of their position to highlight victims' needs and advocate for assistance in their favour.¹³⁷ Actions of such nature could be seen by the ICC as not strictly related to the proceedings and would, most likely, not be undertaken by ICC staff members – including because they could create real or perceived conflicts with other parties or institutions. From a victim's perspective, however, strict compartmentalisation of tasks can be detrimental and may certainly not be in the best interest of the victims. Victims have a myriad of needs and justice is one of them. They do not always have access to other interlocutors and will often request of their legal representatives a broader role than the one they are called to play. We believe that it should be up to each legal representative to make up their mind, in all independence, as to whether they would want to take up tasks that go beyond representing victims in the courtroom. While we are not advocating for the Registry to specifically encourage such initiatives, **we believe that the Registry should not foreclose such a possibility.** Internalisation of legal representation would produce that result.

A problem that is related to independence is the question of reporting and supervision. We understand that the "pool of lawyers" and independent lawyers will not be supervised by the Chief of the Victims Office. However, we do not have at this point sufficient information as to how the Victims' Office, in particular the section dealing with victim representation, would be organised. **We are concerned about any reporting requirements and performance appraisals that lawyers who are staff members may be subject to.**

Elimination of legal aid for victims

We understand that a consequence of internalisation of legal representation would be the elimination of legal aid for victims. We acknowledge that legal aid has posed significant problems to legal representatives in the past, and that the legal aid system has been and will continue to be closely monitored by States Parties. We note that most of the problems encountered by legal representatives in relation to legal aid do not arise from the existence of a legal aid scheme, but rather from problems in its conceptualisation (the system for legal aid for victims, as conceived at the ICC, is still not fully adapted to the situation of victim clients as it originated as a copy of the legal aid system for the defence) and numerous hurdles resulting from the management of legal aid by the Registry (for example, excessive amount of time and resources spent by legal teams to obtain and justify resources; being at the mercy of unclear policies; etc.).

We understand that costs for legal representation of victims would be incorporated into the Court's regular programme budget. Not having seen a proposal as to what resources will be allocated, we

136. Letter by Fergal Gaynor, legal representative of victims in the Kenyatta case, to members of the United Nations' Security Council, 3 November 2013, available at: http://www.iccnw.org/documents/Letter_to_UNSC_from_the_Victims_Lawyer_in_the_Kenyatta_case.pdf (last accessed 28 Oct 2014).

137. *Avocats sans frontières*, Modes of Participation and Legal Representation (2013), p. 36.

cannot offer specific comments on the extent of such resources. We note that the Basic Outline states that internalisation of legal representation would allow the Registry to provide a more cost-effective and efficient service.¹³⁸ However, **no specific and thorough cost study of the implications of the new structure appears to have been undertaken.** For example, there is an assumption that staff members will be able to work on more than one case simultaneously. However, that will depend on the Office's staffing levels.

With regard to the concept of internalisation of legal aid costs, we make the following observations. First, **elimination of legal aid will deprive lawyers of the possibility of challenging the extent of resources allocated for legal representation when those are insufficient.** Up until now, the existence of a legal aid system - and acknowledgement that counsel may disagree with the Registry as to the resources allocated to their team following their independent assessment of what is needed - provided counsel with the possibility to request a judicial review of legal aid decisions.¹³⁹ While an office within the Registry may (or may not) have more leverage within the Registry to advocate for resources when needed, the litigation avenue via an independent request to judges would be foreclosed.

Second, **another consequence of internalisation of costs will be the loss of a certain degree of flexibility and likely increase in costs for compensation of individual lawyers and other team members.** Indeed, once representation is internalised, all counsel and staff involved in representation will have to be compensated in accordance with the ICC salary scale. In the past, external counsel have been allowed to apply some degree of flexibility to use their legal aid budget for compensation of field staff. For example, given that the ICC salaries are too high for some local economies, they could split the budget in two and hire two field assistants with the funds initially allocated to one position. In addition, counsel who become ICC staff members will be entitled not only to salaries but also to additional benefits. In 2012, the Assembly of States Parties reduced the level of compensation offered to counsel¹⁴⁰ as it understood that it was not necessary to compensate, through legal aid, for benefits that they fail to obtain due to their independent status. Internalisation of legal representation costs will amount to reinstating those costs.

We have not been provided with a description of how the unit in charge of representation will be composed. **We caution that internalisation could lead to the creation of permanent positions.** Arguably, an advantage of internalising legal representation, including creation of new resources, could be optimisation of use of resources as staff could work on various cases simultaneously. While we agree that that is an advantage, we believe that it does not outweigh the disadvantages of internalisation that we outline in this letter.

Perceptions and reality: double standards

According to the model proposed by the *ReVision* project, international counsel ("pool of lawyers") will lead representation in the cases, while local lawyers may assist in such representation through communication with the victim clients. The intervention of counsel from the situation countries or with specific expertise on the country concerned appears as an option. The Basic Outline states:

an ad hoc "external" counsel *could* also be added in each case for the duration of the case, either as lead or co-representative and would form an integral part of the team... This Counsel would typically be based in the field to ensure closer ties and communication with the victims (emphasis added).¹⁴¹

Such a way of organising legal representation raises concerns of application of double standards. We believe that the most relevant aspect of victim participation takes place in the field, by genuinely involving victims through information and taking of instructions. However, transforming those

138. Basic Outline, p. 5.

139. Regulation 83(4) of the Regulations of the Court.

140. ICC-ASP/11/2/Add.1.

141. Basic Outline, p. 5.

views into legal arguments and, most importantly, participating to the conception of a litigation strategy constitute the other side of that work and it is where experienced lawyers can provide a substantive added value. **We are concerned that local counsel could be relegated to assistants,¹⁴² with no opportunities to participate to decision-making in relation to the litigation strategy and no appearance before the Chambers in The Hague.** Ensuring that they have such an opportunity and could plead in court if necessary would prevent applying a patronising approach. **We are concerned that prioritising international counsel and making assistance by external counsel optional perpetuates a top-down approach** in matters involving assistance from situation countries' individuals and organisations, which has been typical of ICC policies over the years (for example, use of intermediaries). It makes no sense to apply a top-down approach to victim participation, a matter which, by its very nature, has been designed to do exactly the opposite: favour a bottom-up approach. Allowing for external independent advice to victims without any ties to employment contracts with the ICC is a guarantee for that bottom-up approach to be implemented. And so is the genuine involvement of external counsel across all decisions in relation to the case and including pleading in the courtroom.

An argument that has been made for local counsel to be employed is that they would benefit from capacity building. They have limited knowledge about international criminal proceedings and involvement in ICC cases through would provide them with the opportunity to acquire competences in that field. While this is true and we believe that participation in ICC proceedings represents a priceless opportunity for local lawyers, it is equally true that they also have much to share and from which others at the Court could learn. In other words, capacity building works both ways, with local lawyers having invaluable knowledge to share on the relevant conflict, the political and historical context, domestic law and litigation experience in domestic proceedings.

Finally, involvement of local lawyers as mere assistants could pose perceived and actual problems in relation to the victims' degree of involvement. Firstly, victims may find that there is a disconnection between them and the ICC as the lawyer whom they meet and trust is not the same that pleads their case before the judges. Second, if the only role of the local lawyer is to act as an intermediary that relays views and concerns, that creates an additional (and unnecessary) lawyer of communication between the lead counsel and the victims.

Perceptions and reality: duplication of tasks

Internalisation of legal representation would favour a perception that the ICC applies different standards to victims and to the Defence. The *ReVision* project proposes that while Defence should be completely externalised, victims' representation should be completely internalised (although an argument is made that external counsel will continue to be involved even if as consultants or staff members, in practice that amounts to internalisation and elimination of external independent counsel). **This reinforces the perception that victims are and should be closer to the institution and closer to the prosecution.** It overlooks that victims do not always align with the prosecution and can be critical of both the institution and the prosecution.

Internalisation of legal representation could in practice actually lead to increasing identity between submissions by the prosecution and submissions by victims' representatives. Critics of victim participation have objected that the participation of victims may amount in practice to having the accused have to face two prosecutors. If the reform goes ahead, they may have a point. The main proposal of the *ReVision* project in relation to legal representation, i.e. internalisation of legal assistance, is based upon the idea that knowledge of the Court and the ICC jurisprudence is very relevant to act as counsel. (Based on this notion, Defence representation should also be internalised, because it is similarly important for Defence Counsel to be acquainted with international criminal law jurisprudence to represent the interests of the accused.) **The more knowledge of the substantive and procedural law is prioritised over the knowledge of the context and understanding of the**

142. This is arrangement put in place by the decisions in the Gbagbo, Blé Goudé and Ntanganda cases, where external counsel have been involved as assistants to counsel or team members. Following consultations with the OPCV, we understand that the Office has made a decision to appoint counsel with sufficient experience to plead in court.

victims concerns, the more chances there are that representation becomes a legal exercise detached from the actual views of victims. It also increases the chances of high number of filings on procedural and other issues that may not necessarily have a link with the victims' interest. When contacts with the specific personal views of victims are lost, representation becomes based on the "general interest" of victims (i.e. what would generally and normally be in the interest of victims according to an abstract and theoretical interpretation, as opposed to resulting from a hands-on enquiry). The prosecution already represents such a general interest, and having another entity representing the same interest becomes superfluous.

In this regard we note also that the Basic Outline mentions a number of positions to be based presumably at headquarters: legal officers, case managers, legal assistants and data processing clerks.¹⁴³ **The change proposals, however, fail to elaborate on the specific structure that will be put in place** to support victim participation throughout the proceedings and legal representation **in the field**. The Basic Outline indicates that "the new envisaged set up for field presences will ensure effective and efficient provision of support to the teams in the field."¹⁴⁴ While field services may provide general support in areas such as security, information technologies and basic logistics, coordination of victim participation in the field requires assignment of personnel specifically devoted to that task. **It is erroneous to believe that one external counsel alone (if appointed at all) will be able to maintain regular contact with large numbers of client**. The experience of latest cases at the trial phase (Ruto & Sang and Kenyatta cases) demonstrates that support of field assistants is essential. Field assistants are young(er) lawyers with field experience. They support counsel by regularly calling clients and organising meetings between victims and the legal representatives. Such activities demand mobilisation activities and a great degree of logistical coordination. Lack of field support for these tasks can easily lead to overreliance on intermediaries. Field assistants develop a relationship of trust with victims and victim communities. This is why it is important that persons are specifically selected and assigned to this task. **Having field office staff perform such tasks on an ad hoc or intermittent basis would be inefficient** given the extent of involvement required and the need to maintain continuity in relation to persons interacting with represented victims. It is an intense full-time job and confidentiality and security plead against delegating contacts with victims, even if partially, to intermediaries (except, to a limited extent, for example to support mobilisation and dissemination of some categories of non-confidential information).

Importance of innovation and flexibility

The bottom line is: staff members will never have the same view about victims' concerns as those who are outside the Court. It is a matter of positioning and perception and recognising staff lawyers' independence is simply not enough. **It is inevitable for someone who is employed by the Court to be influenced or have his/her interpretation coloured by institutional policies and/or the experience of other cases**. While experience of representation in other cases is always very valuable, such experience needs to be put at the service of the victims and not the other way around (which is what a system favouring primarily knowledge of the ICC and its jurisprudence could promote).

In this regard, it is important to recall that victim participation and victims' legal representation are new features in international criminal proceedings and that it has only been implemented in courtrooms for about eight years. This is a very short time in the history of developments in international law. There is certainly a lot of space for further evolution. We fear that institutionalising the latest jurisprudence of the Court in relation to legal representation will result in halting further judicial interpretation as to what the ideal system for victims' legal representation could be. We are also concerned that that may also affect evolution of the notion of victim participation, as legal representatives play a crucial role in interpreting provisions on victims' rights and pleading for interpretations before the judges. In this regard we disagree that there should be consistency in legal representation.¹⁴⁵ On a matter as new as victim participation there is certainly no unified view as to how participation should unfold in practice. At this point in the evolution of the legal concept

143. Basic Outline, p. 5.

144. *Ibid.*

145. Basic Outline, footnote 7.


and for the benefit of those most interested, the victims whose rights are at stake, it is important to favour promotion of different views and interpretations. **Concentrating victim representation at the ICC in one office would undoubtedly be detrimental to the evolution of victims' rights.** It is possible that the office will develop its own interpretation of victims' rights and become closed off to innovation. Innovative strategies are important to expand interpretation of victims' rights.

Lastly, a disadvantage of institutionalising one interpretation of how legal representation would look would be the loss of flexibility to adapt to the traits and needs of different victim communities and country settings. In some of the cases before the Court, the Chambers came to different conclusions as to whether victims needed a local lawyer or an international lawyer, a lawyer based abroad or a lawyer based in their country, as well as in relation to the composition of the team that was needed to adequately support communication with clients. It is unclear what degree of flexibility will apply once representation is internalised. It is also unclear whether judges will make pronouncements on the structure for legal representation, or whether those decisions will be of a purely administrative nature. Most importantly, **it appears as though victims will not be consulted on their needs in relation to legal representation.** For example, the Basic Outline does not indicate how counsel will be appointed and whether victims will be consulted at all in relation to their needs regarding legal representation. The reform proposals amount to an assumption made at the outset that what is best for all victims in all cases in all situations is to have a lawyer (lead counsel) who is a staff member of the ICC and could often come from a country that is not theirs.

*

We thank you for considering our serious concerns regarding the *ReVision* proposals on victims' legal representation and remain at your disposal for any clarification.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'K. Lahidji', is shown within a light gray rectangular box.

Karim Lahidji
FIDH President



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inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

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