Madam Registrar,

Re: The Registry's consultation on the amendments to the Regulations of the Registry

I am writing on behalf of the Victims’ Rights Working Group in response to the Registry’s call for input from civil society on the proposed amendments to the Regulations of the Registry of 27 April 2012. The Victims Rights Working Group (VRWG) welcomes the initiative taken by the Registrar to review the Regulations of the Registry and is appreciative of the efforts to share the proposed amendments in advance of a seminar with relevant stakeholders which will take place from 4-6 July 2012.

While the proposed revision covers a wide range of issues, we have focused only on the changes which we believe may impact victims’ ability to exercise their rights before the Court recalling Regulation 4(4) of the current Regulations of the Registry which requires that “Amendments to these Regulations shall not be prejudicial to the rights of other participants in the proceedings.” In the context of the current consultations, the VRWG also stresses, as expressed in Regulation 1 of the Regulations of the Registry, the need to ensure that changes to the Regulations do not, knowingly or unknowingly, contradict the Statute, Rules of Procedure and Evidence (RPE) and the Regulations of the Court.

As the format of the online consultation suggests a review process of regulation per regulation, we only highlight in this letter general issues and considerations that the Registrar may wish to consider in the lead up to the July seminar. In the Annex to this letter, we also provide some preliminary comments in relation to specific changes to actual regulations.

1. Main issues in the proposed amendments

Protection

The VRWG has concerns over the proposed change to Regulation 79 and others to include "on account of testimony" in relation to protection obligations (as
detailed in the attached table). While we take note of the explanation given that this wording is being added to be consistent with Article 43(6) of the Statute, we submit that such wording seems to restrict the applicability of the provision to persons at risk as a result of testimony given by a witness at court. In that regard it is worth recalling that the Appeals Chamber’s jurisprudence clearly provides for broader protection obligations and has recognised that Rule 81(4) of the Rules of Procedure and Evidence should be read to include the words “persons at risk on account of the activities of the Court.” Thus we would welcome further information on how the Registry envisions this new wording, if maintained, would be applied.

**Monitoring of Counsel**

The Code of Conduct for Counsel provides for disciplinary mechanisms in case of misconduct through the establishment of a Commissioner in charge of investigating alleged misconduct and of a Disciplinary Board to rule on the alleged misconduct. Under the Code of Conduct, the Registry is able to bring complaints to the Commissioner directly and victims, as “person or group of person whose rights or interests may have been affected by the alleged misconduct” can submit a complaint to the Registry which shall transmit it to the Commissioner.

The VRWG notes the proposal for the Registry to set up a mechanism “to monitor the quality of performance by counsel” and adds that “such mechanism shall be respectful of the independence of counsel.” The VRWG strongly agrees with the need to ensure victims and accused benefit from the highest quality legal representation. The Group is also aware that it is often difficult for victims on the ground to bring complaints on the quality of the representation they receive, the level of contact/consultation with and by their counsel or the type and/or frequency of information they receive. Certainly, in many respects these limitations are dictated by the budget afforded to legal representatives (determined and controlled by the Registry) to meet with and advise their clients, and we would be interested to learn further how the Registry intends to factor in such limitations in the ability of counsel to effectively carry out their work. The VRWG submits that there is a conflict of interest in the Registry monitoring counsel on the one hand, and on the other hand being the one allocating resources available to them to undertake their functions under the legal aid system.

Furthermore, the VRWG proposes that prior to considering the establishment of a Registry monitoring mechanism, it may be necessary to think through what may be more appropriate: a review of the Code of Conduct or establishing systems to ensure that victims are able to successfully bring to the attention of the Registry or the Disciplinary Board, as appropriate, issues they may have in relation to the adequacy or effectiveness of their representation.

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1 Pertaining to confidentiality of information to protect the safety of witnesses and victims and members of their families.

Thus, we would welcome clarification as to the role envisaged for such a “monitoring” mechanism and its composition as well as to the background of what led to the inclusion of this provision. We would also welcome additional information on how such a mechanism would relate to existing disciplinary mechanisms under the Code of Conduct for counsel as described above and not be duplicating them.

**Assistance to victims in choosing a common legal representative**

The VRWG asserts that ensuring that victims are able to choose the counsel that are to represent their interests in legal proceedings before the Court is a crucial component of the right to legal assistance as reflected in Article 68(3) of the Rome Statute and Rule 90 of the RPE. In accordance with these and other provisions, consultation with victims with the view to appointing a common legal representative is the cornerstone of this right in particular and of reparative justice in general.

We thus welcome the specific reference to consultation with victims in the amendments to the Regulations. Under Rule 90(2), the Chamber can request victims, if necessary with the assistance of the Registry, to choose a common legal representative. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, or suggesting one or more common legal representatives.

In our view the proposed wording in regulation 112 whereby when acting under Rule 90(2) and (3), the Registry “may also, [...] consult victims regarding their priorities in respect of legal representation” is not sufficient to meet the level of assistance required under Rule 90(2) from the Registry in order to assist victims to appoint a common legal representative. When a Chamber acting under Rule 90(3), requests the Registry to appoint a common legal representative if victims have been unable to do so, there is a requirement to give consideration to the views of the victims. Thus consultation is not an optional provision (this could be done, for example, by sharing with them the list of shortlisted candidates, or involving victims in the interview process). This would help guarantee that the need under Rule 90(4) to ensure that the distinct interests of victims are represented is respected. The VRWG therefore suggests that the Registrar consider including a reference to such possibilities in the regulations and strengthening the current reference to consultations.

### 2. Additional issues for consideration

Recalling Rule 14 of the RPE which states that “in discharging his or her responsibility for the organization and management of the Registry, the Registrar shall put in place regulations to govern the operation of the Registry”, the VRWG submits that the Registrar may want to consider additional changes to the Regulation in addition to the amendments proposed so far.

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Communications

Given the obligations of the Registry under Rule 16, 92, 95 and 96 of the Rules of procedure and evidence to 1) provide notice and notification to victims; 2) assist victims to participate in the different phases of the proceedings; 3) inform victims of their rights under the Statute and the Rules; 4) ensure that they are aware of relevant decisions that may have an impact on their interests; and, 5) ensure adequate publicity of proceedings, in particular reparation proceedings, the VRWG supports the suggestion, also made by the CICC Communications team, that the Registrar consider the inclusion of a reference to the three dimensions of communications (public information, outreach and external communications) within the amended Registry Regulations.

The VRWG submits that inclusion of such a reference would clarify the close connection between the Registry acting as “the channel of communication of the Court” as stated in Rule 13 of the Rules and creating conditions conducive to the implementation of the Registry’s mandate in relation to victims.

Guidelines on intermediaries

The VRWG notes that there is no direct legal basis relating to intermediaries in the Rome Statute or the other core legal texts of the International Criminal Court except in the Regulations of the Trust Fund for Victims\(^4\). Nevertheless, the role of third parties is directly or indirectly mentioned in these texts, for example, Regulation 86(1) of the Regulations of the Court (assistance in the dissemination of victims’ application form for participation) and Rule 87 of the Rules of Procedure and Evidence which refers to possible orders from Chambers to apply protective measures for persons at risk on account of the activities of the Court.

While the Group notes that the Court’s Draft Guidelines governing the Relations between the Court and Intermediaries are yet to be adopted, we suggest that the Regulations could already make reference to some of the provisions contained in the Guidelines in relation to services to be provided to intermediaries. This could include reimbursement of costs incurred as appropriate, capacity building, provision of materials, remuneration but also provision of security and protection.

We suggest that such a reference could either be done through inclusion of intermediaries as beneficiaries of existing relevant regulations or through the addition of a new section on intermediaries.

Field Presence

The VRWG notes the existing Regulation 8 on presence in the field which states that “in order to fulfill his or her obligations under the Statute and the Rules, the Registrar may, subject to the prior approval of the President and on the basis of

\(^4\) Regulations of the TFV, Rule, 67, Court-ASP/4/Res: “The Trust Fund may decide to use intermediaries to facilitate the disbursement of reparations awards, as necessary, where to do so would provide greater access to the beneficiary group and would not create any conflict of interest. Intermediaries may include interested States, intergovernmental organizations, as well as national or international nongovernmental organizations working in close proximity with the beneficiary groups.”
an ad hoc arrangement or an agreement with the State concerned, maintain a presence of Registry staff in the field and, where necessary, establish a field office.” The VRWG suggests that reference to field presence could also be made in other Regulations to clarify and ensure consistency in the practice of the Registry in particular in relation to its obligations under Rule 16(1) of the Rules of Procedure and Evidence to assist victims and provide their legal representatives support, assistance and information including such facilities as may be necessary for the direct performance of their duties. This would also reflect the recent jurisprudence in the Uganda Situation whereby the Single Judge instructed the VPRS to “make full use of its staff in the field” in order to assess the completeness of pending victims’ applications.

**In Situ hearings**

Article 62 of the Rome Statute provides that unless otherwise decided the trial will be held at the seat of the Court but Article 3(3) states that “the Court may sit elsewhere, whenever it considers it desirable [...]”. The RPE further provides that the change of seat is subject to the determination of whether it would be in the ‘interest of justice’ to do so and describes the process by which the Prosecutor, the Defence or a majority of the judges can request that the Court sit outside of the host state.

The VRWG suggests that the Regulations could make reference to the protocol that has been developed in relation to in situ proceedings. We submit that it would serve to guide the process, to be followed by the Registry in such an event considering the lack of practice so far in that respect.

### 3. Request for clarification

The VRWG welcomes the explanations provided to help understand some of the proposed changes to the Regulations. As such, explanations have not been provided for all proposed changes and, in order to ensure fruitful discussions during the July seminar, we would welcome further information from the Registrar on the reasons leading to some of the proposed changes and on the impact envisaged these changes will have in practice. (See in the attached table the regulations for which further information would assist the discussions.)

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5 Under Rule 16-1, VPRS is mandated to assist [victims] in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings.

6 The Registry is under a similar obligation in relation to providing the defence with such facilities as may be necessary for the direct performance of the duty of the defence under Rule 20(1)(e).

This letter and the Annex attached compile the VRWG's core concerns and main recommendations in relation to the proposed amendments; however, due to the short timeframe given to consider the proposed changes these are not exhaustive and should be considered as only preliminary. Individual members of the VRWG might have further comments which have been or will be shared directly with the Court in the context of the current consultation process.

Madam Registrar, we appreciate the consultative relationship that has developed over the years between court officials and NGO representatives on matters concerning the rights and concerns of victims and with your office in particular. We thank you for your consideration of the issues raised in this letter and attached annex and look forward to discussing this very important matter further during and after the July seminar.

Sincerely,

Carla Ferstman
Director, REDRESS (on behalf of the Victims' Rights Working Group)

Attachment: Preliminary Comments on the proposed changes to the Regulations of the Registry

Cc:  Mr. Didier Preira, Deputy Registrar  
Mr. Marc Dubuisson, Director, Division of Court Services  
Ms. Fiona Mackay, Chief of the Victim Participation and Reparation Section  
Mr. Esteban Peralta Losilla, Chief of the Counsel Support Section