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

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RECOMMENDATIONS TO THE 16TH SESSION OF THE ASSEMBLY OF STATES PARTIES OF THE INTERNATIONAL CRIMINAL COURT

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Introduction

Thousands of victims across the world continue to see the ICC as a beacon of hope and an avenue to obtain justice for egregious crimes perpetrated against them. Up to September 2017, over 12, 985 victims were participating in proceedings before the Court.¹ Between August 2016 and August 2017 alone, the Court received over 4,725 applications for participation and/or reparations.² In addition, reparations proceedings are currently underway in four cases- Thomas Lubanga, Germain Katanga, Jean-Pierre Bemba and Ahmad Al Faqi Al Mahdi, and the Court anticipates an additional 7,400 victims to apply for participation/reparations in 2018.³

The work ahead is not without challenges. The increasing number of victims seeking to fulfill their rights before the Court (through their participation in a case and/or by applying for reparations) will require the Court and its organs to ensure that its procedures are capable of meeting those demands and are reparative.⁴ The Victims Rights Working Group (VRWG) submits that a number of issues merit particular attention:

Firstly, the ICC should revise its Strategy in Relation to Victims (Victims Strategy) which dates back to 2012. In our view, the ICC's approach to victims must be directed by a clear, comprehensive,

¹ See Proposed Programme Budget for 2018 of the International Criminal Court (ICC Proposed Budget 2018), ICC-ASP/16/10, p. 86, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-10-ENG.pdf.

² Report of the International Criminal Court on its activities in 2016/2017, A/72/349, available at https://www.icc-cpi.int/itemsDocuments/A72349/170817-rep-UNSC_ENG.pdf. According to ICC Registry figures, there has been a 66% increase between 2013 and 2017 in the number of victims applying for participation/reparations, see ICC Proposed Budget 2018, p. 84.

³ Reparations orders were made in the Germain Katanga case in March 2017 and in the case of Ahmad Al Faqi Al-Mahdi in August 2017.

⁴ G.Carayon and J.O'Donohue, "The International Criminal Court's Strategies in Relation to Victims" in Journal of International Criminal Justice, Volume 15, Issue 3, 1 July 2017, pp. 567-591, <https://doi.org/10.1093/jici/mqx023>.

coherent and holistic strategy which guides all of its victims-related activities and processes. An updated Victims Strategy that is known by victims, all organs of the Court and external stakeholders, is key to ensuring that victims' rights are prioritised and realised.

The Guidelines Governing the Relationship between the Court and Intermediaries (the Intermediaries Guidelines), a separate but related strategy document governing the Court's relationship with intermediaries, also urgently requires updating to reflect ongoing developments at the Court. The Trust Fund for Victims' (TFV) Strategic Plan for 2015-2017 expires at the end of this year; however the TFV has opted to defer drafting a new plan until 2018.⁵ The VRWG reiterates its previously stated position that the existence of clear strategic goals not only contribute to increased levels of efficiency, but also contribute to clarity for victims, legal representatives and others who work with victims.⁶

Secondly, the effective and meaningful legal representation of victims remains an ongoing challenge for the ICC. In 2017 the Court launched yet another review of the Legal Aid System (LAS). While the review is welcome in light of prevailing concerns that the specific requirements of victims and their legal representatives have not fully been taken into account, it is critical that the needs and concerns of victims are not sacrificed at the altar of budgetary expediency. The VRWG considers that the discrete needs of victims and their legal representatives ultimately warrants a separate and distinct legal aid system for victims.

Thirdly, as reparations proceedings are ongoing in four cases, and will arise in future cases, the Court's approach to facilitating victims' access to reparations and the work of the TFV will be subject to greater scrutiny. There is a need to urgently clarify key steps and procedures that facilitate effective implementation of the Court's reparations mandate in order to safeguard rights of victims and ensure the success of the Court's reparation system. The declining revenue of the TFV is very concerning; according to the TFV Annual Report 2016, revenues have fallen from €5million to €2 million within the last few years. The TFV has yet to hire a competent fundraising officer to build its internal capacity in this area.⁷

The VRWG welcomes the draft Paris Declaration and the connection made therein between the tracing and recovery of assets and reparations. Given the Court's limited capacity to effectively investigate and pursue the identification, freezing and seizure of assets, we call upon all States to provide consistent and timely cooperation to the Court so that more funds are available for reparations, and to increase the number of voluntary and ear-marked contributions to the TFV in order to allow it to effectively fulfil its reparation and assistance mandate.

Finally, the VRWG reiterates its call made in previous submissions for the Court to adopt an integrated approach to proceedings which considers the process and procedures as a whole on

⁵ The Board of the TFV decided to extend the validity of the Strategic Plan by one year to 2018, to allow the TFV to consider the following as important building blocks for the new Strategic Plan: the initial experience with the design and implementation of Court-ordered reparations in four cases; the planned expansion of its assistance mandate programmes; the outcome of an external programme evaluation; and intensified fundraising and visibility activities. See Proposed Programme Budget 2018, para. 736.

⁶ VRWG, "Recommendations to the 15th Session of the Assembly of States Parties," November 2016 (VRWG, 2016 Recommendations), at http://www.redress.org/downloads/publications/2016_VRWG_ASP.pdf.

⁷ See ICC Proposed Budget 2018, para. 760.

how victims are able to access the Court in relation to participation, legal representation and reparations.⁸

The VRWG remains solidly committed to supporting the efficacy and efficiency of the Court's functioning generally and to giving full effect to the rights of victims as enshrined in the Rome Statute specifically. We urge the Court and States Parties to ensure that the ICC is not only **victim-centric** in theory; but importantly, that it is **victim-focused** in practice.

SUMMARY OF RECOMMENDATIONS

To the Court

- Judges should amend the Chambers Practice Manual to include best practices for the appointment of victims' legal representatives. This could be done through the Court's Working Group on Lessons Learnt, or any other appropriate forum, and should involve close consultation with the Registry, and in particular the Victims Participation and Reparations Section;
- As an example of best practice, the Chambers Practice Manual should clearly enumerate the right of victims to choose their counsel and that the appointment of common legal representative should be an exceptional decision of last resort made after comprehensive consultation with victims;
- Ensure that the ongoing legal aid review fully takes into account the unique and specialized nature of victim's legal representation;
- Take into account the feedback received during the Legal Aid Review consultation and implement a revised legal representation system which is transparent, efficient and effective;
- Review the Victims Strategy and the Guidelines for Intermediaries as soon as possible and in consultation with relevant stakeholders;
- Ensure that any strategy or policy reviews concerning victims' rights at the ICC include detailed consultations with victims, national and international civil society groups and legal representatives of victims

To the Trust Fund for Victims

- Develop a strong and long term fundraising capacity to attract additional – and more diverse – funding so as to be able to effectively fulfil its mandate and expand its work;
- Address staffing deficits at the TFV. In particular, take steps in 2018 to hire a competent fundraising and visibility officer as soon as possible once the position has been approved by the Assembly.
- Review the TFV Strategic Plan in full consultation with relevant stakeholders.

To States Parties

- Reiterate commitments to effective victims' participation at the ICC including by

⁸ VRWG, 2016 Recommendations.

encouraging the Court, in General Debate statements and other appropriate contexts, to establish best practices in decision-making regarding the choice of legal representation of victims;

- Commit to providing adequate resources in the Court's budget for legal aid for victims;
- Support the ongoing revision of the legal aid system and reject all attempts to pre-empt its outcomes and impose pre-determined budgetary limits prior to the completion of the review. It is important that the review is purpose and effectiveness driven rather than purely budget driven.
- Strengthen the Court's capacity to effectively investigate and pursue the identification, freezing and seizure of assets including for reparations as provided in Article 75(4) of the Rome Statute and Rule 99(1) of the Rules of Procedure and Evidence;
- Cooperate fully with, and take all measures and steps required to assist the TFV in the implementation of its assistance and reparations mandate, including by approving requests for additional staff to strengthen the TFV's internal capacity.
- Increase the voluntary and ear-marked contributions to the TFV to allow it to effectively fulfil its mandate.

The Victims Strategy and Guidelines on Intermediaries

The VRWG notes with concern that despite repeated appeals and assurances by the Court in 2014 and 2015, there has still been no detailed review of the Victims Strategy. The ASP in 2014 indicated that it expects the Court to conduct the review only 'once a judicial cycle is finished, if necessary'.⁹ However, this has not yet been done.

The Court's practice in respect of victims is in constant flux and has suffered from a piecemeal and disjointed approach to a number of issues including legal representation, protection and participation. Furthermore, inconsistency in the jurisprudence and practice of the Court on these and other victims' issues including reparations, has contributed to the current climate of uncertainty which prevails. The VRWG is aware that major improvements in the ICC's practice towards victims will require a comprehensive and systematic change of approach and policy internally. However, we consider that the development of a clear Victims Strategy with measurable and time-sensitive goals is an important starting point to streamline and harmonize the work of the Court in relation to victims.

Specifically, the new Victims Strategy should be: a) **Comprehensive** – setting out clear objectives in relation to all victims' rights and the ICC's activities and procedures to achieve them, as well as clear performance indicators to assess progress; b) **Coherent** – articulating the logic and rationale of the Court's relationship with victims as an on-going relationship

⁹ Resolution on Victims and affected communities, reparations and Trust Fund for Victims, ICC-ASP/13/Res. 4, 17 December 2014, para.1, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP13/ICC-ASP-13-Res4-ENG.pdf.

involving a number of inter-related rights, rather than a series of isolated interactions; c) **Coordinated** – bringing together all policies, strategies and practices relating to victims into one strategy and clearly setting out the roles of the different organs and units of the Court responsible for its implementation.

The VRWG considers that while it is important for the Victims Strategy to take into account the evolution of current practice concerning victims at the Court, it should be prospective rather than retrospective in focus in order to guide the Court in terms of what should be achieved on behalf of victims. In short, the Victims Strategy should not merely reflect the existing practice of the Court but should prescribe best practices which the Court can or should implement.

In addition, the Court adopted the Intermediaries Guidelines in March 2014.¹⁰ The Intermediaries Guidelines provided for a first review to take place in October 2015. The Court has relied on intermediaries in respect of victims' issues and in particular to support victims' participation and the implementation of the TFV's assistance mandate. The Victims Strategy and the Intermediaries Guidelines should regularly account for changes in practice to provide a measure of predictability for both the Court and intermediaries in respect of their collaboration. The Intermediaries Guidelines were intended to be a living document and subject to regular review, which includes thorough and genuine consultations with intermediaries themselves and the NGOs that work with them. Such regular review is needed in order for the Intermediaries Guidelines to remain current and relevant. In our view, the review should begin with an assessment of whether and how effectively the Intermediaries Guidelines have been implemented, and the extent to which they have served the interest of the court and intermediaries since their adoption.

Recommendations

- The VRWG reiterates its prior call for a comprehensive review of the Victims Strategy and the Intermediaries Guidelines. The review process should include consultations among relevant stakeholders followed by wide dissemination of the outcomes among the different interest groups.
- The new Victims Strategy should include specific, measurable and time-bound objectives and identify concrete targets to enhance victims' participation in all phases of proceedings before the Court.
- We call upon the Court to use all efforts to make the revised Victims' Strategy accessible to victims, legal representatives, intermediaries and other concerned members of the community.

¹⁰ See Guidelines governing the Relations between the Court and Intermediaries, March 2014, available at <https://www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf>.

Victims legal representation

As only a few victims will appear directly before the ICC, their effective representation by counsel is essential to realizing their rights to participation. The ICC's Rules of Procedure and Evidence (RPE) give priority to victims' choice of counsel, even where it becomes necessary to select a common legal representative. Supporting victims in their choice of counsel is not only consistent with the Court's RPE but it is also an opportunity for the ICC to empower victims early on in Court proceedings.

Current practice at the Court, however, falls short of this goal, with decisions about common legal representation, in particular, increasingly made totally without or with only limited consultation with victims. In addition, diverse approaches by different chambers have led to a lack of clarity and transparency. While the Registry is responsible for assisting victims when it comes to participation and legal representation, the absence of a consistent procedure regarding when and how legal representatives are appointed complicates efforts to provide information sufficient to promote informed choice by victims. It also prevents counsel who are directly appointed by victims, from knowing how to obtain legal aid or how to be appointed as the common legal representative. In those instances where the Court has deemed it appropriate to appoint counsel directly, these discrepancies and concerns are aggravated by the failure to conduct a transparent and fair recruitment process that takes into account victims' views.¹¹ We submit that the Court's legitimacy and its victims' mandate are undermined where victims' views are not adequately taken into account.

In our view, the effective involvement of victims in the selection of their counsel is a precondition for their genuine participation in ICC proceedings. While we understand that there are other important goals, including reducing the cost and length of proceedings, we believe concerted attention to this issue can help achieve a better balance than the practice to date.

Recommendations

- The VRWG recommends that the judges amend the Chambers Practice Manual to adopt best practices for the appointment of victims' legal representatives. This should involve close consultation with the Registry, and in particular the Victims Participation and Reparations Section.
- We recommend that as an example of best practice, the Chambers Practice Manual should clearly enumerate the right of victims to choose their counsel and that the appointment of common legal representative should be an exceptional decision of last resort made only after comprehensive consultations with victims.
- The Registry should improve the information provided to the Chambers to ensure that decisions are rooted in a clear understanding of developments in the relevant communities.

¹¹ Human Rights Watch, "Who will stand for us: Victims legal representation at the ICC in the Ongwen case and beyond," 29 August 2017, available at <https://www.hrw.org/report/2017/08/29/who-will-stand-us/victims-legal-representation-icc-ongwen-case-and-beyond>.

Legal Aid

The VRWG welcomes the ongoing review of the legal aid system (LAS) at the ICC for both defence and victims, and the opportunity provided to civil society to comment on the process and participate in the consultations.¹² The review is a timely development that will hopefully provide clarity for victims and their legal representatives.

While the Rome Statute does not expressly provide for a right of victims to access legal aid for legal representation, the practice of the Court has thus far recognized that without legal aid, many victims would be denied meaningful and effective access to the Court. However, the existing system has been cumbersome, unclear and lacking in transparency, leaving legal representatives for victims with little guidance as to the resources they can expect.¹³ This uncertainty has been frustrating for the legal representatives and their clients and proven to be an increased administrative burden for the Counsel Support Section which administers these matters.

In light of the specific and distinct needs and challenges of legal representatives of victims to meaningfully and effectively represent victims, the review should give serious consideration to establishing a discrete legal aid system for victims in place of the current one that was simply adapted from the legal aid system for defendants at the Court. In particular, the review needs to provide clarity concerning how legal aid will be implemented during the reparations phase given its fundamental importance to victims. Importantly, it is crucial that the Court's legal aid review does not 'put the cart before the horse', nor be approached as a distinct exercise unrelated to other reviews and strategic exercises (including the review of the Victims' Strategy and Intermediaries Guidelines) which we expect the Court to carry out in 2018.

More specifically, the legal aid review must take into account the diverse approaches to legal representation at the Court. For several years, the uncertainty surrounding the applicable 'legal representation model' has impeded the efficient implementation of the system. Thus, any legal aid review must not be seen as a standalone exercise, but must be undertaken with an a priori understanding of which legal representation 'model' it is to apply to, or – given that this issue has yet to be properly resolved – design a legal aid system in such a way that it can be applied to the diverse victims' representation models which currently exist.

While a full discussion of the proposed amendments to the LAS is beyond the scope of this paper, we wish to indicate our support for some of the recommendations proposed in the report on the "Assessment of the ICC's Legal Aid System" (Expert Report).¹⁴ The VRWG supports the recommendation that the Registry should apply a presumption of indigence to victims which may be rebutted where there is evidence to the contrary. This presumption will obviate the need for the complex financial disclosure form currently utilized as well as the

¹² See for example, REDRESS, Comments on the development of an effective legal aid policy for victims at the ICC, June 2017, at <http://www.redress.org/downloads/publications/1707REDRESS%20LegalAid.pdf>.

¹³ See Concept Paper, Review of the International Criminal Court Legal Aid System (Draft for comments), available at <https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-CP-ENG.pdf>.

¹⁴ See Richard J. Rogers, "Assessment of the ICC's Legal Aid System," 5 January 2017, available at <https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>.

simple declaration of indigence that is proposed in the Expert Report. The VRWG also supports in principle the idea of an overall budget for victims' legal representatives provided that the legal representatives of victims are fully briefed concerning the scope of activities which may reasonably be expected to fall within this budget.

The VRWG is aware that a review of the LAS may have budgetary implications for the Court. Nevertheless we emphasize that the review should be driven by considerations of transparency, efficiency and effectiveness rather than budgetary expediency. As such we are concerned by the recommendation of the Committee on Budget and Finance (CBF) in the Report of the work of its 29th session that the Court should make “every effort to present a reform that aims at limiting the administrative burden without compromising accountability *and that can be achieved within existing resources*” (emphasis added).¹⁵ In our view this recommendation should be rejected as it attempts to pre-empt the outcome of the Legal Aid review and seeks to impose pre-determined budgetary limits prior to its completion.

Recommendations

- The Court should take into account the feedback obtained as part of the consultation process and implement a fair, effective and sound legal aid system which takes into account the specific and disparate needs of victims and defendants;
- In implementing the revised LAS, the Court should not simply choose the most cost-effective approach for reasons of expediency if this would in fact deny victims effective and meaningful participation;
- We call upon States to reject the CBF recommendation to pre-empt the outcome of the legal aid review and allow the review to be purpose and efficiency driven rather than purely budget driven.

The Trust Fund for Victims

The activities of the TFV have gone through considerable expansion this year with the delivery of two reparations awards in the Katanga and Al-Mahdi cases; the start of the implementation of the programmatic framework for collective service-based reparations in Lubanga and the launch of the assistance programme in the Ivory Coast. As the workload of the TFV increases, more attention will need to be paid to developing the connection between its reparation and assistance mandates in order to more effectively address the direct harm suffered by victims of crimes before the ICC as well as by the wider community of victims.

It is therefore critical that the TFV has the internal staff capacity as well as sustained sources of funding to effectively carry out its mandate. The VRWG notes with concern that while the activities of the TFV are increasing considerably, the number of voluntary contributions have continued to decrease. It is essential for the TFV to develop a strong and long term fundraising capacity that enables it to attract more – but also more diverse – funding to allow it to

¹⁵ Report of the Committee on Budget and Finance on the work of its twenty-ninth session, ICC-ASP 16/15, paras. 11 and 182, 3 November 2017, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASPI6/ICC-ASP-16-15-ENG.pdf.

effectively fulfill its mandate and to expand its work to new situation countries as appropriate. Thus, in order to strengthen its internal fundraising capacity, one of the main priorities of the TFV must be to urgently employ a fundraising and visibility officer.

The VRWG highlights the important role States play in supporting the implementation of reparation awards through the TFV:

States should cooperate fully with the TFV during the implementation stage and take all measures and steps required to assist, including by cooperating with its requests for facilitations listed in its draft implementation plans or requested later (for example, in its July 2017 draft implementation plan for the reparation order delivered in Katanga, the TFV has requested the DRC to consider granting facilitations such as waiver of fees, taxes and providing security to the TFV's staff).¹⁶

The VRWG welcomes the donations made by the Netherlands, the United Kingdom and Germany to the TFV in 2017.¹⁷ Donations by States are critical in order to ensure that the funds available to the TFV do not fall beyond the limits necessary to fulfill its mandate. States also play a key role in the identification, freezing and seizing of assets which can be utilized for reparations. The VRWG welcomes the progress on strengthening States' cooperation with the ICC on the identification and recovery of assets culminating in the Paris Conference on "The ICC and international cooperation: the challenges of asset recovery" held in October 2017.¹⁸

The VRWG welcomes the linkage made in the draft Paris Declaration- the outcome document of the Paris Conference- between the tracing and recovery of assets and covering the costs of reparations.¹⁹ Assets seized from an accused person should be preserved for the purpose of fulfilling reparations orders in line with the RPE, which provide for priority to be given to the enforcement of reparations awards when deciding on the allocation of funds seized from the convicted person.²⁰

Given that it will take time for the Paris Declarations to move from aspiration to reality, the VRWG calls on States Parties to take immediate and concrete steps to strengthen the Court's capacity to effectively investigate and pursue the identification, freezing and seizure of assets, including by approving the Court's request for additional staff with expertise in this area and through timely cooperation with the Court. For example, despite the fact that judges sentenced the accused in the *case of Bemba et al* for crimes against the administration of justice, to terms of imprisonment and fines of 330,000€, the fines have not yet been transferred to the TFV as

¹⁶ Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017, (ICC-01/04-01/07-3728), 25 July 2017, at p. 70.

¹⁷ See Trust Fund for Victims, News, available at <http://www.trustfundforvictims.org/news>.

¹⁸ French Embassy in the Hague, "International Conference addresses challenges of Asset Recovery," available at <https://nl.ambafrance.org/International-conference-addresses-challenges-of-asset-recovery>

¹⁹ Ibid.

²⁰ See ICC Rules of Procedure and Evidence, Rules 94-98.

required by Article 79(2) of the Statute.²¹ Without cooperation and adequate capacity the Court will find it difficult to enforce such orders.

Recommendations

- The TFV should develop a strong and long term fundraising capacity to attract additional – and more diverse – funding so as to be able to effectively fulfill its mandate and expand its work;
- The TFV should also strengthen its internal fundraising capacity including by hiring a full-time fundraising officer as a matter of priority.
- States should be more pro-active in relation to the successful identification, tracing and seizing of assets for the purpose of reparations.
- States should enter into voluntary agreements or arrangements with the Court to increase the efficiency and expedite the process of tracing and recovery.
- States should continue to support the TFV through providing voluntary and earmarked contributions such as for sexual and gender-based crimes.

²¹ See Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2016 to 30 June 2017, ICC-ASP/16/14, at para. 96, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-14-ENG.pdf.