



Modes of Participation and Legal Representation



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Cover Picture: Legal Assistance to victims in DRC © ASF/Bahia Zrikem

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INTRODUCTION

The International Criminal Court (ICC) is the first international criminal tribunal to allow victims to participate in international criminal proceedings. The departing point for this study is the recognition of the benefits that participation in the proceedings can bring for victims and their communities, as well as for the legitimacy and mandate of the Court and for international justice as a whole. The adoption of provisions on victim participation in the Rome Statute reflects the evolution of international law, embracing involvement of those most affected by the crimes the Court has been designed to prosecute, and acknowledging the need for a more comprehensive form of justice.

Victims have participated in proceedings before the ICC since 2006. Not having any previous international experience to rely upon, the ICC's victim participation system has developed in an empirical manner. Significant progress has been made over the past seven years as mechanisms for victim participation and their representation in Court were established mainly through jurisprudence and administrative practice.

The ICC has recently been revisiting its victim participation regime. The present report aims to contribute to such discussion by considering the ICC's practice regarding facilitation of victim participation and legal representation. In undertaking this study, this report takes into account not only ASF's direct experience in support to victims in the countries where ASF operates, but also observations gathered through interviews and monitoring in respect of the experience in other situation countries. Specific issues of interest to the ICC have been identified for the purpose of this study.

This report recognises that victim participation is a practice that unfolds not only before the Court and in the courtroom, but also, and mainly, among victims, within victim communities and in the situation countries. The analysis and recommendations presented have been taken into account a holistic, pragmatic and field-based approach.

Methodology

This report has been written by an external consultant following an agreement with ASF. It compiles some of the findings made during a comparative study that looked into support to victims for involvement in proceedings in the Democratic Republic of Congo (DRC) and at the ICC. Over a period of three months the consultant reviewed relevant documentation and interviewed actors involved in the participation and legal representation of victims before national tribunals in the DRC, as well as before the ICC. Those interviewed include victims, victims' lawyers and members of their teams, judges, prosecutors, representatives of NGOs, ICC staff members, United Nations representatives and researchers. A mission to Bukavu was organised at the beginning of September 2013. Other interviews took place in The Hague, Brussels and over the phone. The report compiles and compares information available in relevant documentation and the views expressed by experts. It also draws on the consultant's prior experience and incorporates her analysis and recommendations.

Some of the persons interviewed for this report expressed a preference to be consulted in an informal manner and not to be quoted. Others had reservations about being quoted by name, for confidentiality reasons. Thus, unless specifically requested by the interviewee, actors will be quoted with reference to their position.

I- IMPROVING ACCESS TO JUSTICE FOR VICTIMS OF INTERNATIONAL CRIMES? REVISION OF THE APPLICATION PROCESS AT THE ICC

The first step to access justice at the ICC is the application process. Rather than describing the application process in general terms, this section will focus on latest developments surrounding the application process and specifically the Court's efforts to improve processing of victims' applications. While the application process accounts only for a limited part of victims' experience of participation, the way in which such a process is handled can have a significant impact on the manner in which participation is organised and on subsequent stages of the proceedings.

It is relevant to briefly recall the state of the various proceedings seeking to revisit the application process. When the ICC Registry started to implement its mandate to facilitate victim participation, it designed a 17-page form to be filled in by individual victims. That form was later revised and replaced by an individual seven-page form.¹ The process designed at a time when the Court was only dealing with a limited number of victim applicants has proved to be burdensome. Treatment of applications has been slow, putting a strain on all those involved, including the judges, the parties, the Registry as well as victims themselves. As the number of cases increased and victims became more aware of their rights, the number of applicants has risen. This should be considered a measure of success for the Court. It is unfortunate that the Court did not foresee the limitations of the application process as it had been designed and that changes to the system are only being considered after asserting that the system originally put in place by the Court is unsustainable.² Having said that, the Court's efforts to handle this situation are welcome.

Discussions have turned around the idea of amending or eliminating application forms, including the possibility of replacing individual forms with collective forms, and modifying the way those forms are treated by the Registry and the Chambers.

A- Observations on revision initiatives

As it will be described below, both the Court's Chambers as well as the Assembly of States Parties (ASP), through the Hague Working Group, and Judges' Lesson Learnt Working Group, have been involved in consideration of the victims' participation regime. Efforts to build a new system that makes the application process more manageable for all those involved should be intensified in order to allow a thorough analysis of the underlying problems and to consult all those concerned.

1. The need for a thorough analysis of the underlying problems

Several reports have described the unsustainability of the application process and the necessity to amend it. According to such reports, unsustainability has been brought about by the number of applications, which causes backlogs, which in turn causes

¹ Available online on the ICC website, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/forms.aspx (last accessed 9 Oct 2013)

² ICC-ASP/11/22; ICC-ASP/11/32

delays.³ This has been automatically linked to resources, i.e. in order to process more applications in the same manner, more resources are needed.⁴ This analysis, however, does not seem sufficiently thorough, as it does not consider for example the *manner* in which applications have been handled. While factors such as the length of the forms and the number of applications received may have contributed to difficulties in managing the application process, such analysis overlooks other aspects of the treatment of applications which have also likely made the application process burdensome. Some such aspects identified during this research include:

- Lack of adequate and unified database shared by and accessible to all those involved in the treatment of applications and making observations thereon (where access would be tailored to the level of confidentiality applicable to each section/organ/party).
- Difficulties arising from having intermediaries (as opposed to the Registry directly) fill in and collect forms. While, as will be discussed below, the assistance of intermediaries seems unavoidable for various reasons, involving intermediaries inevitably carries risks. Despite having been trained, intermediaries are not experts in the law, proceedings and practice of the ICC. Such risks involve the likelihood that forms are filled in incorrectly or are incomplete and the possibility of delays due to the need to obtain further information or clarifications through an intermediary.
- Until recently, there does not seem to have been a practice of grouping applications for the purpose of treating them in a way that makes analysis of transmitted applications more accessible to the Chambers. The consequences of not having a systematic methodology regarding grouping and treatment of applications can also have negative effects in the field. For example, in the *Mbarushimana* case where a large number of applications were submitted shortly before the deadline, no particular criteria for file selection, (i.e. according to the location of the crime or the degree of vulnerability of the victim) was applied. As a consequence, among victims from the same village, some saw their applications treated and accepted, while their neighbours' applications were not considered due to lack of time. That type of situation creates confusion among victims and could bring about tensions among community members.⁵
- The need to apply redactions to the application forms for transmission to the Defence. This reveals the inevitable tension between protection issues and expeditiousness of the proceedings. The number of redactions needed is directly proportional to the amount of information given by the applicant and thus often to the length of the form.

Recent decisions in the *Gbagbo* case and the *Ntaganda* case, especially in the latest one, have positively tackled these problems. Collection of applications in the *Ntaganda* case under the new system was under way at the time of writing. The new system is being tested and a critical assessment of the experience of implementation will need to be made in due course.

³ ICC-ASP/11/22; ICC-ASP/11/32; ICC-ASP/11/Res.7

⁴ *Id.*

⁵ This situation has been documented by ASF and is recorded in internal files.

2. The need for a wide consultation process

Collection and processing of applications and implementation of victim participation involves a relevant number of actors within and outside the Court. Consultations with those involved, including victims and those representing them, appear to be crucial in order to ensure that any amendment to the system addresses relevant challenges and is tailored to the needs of those most affected.

There has been no uniform approach to the issue of consultations by the Chambers. Pre-Trial Chambers I (in *Gbagbo*) and Pre-Trial Chamber II (in *Ntaganda*) sought or received observations from other entities before making a decision on the application process.⁶ Trial Chamber V (in the Kenya cases), in contrast, did not consult any of the parties, participants or members of the Registry.⁷ Interestingly, the Trial Chamber V decisions contain a number of references to the interests of victims.⁸ However, such assertions seem to have been based on general assumptions regarding the interests of victims, as opposed to actual findings made following enquiries and consultations. General assumptions on what victims need or want is precisely what victim participation (i.e. allowing victims to express their own voice through a representative) is meant to avoid.

At the level of the Hague Working Group, consultations have been conducted with organs of the Court and to a certain extent with NGOs and other experts.⁹ As for the Lessons Learnt Working Group, it is unclear whether any consultations will be conducted beyond the Chambers.

It is striking that all processes have systematically omitted to consult with legal representatives¹⁰ (either those directly involved in the cases or other legal representatives who have experience in liaising with and representing victims before the Court, as appropriate). This reveals two problematic matters: a) likely lack of sufficient consideration or awareness of the impact of the application process on participation throughout proceedings and representation; and b) difficulty to involve and consider the views of those who are not part of the Court. The latest is paradoxical as victim participation was in fact designed to bridge the gap between the Court and the field and to make the proceedings more alive to and tailored to the Court's constituencies.

⁶ Pre-Trial Chamber I conducted a more thorough consultation involving the Registry (VPRS), as well as the parties, the OPCV and NGO REDRESS, which was allowed to make submissions as *amicus curiae*. Pre-Trial Chamber II sought observations from the Registry (VPRS), particularly in relation to the implementation of the system put in place by Pre-Trial Chamber I in the *Gbagbo* case.

⁷ It is unknown whether any such consultations were conducted unofficially. No consultations were conducted according to the proceedings in the case, nor reflected in the relevant decision.

⁸ ICC-01/09-02/11-460 (e.g. paras. 30-31); ICC-01/09-02/11-498 (e.g. paras. 29-30)

⁹ For example, the Hague Working Group has considered the views of an independent panel of experts convened by Amnesty International and REDRESS. See ICC-ASP/12/38, para. 6.

¹⁰ While the OPCV was admitted to comment on the application process in the *Gbagbo* case following a request to that effect, no independent legal representatives were consulted in any of the processes. While the OPCV may in practice undertake legal representation and perform functions that are similar to those of external legal representatives, the views of the OPCV and those of external lawyers may not always coincide. As it is underlined in this paragraph, the interest of involving legal representatives is to engage in discussion with those who are *outside* the Court (while the OPCV in an independent office and is falls within the remit of the Registry only for administrative purposes, it is nevertheless part of the Court's structure and its staff members are ICC staff) and have a view of the Court that is shaped from outside and involves a broader picture that takes into account not only the proceedings at the Court but also its impact in the field. While the Registry and other ICC sections and organs may project what the impact of certain decisions could be in the field, involving also those who have no institutional connection with the Court presents considerable advantages.

B- Recent initiatives aimed at revising the application process

When looking at the current state of the victim participation regime, it is important to consider the way in which it has developed. In this regard, it was observed during this study that there is a lack of shared vision on victim participation,¹¹ especially among ICC organs, units and staff members. In the absence of a shared vision, different persons' perspectives on victim participation seem to have been driven by personal ideas and background.¹² As it will be seen below, initiatives aimed at revising the application process have not been driven by a shared vision either. Chambers' decisions in particular have been taken in the context of given cases and, as such, are only applicable to the cases concerned.

1. Chambers' initiatives aimed at revising the application process

a. Chambers' decisions

Gbagbo case (pre-trial phase). A decision adopted in April 2012 implemented a so-called 'partly collective' application system (*Gbagbo Decision*). Pre-Trial Chamber I ruled that victims could come together as a group to fill out a group application form. Individual declarations by those victims were to be attached to such group form. The Chamber also allowed for victims to file individual applications by using the standard application form.¹³

Kenya cases (trial phase). In decisions adopted in the *Ruto and Sang* case and the *Kenyatta* case in October 2012 (*Kenya cases Decisions*), Trial Chamber V decided that only victims who wished to appear in person or via video-link before the Court should present a standard application form. According to the Chamber, victims who do not wish to appear directly before the Chamber, and instead prefer to only have their views and concerns expressed through a Common Legal Representative, do not need to lodge an application. Instead, those victims can (but are not obliged to) register with the Registry.¹⁴ Arguments given by the Chamber to implement an application system which is radically different to the one put in place in other cases include: the large number of victims involved, unprecedented security concerns and the special circumstances of the cases, and the time consuming nature of the process of treating applications for participation.¹⁵ Noticeably, neither the victims nor the parties to the proceedings or the Registry were provided with an opportunity to make observations on the application process before the Chamber adopted decisions putting in place a new system.

¹¹ This finding was also made by the Independent Panel of Experts. See Independent Panel of Experts' Report on Victim Participation at the International Criminal Court http://www.iccnw.org/documents/report_victims_participation.pdf (last accessed 22 Oct 2013) (hereinafter 'Independent Panel Report'), paras. 7 and 44. See also J.WEMMERS, Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding Victims' Rights to Participate, *Leiden Journal of International Law*, 23 (2010), 629-643

¹² In particular, it was noted that legal background, including judges' legal background, can play a significant role in the interpretation of victims' rights in ICC proceedings. It is commonly thought that a tension can be found among those who come from common law and civil law legal systems respectively. However, it was pointed out during this study that interpretation of victims' rights can also be affected by the fact that staff and judges who came from other international criminal tribunals where victims did not have an independent role, could be reluctant to accept victim participation.

¹³ ICC-02/11-01/11-86

¹⁴ ICC-01/09-01/11-460; ICC-01/09-02/11-498

¹⁵ *Id.*

Ntaganda case (pre-trial phase). More recently, in May 2013, Pre-Trial Chamber II reconsidered the application system in the *Ntaganda* case “with a view to rationalizing the application process and enhancing its predictability, efficiency and expeditiousness” (*Ntaganda Decision*).¹⁶ The Chamber ordered the use of a simplified one-page application form.¹⁷ In addition, specific instructions were issued regarding the Registry’s involvement in the collection of applications and necessary oversight of intermediaries. The purpose of such instruction appears to be to avoid that likelihood of receiving incomplete application forms, which has been a common situation in the past. Finally, the Chamber ordered the Registry to group applications for the purpose of its transmission to the Chamber. Issues regarding work with intermediaries and grouping of applications will be further analysed in subsequent sections of this report.

b. Assessment

✕ *Lack of consistency and predictability*

While it is understandable that the judges have become involved in reshaping the application process, it is regrettable that there was no earlier institutional initiative (from the Registry) to propose amendments to the system. Not having taken control of this situation in time has led different entities to adopt initiatives to revise and possibly amend the application process. Such initiatives are not coordinated, resulting in lack of predictability and legal insecurity. As a consequence of the Chambers’ rulings in various cases, different regimes have applied to different cases, in an effort to move towards simplified ways of treating victims’ applications. In the short term, that has made the system unpredictable for victims and has delayed collection of applications by the Registry’s Victim Participation and Reparations Section (VPRS), which has had to wait for a ruling of the relevant Chamber before informing victims and collecting applications.¹⁸

In the Kenya cases, where the Trial Chamber implemented a system at the trial phase which is different from the one applied at pre-trial, victims who wanted to participate had to wait for instructions on how to proceed for a significant period of time. This has been due not only to the late change of the application system while proceedings were ongoing (making the application process uncertain for around one year), but also to the time necessary to put in place the new registration system in Kenya, which has been further delayed because of the elections held in the country earlier this year and related security constraints.

While taking different decisions in different cases led to constant readjustment regarding collection of application forms or registration of victims in the field, efforts to build a new system that makes the application process more manageable for all those involved are to be praised. In particular, it is noted that before ruling in the *Ntaganda* case, Pre-Trial Chamber II carefully examined the decision taken in the *Gbagbo* case by the Pre-Trial Chamber I and sought to build upon that experience.¹⁹

¹⁶ ICC-01/04-02/06-67

¹⁷ See ICC-01/04-02/06-67-Anx. The form is in practice two-page long. The VPRS has added a second page with questions that are necessary for the VPRS to treat the form. However, only the first page will be transmitted to the Chamber.

¹⁸ Interview with VPRS representative, 29 Aug 2013 (notes in file with the author).

¹⁹ ICC-01/04-02/06-57; ICC-01/04-02/06-67

✧ **Preliminary assessment of the implementation of Chamber's decisions**

Despite the fact that the *Kenya cases Decisions* were adopted one year ago, implementation has not gone very far.²⁰ Interestingly, despite the fact that the decisions clearly state that victims' registration is to be done by the Registry,²¹ registration responsibilities have been delegated to legal representatives. The information collected by legal representatives is shared with the Registry and the Registry is in charge of administering a database.²² The legal representatives are therefore responsible for verifying that the victims that register fall within the scope of the case. In changing from the standard application process to a registration process, Trial Chamber V probably had in mind disposing of victims' forms and reducing the amount of paperwork related to the process of admitting victims to participate in proceedings. However, the Registry, together with the legal representatives in the Kenya cases, have produced other types of forms (declarations) that are collected for the purpose of registration.²³ The need for some sort of documentation is understandable in the context of legal proceedings.

While the advantage of registration as designed by Trial Chamber V is that such forms are not transmitted to the Chambers or the parties, this new system is questionable in several respects. In particular, the fact that the process is largely administered by the legal representatives poses a series of problems. At the practical level, while it could be positive for the legal representatives' teams to listen to victims' stories first-hand,²⁴ that creates a very significant strain in the teams' resources.²⁵ From a legal perspective, the fact that no organ (Registry or Chambers) is involved in determining the admissibility of victims' requests for registration is problematic. For some victims, it may be important that their stories reach the judges and that an independent determination on their victims' status be made by the Court. However, no study has been conducted in this regard and it is not possible to assert whether that is a factor that may influence the victims' willingness to participate in the process and their experience of participation.

In relation to the *Gbagbo* case, the successes and challenges of the implementation of the decision were documented and shared in a report filed by the Registry in the *Ntaganda* case.²⁶ It was reported that the partly collective approach in the *Gbagbo* case resulted in the receipt of less information than the standard application form, thus reducing the amount of time needed to scan, analyse and redact documents, and enter information into the database. However, problems were encountered in grouping of

²⁰According to the Registry's periodic reports, only victims who had already applied to participate at the Pre-Trial stage of the case, but whose applications were not transmitted to the Pre-Trial Chamber prior to confirmation, have been registered. Other Registry reports state that those victims should be considered as having already registered (ICC-01/09-01/11-566-Anx; ICC-01/09-01/11-980-Anx; ICC-01/09-02/11-606-Anx; ICC-01/09-02/11-766-Anx; ICC-01/09-02/11-810-Anx).

²¹"[V]ictims may, if they so wish, register with the Registry... The Registry shall enter these victim registrations into a database, which it will administer and make accessible to the Common Legal Representative." (ICC-01/09-01/11-460, para. 49; ICC-01/09-02/11-498, para. 48)

²²ICC-01/09-01/11-566-Anx; ICC-01/09-02/11-606-Anx

²³*Id.*

²⁴ The legal representation teams have a deep knowledge of the case, understand the legal implications of the victims' stories and can advise them accordingly. In addition, from the teams' perspective getting acquainted with the victims' stories at the outset can be beneficial for the purpose of legal representation.

²⁵ The intensity of the field work necessary for registration of high numbers of victims is not foreseen in the legal aid scheme. Delegation of registration functions from the Registry to the legal representation teams has not been followed by reallocation of resources from the VPRS to the legal representatives. For a discussion on the financial implications and other practical challenges in the implementation of the registration system in the Kenya cases, see A. SEHMI, New victim participation regime in Kenya, in ACCESS – Victims' Rights Working Group Bulletin, Issue 22, Spring 2013, <http://www.vrwg.org/downloads/130617EnglishVersionFinal.pdf> (last accessed 28 Sept 2013)

²⁶ ICC-01/04-02/06-57

victims for the purpose of a collective form.²⁷ It can also be observed that, while victims' stories share similarities, merging information about both the events and the harm suffered by the victims into one collective account results in losing relevant and specific details about the experience of singular victims which, depending on the context, may be relevant in treating the applications.

As for the *Ntaganda* case, this study was conducted while the decision was being implemented and applications were being collected and filed. The cycle of the application process had therefore not been completed and any remark herein is only preliminary. These remarks are primarily based on the ASF's experience in the collection of applications in the field. ASF has been involved in the collection of forms directly and through its own intermediaries, and in coordination with the VPRS and other intermediaries. First of all, the simplified one-page application form proved to be a handy tool and was well received by victims and intermediaries. Forms are much easier to fill out, which speeds up the process. It is noted, however, that while simplifying the information provided in the forms facilitates treatment of applicants, that may have an adverse impact on legal representation as considerably less information on the victims' profile is documented through the application phase. That emphasises the importance of more in-depth consultations between the victims and the Common Legal Representative once appointed. Second, in the *Ntaganda* case, the application forms were used to consult victims on their preferences regarding legal representation. ASF has observed that the use of the application forms and the application process to conduct consultations on legal representation is questionable. Further comments regarding the experience of collecting forms in the *Ntaganda* case will be made below.

2. Institutional processes

Two initiatives at the institutional level have attempted to revise the application process. One such initiative has arisen in the context of the ASP Study Group on Governance (a sub-organ of the ASP which has looked, *inter alia*, at ways of expediting the criminal proceedings). In the framework of those proceedings, the Court produced a report taking stock of lessons learnt during its first ten years of operations and identifying areas where measures could be taken to expedite judicial proceedings and enhance efficiency. Victim participation was identified as one such area.²⁸ Significantly this concerns the victim application process, as well as modes of participation in the proceedings including models for legal representation. The Lesson Learnt Working Group, composed of judges, is in charge of further reflection upon these matters and, following its roadmap, the issue of victim participation and legal representation is likely to be taken up next year.

The other such initiative is the ASP's Hague Working Group facilitation on victim participation and reparations. Concerned by reports from the Court on backlogs brought about by the number of victims' applications and the Registry's inability to treat them in a timely manner, the ASP, at its eleventh session in November 2012, "underline[d] the urgent need to modify the system for victim participation [...], in order to ensure the sustainability, effectiveness and efficiency of the system" and "request[ed] the Bureau to prepare, in consultation with the Court, any amendment to the legal framework for the

²⁷ *Id.*

²⁸ ICC-ASP/11/31/Add.1

implementation of a predominantly collective approach”.²⁹ Following such a mandate, the Hague Working Group considered the issue of victim participation throughout 2013.³⁰

✧ ***The so-called ‘collective approach’ and amendment proposals***

The language of ASP documents has pointed to the need to implement a ‘collective approach’ with regard to victim participation. Confusion has prevailed in discussions concerning this matter. It is unclear what the ASP specifically meant by ‘collective approach’. Also, although relevant ASP documents refer to concerns regarding the application process, the mandate to look into possibly revising the system refers to victim participation generally. It would appear that the ASP’s intention was to evaluate the possibility of introducing a collective approach with regard to victims’ applications³¹ and for the purpose of solving problems arising out of backlogs and delays.

The matter of collective participation or collective applications raises several issues, which do not seem to have been appropriately considered in ASP discussions surrounding this question. One such issue is the dissociation between collective applications and the whole experience of victim participation. Actually the latter has predominantly been ignored. It has been overlooked, for example, that a ‘collective approach’ is already implemented in practice in the manner in which victims are represented in Court, as they are mostly gathered around a Common Legal Representative. In addition, it is to be noted that the situation regarding the backlogs reported in 2012 which motivated the ASP’s resolution requesting consideration of amendments, could have changed over the course of 2013 given the implementation of new systems in different cases as summarised above.

All of this begs the question of what the next steps should be and what is the best suited organ to consider amendments to the victim participation regime. The ASP appears to lack expertise, both in terms of knowledge of the practical application of rules and judicial proceedings, and in terms of impact in the field and contact with victims, to consider any revision or amendment to the victims’ scheme. Victim participation is a complex and specialised field, and requires the intervention of those who are familiar with the system and its implications. It is observed that the Court, under the judges’ lead, may be well suited to consider amendments to the standard application form and the process of treating applications, in consultation with the Registry. However, it is submitted that the Court has only a narrow view of the application process and the practice of victim participation, which is the legal proceedings from the perspective of the judges and the Registry. Victim participation has a dimension that goes well beyond the courtroom and therefore requires that broad and thorough consultations with victims, those who represent them and those who assist them more closely be conducted. It is observed that the great majority of judges have not travelled to the field, nor have an opportunity to get personally acquainted with the reality of and interact with victim communities. While other members of the Court may have conducted missions to the field, their mandate is to administer the Court’s system and therefore may not always have a broader view to the issue of victim participation. This is why it is imperative that not only actors involved in proceedings, but also victim communities and those who have experience representing them, be genuinely involved in consultations, in order to continue to shape the victim participation scheme and adapt it to the needs of those it was created to serve.

²⁹ ICC-ASP/11/Res.7

³⁰ ICC-ASP/12/38

³¹ For a discussion on collective applications, see ICC-02/11-01/11-62

II- ASCERTAINING INFORMED CONSENT

A large number of victims of the crimes that are currently before the Court as well as victims from some of the countries where international crimes have been committed have little to no experience of justice. Many of them have never seen a tribunal, a judge or even a lawyer. Lack of awareness about their rights and the rule of law is widespread. Some believe that corruption is the norm and have difficulties imagining impartial justice. Yet, most if not all of them are attached to justice as a value. As it will be discussed below, in order to allow victims to make an informed decision on their participation, it is crucial that adequate, timely and full information be provided regarding the content their rights and likely consequences of exercising them.

A. Informing victims and victims' understanding of their rights and of the judicial process

The first step to enable access to justice is to inform victims of their rights. Informing victims of their rights and assisting them in exercising them can lead to their empowerment.³²

The need for information is all the more important when it comes to their rights before the ICC, for two main reasons. Firstly, there are fewer opportunities for them to learn about those rights in other ways given the physical distance between the Court and the communities concerned. Secondly, it is more challenging for victims to understand such rights and how to exercise them because they are different from what they may have heard, seen or been used to in their national legal system.

One of the questions that arise in relation to victims' understanding of their rights and the judicial process is how to ascertain the victims' informed consent regarding their decision to participate in judicial proceedings. The reason why this is relevant is because when discussing the success of victim participation, there may be a tendency to look at the numbers of victims who have applied to participate. In the context of the ICC, those who believe that the number of victims could have financial implications may be interested in seeing such numbers being reduced. But the reason why ascertaining victims' informed consent is important is because it goes to the core of victims' experience of justice and their expectations about what the process can deliver. In this study, we enquired about victims' motivation to take part in legal proceedings, as well as about how to ensure that victims are duly informed of what such participation implies for them. The findings made are described below.

1. Victims' motivation to participate in proceedings

The answer to the question 'what do victims' want?' is not unique. The reasons behind a decision to participate are personal and may vary depending on the persons' background, education, age, social status, type of violation, local context and many other factors. Two

³² M.PENA and G.CARAYON, 'Is the ICC Making the Most of Victim Participation?', *International Journal of Transitional Justice* (doi:10.1093/ijtj/ijt021), Sept 2013, pp. 15-16

persons with seemingly identical backgrounds may have different motivations. Also, the reasons why victims seek justice may vary over time. Yet, there are a few common considerations that are often raised³³:

- *"I have suffered harm and I have a right to claim for that."*
- *"I want to make sure the perpetrator does not commit such acts again in the future."*
- *"The conviction can set an example for others not to do the same."*

Victims articulate what they want in different ways, in accordance with their background and social context. All in all, the above, together with information obtained from victims in other contexts³⁴, leads us to believe that some of the aspects on which victims seek improvement are justice, reparations, prevention and deterrence. It should be noted that reconciliation does not always come as a priority, at least not in all contexts. That may be due to the traits of each conflict and many other factors. It is worth recalling that some countries in which the ICC has been operating have been marked by intense ethnic divisions, which have often been exacerbated during conflict and which continue to exist.

Carefully studying victims' motivations to participate is relevant to ensure that victims understand how and to what extent participation in judicial proceedings will or will not meet their expectations. A fundamental issue that requires vigilance and transparency on the part of those assisting victims to participate is the question of reparations. In the context of the ICC in particular, where participation and reparations are two separate processes and given the financial and practical constraints that surround implementation of reparations, victims' desire to obtain reparations seems to have become a taboo subject. The preference expressed by victims in some contexts to receive individual reparations (as opposed to collective reparations) has been all the more neglected and has become difficult to discuss. Victims' wish to be compensated for the harm suffered has in certain cases been considered materialistic.

2. Ascertaining informed consent

There is no one-size-fits-all prescription to ascertaining victims' informed consent. The act of informing victims and those assisting them directly about what participation in legal proceedings implies and what outcome can be expected must be repeated at different stages. It is important to inform victims about the possibility of acquittal or termination of proceedings for other reasons, as a likely alternative to a conviction. ASF has noted that it is usually difficult for victims to accept that a person could be acquitted by the ICC.³⁵

Persons who have been involved in direct assistance to victims have recommended that ascertaining victims' informed consent be adequately integrated in the filling in of

³³ Interviews with victims in DRC, 3 Sept 2013 (notes in file with the author)

³⁴ Interviews conducted for this study (in file with the author); ASF experience and the author's work with victim communities

³⁵ While this could in a way be remedied through more information about the rights of the accused, equality of arms and the different reasons that could lead to acquittal or termination of proceedings, increased information may not be enough to manage expectations. Victims have suffered greatly as a result of the crimes and for them the ICC represents justice as a value. They thus expect the ICC to acknowledge their harm and they see retribution as a necessary outcome.

application forms or other documents for the purpose of filing civil party complaints.³⁶ For example, a local NGO that undertakes fact-finding in the DRC has drafted a text, which is contained in the first page of an interview form and is read to the victim by the person interviewing them.³⁷ In the context of the ICC, question no. 32 of the standard application form ('Why does the victim want to participate in the proceedings?') provided the opportunity for victims to check their own motivations and helps those processing forms and receiving them at a later stage to understand victims' expectations. Forms used in recent cases (*Gbagbo* case, *Ntaganda* case) have not included that question.

This study has also revealed that it is important that full information about what victims can expect is not disclosed to them just before they are invited to fill in a form accepting to participate in judicial proceedings. The following example of a situation to be avoided has been provided. As mentioned above, in the context of the ICC proceedings in Kenya the application process has taken the form of registration. The Registry's VPRS undertakes mapping of victims and organises meetings between victims and the legal representative team, as the latter is in charge of registering victims. It has been observed that victims are not duly informed of their rights and the participation process before they attend a meeting for the purpose of registration. The task is delegated to intermediaries but there is no way to verify that that is done efficiently and effectively. While legal representatives and their teams provide relevant information at the beginning of the meeting, it seems unfair not to give victims sufficient time for them to reflect upon their decision.

A similar issue arose in the *Ntaganda* case, where the application forms were used not only to facilitate victims' participation but also to consult victims on their preference regarding their legal representation. The application forms in the *Ntaganda* case is one double-sided page. The back side contains the following question regarding victims' preferences on legal representation: "Does the victim have any objection to the fact that one single lawyer would represent the entire victims of the case? *If yes, Please give the reasons.*"

In ASF's experience, this rather vague formulation has led to misinterpretation. Victims need to be fully aware of the case (the difference between the two warrants and the different crimes the accused is charged with, for instance) and of the various possibilities regarding their legal representation to make an informed choice. In other words, a proper outreach has to be conducted and interviewers have to be correctly trained to assist the victim as much as possible in order to thoroughly clarify the meaning of the questions. At least, in order to properly understand such question, victims must be aware that a common representation would include victims of Lendu and Hema origins, as well as victims from different crimes and from different villages, sometimes far away from their place of residence, all represented by one unique lawyer.

Probably due to a lack of time and resources, the various trainings and outreach missions organised by the VPRS mainly focused on the description of the arrest warrants, the

³⁶ Interview with local NGO (DRC), 3 Sept 2013 (notes in file with the author)

³⁷ English translation of the text drafted by the local NGO: "[Name of the NGO] is undertaking an investigation on.... For this purpose, we request your assistance to answer a few questions about the events. Responding to these questions will take between 20 and 30 minutes. We would like to point out that your participation in this investigation is voluntary. You are free to refuse or to accept to respond fully or partially to these questions. If you accept to participate in this investigation, your responses will remain strictly confidential between you and [name of the NGO]. We will ask you to sign this form and that will confirm your participation. Do you have any questions about our investigation? Are you ready to start the interview?"

rights of victims before the Court and the manner in which victims' participation takes place in the proceedings. An explanation, question by question, was given but this exercise alone did not enable interviewers to be prepared for a detailed interview that would allow victims to grasp the meaning of such questions. In turn, wishes on legal representation expressed by the victims in the forms are often difficult to interpret. Many answers provided in the forms collected by ASF were vague, reduced in the terms "*pas d'objections*" ("*no objections*") or simply "*non*" ("*no*"). From this negative answer, one cannot necessarily conclude that the applicant is in favor of a common representation where one lawyer would represent all victims of the case. Some answers indicate that applicants simply did not understand the question. For example, many applicants answered "*no objection, the lawyer can do properly his work*" or "*no objection, we don't know any lawyer*". In this case, the answer "*no objection*" refers to the fact that the Court may appoint a lawyer unknown to the applicants rather than a preference for any type of grouping.

This example regarding the *Ntaganda* case underscores the importance of providing thorough information and adequately ascertaining victims' consent not only with regard to the application process but also in relation to all aspects related to their participation experience, including legal representation. Further comments regarding consultation of victims regarding the choice of legal representatives will be made in the below section on legal representation.

3. Ongoing information to victims

The crimes that the victims suffered had a profound impact on their lives. It follows that anything that relates to that experience can also deeply affect victims (positively or negatively). Those who have decided to engage in judicial proceedings have a keen interest not only in the outcome of the case, but also in the justice process. Being informed about the progress of proceedings, including when there are no relevant developments, is very important to victims. Lack of information creates confusion and frustration, and provides an opportunity for misinformation and misconceptions to circulate. It is thus crucial that victims be informed regularly about developments in the proceedings.

The research conducted for the purpose of this project has revealed that informing victims about their rights is an ongoing process which does not stop once the victims' application has been filed. In addition to the information that victims have a right to receive about developments in the case and impact on their participation, legal representatives often continue to explain to victims the content and way of exercising their rights, as well as other matters related to judicial proceedings, throughout the life of the case.³⁸ That appears to be a necessary process, as complex legal notions are difficult to grasp and can at times only be understood through repetition over time.

The process of informing victims is therefore time-consuming. A Common Legal Representative interviewed for this research indicated that those who do not have the experience of engaging with victims in such type of dialogue do not normally appreciate how long it takes.³⁹ As time-consuming as this process may be, it must be emphasised

³⁸ Interview with Fidel Nsita, ICC Common Legal Representative, 27 Aug 2013 (notes in file with the author)

³⁹ *Id.*

that strengthening victims' knowledge about their rights makes a very significant contribution to the rule of law.⁴⁰ Conversely, lack of adequate and timely information creates frustration among victim communities and may cause some to lose interest in the process.⁴¹

One relevant source of frustration for victims is the length and slowness of proceedings. The slow pace of proceedings has concrete consequences for victims. For example, in the *Katanga and Ngudjolo* cases at the ICC, some victims have died before the case reaches a final verdict. However, the most common source of frustration is by far the lack of access to reparations. The slowness of proceedings has a direct impact on frustrations with reparations: the longer the trial, the more the victims have to wait for reparations.⁴²

Regarding proceedings at the ICC in particular, victims have expressed frustration with the outcome of proceedings. The following examples will help illustrate this:

Victims in the *Mbarushimana* case were genuinely disappointed by the non confirmation of charges in the case. The process of informing victims about the outcome and consequences of the confirmation of charges decision was deficient and hampered by security constraints. To make matters worse, some of the locations targeted by the arrest warrant were attacked immediately after Mbarushimana was released, which has been interpreted by victims as an act of reprisal.⁴³ ASF submits that victims' negative experience in the *Mbarushimana* case is likely to have an adverse impact on their willingness to participate in the case *Prosecutor v. Sylvestre Mudacumura* (still at large), which covers most of the locations covered by the *Mbarushimana* case.

Victims in the *Ngudjolo and Katanga* cases have expressed deep frustration following the acquittal of Mr Ngudjolo. Their legal representative has explained that they were hopeful during the proceedings, received information about developments in the trial and were keen to contribute. However, the acquittal of Mr Ngudjolo was a blow for victims. Even though the acquittal is not final (an appeal is pending at the time of writing) and no final judgment has yet been issued in respect of Mr Katanga, a significant number of victims have lost hope in the process and in the ICC.⁴⁴

In the *Ruto and Sang* case, victims expressed disappointment at the narrowing down of the temporal and geographical scope of the case.⁴⁵ Also, some of the victims have expressed dissatisfaction about the fact that "some of the people that they considered responsible for the post-election violence were never charged [...]. They highlighted that after highlighting this issue to the former Common Legal Representative, the Office of the Prosecutor failed to take this concern into consideration..."⁴⁶ In the *Ruto and Sang* cases, there have been reports about 93 victims informing the Court that they wished to withdraw from the proceedings. While such an action must be read in the particular context of the political climate in Kenya following the 2013 elections and there are

⁴⁰ The legal representatives' duties to inform victims will be further analysed below.

⁴¹ Interview with Fidel Nsita, ICC Common Legal Representative, 27 Aug 2013 (notes in file with the author)

⁴² For example, it has been reported that victims in Kenya have said "that the ICC case [is] too slow and [has] been subject to several adjournments, and [that they] doubted that they would in any way benefit from the ICC case." (ICC-01/09-01/11-896-Corr-Red)

⁴³ ASF, Plus Jamais Ça ! La voix des victimes de crimes internationaux (RD Congo), 17 July 2012, <http://www.asf.be/blog/publications/plus-jamais-ca-la-voix-des-victimes-de-crimes-internationaux-drc-july-2012/> (last accessed 22 October 2013)

⁴⁴ Interview with Fidel Nsita, ICC Common Legal Representative, 27 Aug 2013 (notes in file with the author)

⁴⁵ See below. ICC-01/09-01/11-825-Anx

⁴⁶ ICC-01/09-01/11-896-Corr-Red

allegations of the victims having possibly been manipulated, the likelihood that victims may want to disengage from proceedings at the ICC should not be overlooked.⁴⁷

Overall, frustration seems to be linked to lack of adequate information including about the potential impact of their participation and outcome of the proceedings, and disregard for their interests, views and concerns. It is relevant to note that it will be harder for victims to accept an acquittal or non confirmation of charges when that outcome is the result of incomplete investigations and weak evidence, than when the person is actually innocent.

4. The specific issue of victims who are left out of the scope of the case

A matter that appears to be particularly difficult is dealing with victims who are outside the scope of a case. In the context of the ICC, the policy of 'focused investigations and prosecutions' has resulted in narrow cases that only take into account a very limited number of incidents in a context of widespread criminality.⁴⁸ Those assisting victims explain how difficult it is to tell a victim 'that they are not a victim'.⁴⁹ That can create tensions in the communities due to lack of understanding about the reasons that determine that certain incidents are chosen and others are not, leaving the victims out of the scope of the investigation. That underscores the importance of informing victims about the reasons why certain incidents have been selected. When it comes to cases before the ICC, clear information about such reasons is not always available.

At the ICC, a problem that has arisen is the gradual limitation of the case, which has led victims who participated in the initial stages of the proceedings to be excluded at later stages.⁵⁰ The main problem relates not to elimination of certain counts, but rather to exclusion of crimes committed in certain localities at certain times. ICC arrest warrants have a general wording that may allow for a broad interpretation of the scope of the case, while confirmation of charges decisions tend to narrow that scope down by establishing with more precision the dates and places of commission of the crimes. For example, in the *Ruto and Sang* case, the summons to appear stated that there were reasonable grounds to believe that crimes had been committed from 30 December 2007 and the end of January 2008 in locations *including* Turbo town, the greater Eldoret area, Kapsabet town, and Nandi Hills town, in the Uasin Gishu and Nandi Districts.⁵¹ The vague determination of dates and the use of the word 'including' regarding locality left the door open for a broad interpretation of the charges. In the confirmation of charges decision, the scope of the cases was drastically reduced to crimes committed in Turbo town on 31 December 2007, the greater Eldoret area from 1 to 4 January 2008, Kapsabet town from 30 December 2007 to 16 January 2008, and Nandi Hills Town from 30 December 2007 to

⁴⁷ *Id.*

⁴⁸ It is noted that the policy of focused investigations and prosecutions has lately been reconsidered. See OTP Strategic Plan, June 2012-2015, 11 Oct 2013, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf (last accessed 4 Nov 2013)

⁴⁹ Interview with ASF staff in DRC, 6 Sept 2013 (notes in file with the author). It is worth recalling that a person is a victim regardless of the existence of a case. According to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Doc A/Res/40/34 [1985]), 'A person may be considered a victim... regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted...'

⁵⁰ One of the requirements for victims to participate in proceedings is that the harm they suffered is linked to the charges brought against the accused. See e.g. ICC-01/04-01/06-172

⁵¹ ICC-01/09-01/11-01

2 January 2008.⁵² As a consequence of such limitation, victims who had been accepted to participate at the pre-trial stage were left out.⁵³ Exclusion of victims from the scope of the case in the *Ruto and Sang* case has brought about disappointment, tension and confusion.⁵⁴ It is noted that the Pre-Trial Chamber ruling was based on evidence presented by the Prosecution during the confirmation hearing. Later filings and decisions in the case indicate that investigations may not have been completed prior to confirmation, thus adversely impacting the temporal scope of the case in respect of one of the locations.⁵⁵

This matter is directly linked to the Prosecution's investigations, evidence gathered prior to the submission of a request for an arrest warrant and continuation of investigations up until the confirmation hearing and thereafter. The Chambers of the Court have made rulings in this regard stating that investigations should be completed earlier on.⁵⁶ The Office of the Prosecutor (OTP) has taken that demand into account in the development of its new strategic plan, where it states that it will "aim at presenting cases at confirmation hearing that are as trial ready as possible."⁵⁷

One of the questions that may arise is whether, given the changes in the scope of the case, it makes sense for victims to participate in the early stages. Victims have a keen interest to influence and shape the scope of the case, because that will have an impact both on their capacity to participate at the later stages and on their ability to receive reparations in case of conviction.⁵⁸ The question is rather how to better define the scope of the case at an early stage. A related question is the role that victims play and should play to contribute to the definition of the scope of the case. The Chambers of the Court have so far applied a restrictive interpretation mostly barring victims from the possibility of contributing to shaping the case, thus adversely affecting victims' rights to genuinely participate in, and make contributions to, the proceedings.⁵⁹

Another delicate point is how to deal with victims who have been excluded from the scope of the cases. Within the ICC framework, those who have been excluded automatically lose their right to be represented by a lawyer as common legal representation through the legal aid programme is strictly limited to victims of the case. In the Kenya cases, victims who were left out of the scope of the case were informed by the VPRS.⁶⁰ For victims who have been communicating with a lawyer to be suddenly stripped of a legal representative and be told by another entity that they can no longer participate in proceedings can be difficult to accept. In some cases, there may be possibilities for them to claim for their rights, by presenting arguments regarding the interpretation of the scope of the case or further evidence on the harm they suffered. However, such types of acts will likely require the assistance of a lawyer.

⁵² ICC-01/09-01/11-373

⁵³ ICC-01/09-01/11-566-Anx

⁵⁴ *Id.*; ICC-01/09-01/11-825-Anx and ICC-01/09-01/11-896-Corr-Red

⁵⁵ See e.g. ICC-01/09-01/11-824; ICC-01/09-01/11-859 (At the time of writing this matter is pending before the Appeals Chamber)

⁵⁶ ICC-01/04-01/10-514; ICC-01/09-02/11-728

⁵⁷ OTP Strategic Plan, June 2012-2015, 11 Oct 2013, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf (last accessed 4 Nov 2013)

⁵⁸ See Independent Panel of Experts' Report on Victim Participation at the International Criminal Court http://www.iccnw.org/documents/report_victims_participation.pdf (last accessed 22 Oct 2013) (hereinafter 'Independent Panel Report'), para. 49.

⁵⁹ M.PENA and G.CARAYON, 'Is the ICC Making the Most of Victim Participation?', *International Journal of Transitional Justice*, doi:10.1093/ijtj/ijt021 (2013), p. 12-14

⁶⁰ ICC-01/09-01/11-661-Anx

III. PRACTICAL ASPECTS REGARDING ORGANISATION OF VICTIM PARTICIPATION

Organising participation and representation of large numbers of victims in proceedings concerning crimes committed in distant locations presents a number of practical and logistical challenges. This report will address two main challenges: working with intermediaries and grouping victims.

A. Working with intermediaries

Much has been said about the reasons that have driven the ICC to make use of intermediaries, including for the purpose of facilitating victim participation in proceedings. Intermediaries have established links with members of the victim communities, can help access and make contacts with victims and communicate with them in their language. Most importantly, local actors such as grassroots NGOs and local leaders enjoy the trust of victims and their communities. The use of intermediaries therefore becomes unavoidable. While the question whether intermediaries should be used is not controversial, the extent to which their involvement should be allowed remains uncertain. The matter of adequate support to intermediaries is also an unsettled area.⁶¹

While the most well-known purpose for which intermediaries have been used in respect of facilitation of victim participation before the ICC is the application process, intermediaries do not only play a role in that initial phase but also continue to make substantial contributions throughout the trial.

1. The ICC's use of intermediaries for the application phase

The Registry's Victim Participation and Reparations Section (VPRS) has resorted — somewhat extensively — to intermediaries for the purpose of facilitating victim participation. The VPRS' traditional practice has been to make standard application forms available to local intermediaries and to train those intermediaries to enable them to assist victims to fill in those forms.⁶² In recent cases, however, the practice has somehow shifted following modifications in the application process and changes of policy.

In the *Gbagbo* case (pre-trial), following the Registry's advice, Pre-Trial Chamber I ordered that the Registry staff (as opposed to intermediaries) should assist applicants in completing application forms. The new approach was tied to the introduction of a novel — 'partly collective' — application system in the case and sought to "maximise efficiency,

⁶¹ See e.g. International Refugee Rights Initiative & Open Society Justice Initiative, Commentary on the ICC Draft Guidelines on Intermediaries (18 August 2011), <http://www.opensocietyfoundations.org/sites/default/files/icc-intermediaries-commentary-20110818.pdf> (last accessed 22 Oct 2013); Victims' Rights Working Group, VRWG submission ahead of the discussions on intermediaries to take place in The Hague Working Group (11 March 2013), http://www.vrwg.org/downloads/2013_March_VRWG_HWG_Intermediaries.pdf (last accessed 22 Oct 2013)

⁶² ICC-01/04-02/06-57

ensure that the collective account of the events reflected in an exclusive manner the perspective of each member of the group, and introduce a measure of quality control.”⁶³

In the trial phase of the Kenya cases, following the introduction of a new registration system (see above), the Registry has assigned a different role for intermediaries. As explained, although a plain reading of the *Kenya cases Decisions* appears to indicate that registration is to be done by the Registry, in practice such registration is undertaken by the Common Legal Representatives. The Registry is meant to assist in the process through mapping of victim communities.⁶⁴ In practice, the Registry trains intermediaries about victim participation and the scope of the cases, it then being up to the intermediaries to map the communities.⁶⁵ In other words, instead of using intermediaries to fill in forms, intermediaries are now requested to identify victims who fall under the scope of the cases and could therefore potentially be interested in registering to participate in the proceedings.

Finally, in the *Ntaganda Decision*, Pre-Trial Chamber II gave specific instructions in relation to the Registry’s use of intermediaries. The Chamber acknowledged that the VPRS may lack sufficient field staff to assist all victims in the field. Security constraints or tensions in the communities may also prevent ICC staff from reaching some of the villages. Departing from the practice established by Pre-Trial Chamber I in the *Gbagbo Decision*, Pre-Trial Chamber II ruled that “the VPRS may benefit from the assistance of suitable individuals, based in the field, who will serve as intermediaries between the affected communities and the Court. Such individuals should be identified and selected from amongst those vested with leading roles in the affected communities and who, by nature of their positions, are trusted by the population. Such individuals may include, for example, [...] community leaders, chefs de village, or staff members of local NGOs.”⁶⁶ The Chamber also issued instructions relating to the control that VPRS should exercise over the intermediaries in order to ensure “their proper performance” by providing adequate training. “All such training activities [...] should be closely coordinated and supervised by the VPRS staff members.”⁶⁷

A number of matters arise from the practice regarding use of intermediaries for the purpose of the application/registration process and latest practice:

✧ ***Presence of the VPRS staff during collection of applications***

Up until Pre-Trial, Chamber I ordered the VPRS to be directly involved in the collection of applications, which was mostly delegated to intermediaries. In the DRC, the VPRS did not hold meetings with victims nor travelled to the areas where victims live (VPRS staff travelled only to the main cities but not to the distant and remote areas where victims are located).⁶⁸ That form of operating had a significant impact on processing applications. In this regard, it has been noted that “mechanisms for checking applications in the field before submission to the VPRS in The Hague appear inadequate [...] large numbers of incomplete forms are being sent to the ICC, resulting in delays in processing applications and, in some instances, victims’ forms not being transmitted to Chambers. To complete

⁶³ ICC-01/04-02/06-57, para. 3

⁶⁴ ICC-01/09-01/11-566-Anx, para. 6; ICC-01/09-02/11-606-Anx, para. 6.

⁶⁵ *Id.* See also Sehmi A., “New victim participation regime in Kenya”, *ACCESS – Victims’ Rights Working Group Bulletin*, Issue 22 (Spring 2013), <http://www.vrwg.org/downloads/130617EnglishVersionFinal.pdf> (last accessed 20 Aug 2013), p. 6

⁶⁶ ICC-01/04-02/06-67, para. 27

⁶⁷ *Id.*, para. 28

⁶⁸ Interview with ASF DRC staff, 6 Sept 2013 (notes in file with the author)

the forms, VPRS must revert to intermediaries and victims for missing information, which is resource intensive and time consuming. It also exposes victims and intermediaries to further contact with the ICC, which in some circumstances could pose security risks.”⁶⁹

In this context, more intense involvement of the VPRS in the field is a very significant development. While the presence of VPRS staff during collection of applications may not always be possible (due to lack of resources, or for security or other reasons) and use of intermediaries will always be needed to identify and reach out to victims,⁷⁰ such direct involvement may make a significant difference, especially when no specialised NGO is involved. That ensures that the applications are complete, which could significantly speed up the application process. The presence of Registry staff in collection of applications may also have a positive impact on victims as it would allow victims to express themselves to ICC staff directly as opposed to through intermediaries.⁷¹

✦ ***Support to intermediaries: training and resources***

Lack of traditionally sufficient support to intermediaries has been extensively documented.⁷² While the adoption of the Draft Guidelines Governing the Relationship Between the Court and Intermediaries (*Draft Guidelines*)⁷³ acknowledges the need for support and provides a framework for the Court’s interaction with intermediaries, in practice such support is rather limited.

The VPRS has trained intermediaries for the purpose of collecting applications since the first ICC cases. As indicated above, Pre-Trial Chambers have recently ordered a more prominent involvement of the VPRS in the collection of application forms, including through careful training and supervision of intermediaries. That has contributed to a significant increase in the coordination established by the VPRS with intermediaries, for example to ensure that different areas where victims within the scope of the case live are reached out to.⁷⁴

Another relevant aspect regarding interaction with intermediaries is the provision of financial support. According to the *Draft Guidelines*, the Registry may only provide such support in the form of reimbursement for expenses, when the intermediaries are requested by the VPRS to undertake certain functions. As a consequence, whenever intermediaries are not specifically requested by the VPRS to undertake an action, they cannot claim reimbursement of expenses.

✦ ***Shift towards grassroots intermediaries***

In addition to the practice of increased presence of VPRS in the field in certain cases following specific orders by the Chambers, it has also been noted that there has been a shift in focus regarding the type of intermediaries used for collection of applications.

⁶⁹ Independent Panel Report, para. 63

⁷⁰ As acknowledged by the Registry in filing ICC-01/04-02/06-57

⁷¹ *Id.*

⁷² E.g. Victims’ Rights Working Group, *Intermediaries Guidelines: Outstanding Issues*, April 2011, http://www.vrwg.org/VRWG_DOC/2011_VRWG_Intermediaries.pdf (last accessed 22 Oct 2013); REDRESS, *Comment on the Draft Guidelines Governing Relations between the Court and Intermediaries* (15 Oct 2010), http://www.redress.org/downloads/publications/Comment_on_draft_guidelines_on_intermediaries_15_Oct_2010.pdf (last accessed 22 Oct 2013); Victims’ Rights Working Group, *Comments on the Role and Relationship of ‘Intermediaries’ with the International Criminal Court* (6 February 2009), http://www.vrwg.org/VRWG_DOC/2009_Feb_VRWG_intermediaries.pdf (last accessed 22 Oct 2013).

⁷³ ICC, *Draft Guidelines Governing the Relationship Between the Court and Intermediaries*, April 2012

⁷⁴ ASF’s experience regarding outreach to victims in the Bosco case in coordination with the Registry

Initially the VPRS expected to work with national human rights organisations in the belief that they would be well placed to assist in this process. The focus quickly shifted towards working with grassroots organisations or individuals who have a prominent role in the victims' communities (e.g. community leaders, chefs de village, etc.), as these proved to be better able in practice to reach and assist applicants.⁷⁵ The preference for individuals with direct ties with victims is understandable and seems wise. However, in practice and depending on the context, the absence of NGOs with a more robust structure and expertise may prove detrimental. While bigger and more established NGOs normally need to establish their own ties with the communities through local leaders or mobilisers (thus adding an extra layer of communication between the Court and victims), there may be advantages to having larger NGOs involved. For example larger NGOs have the resources to reach out to victims and support local mobilisers, which the VPRS is not always in a position to provide. Lack of means has an impact on intermediaries' capacity to operate in a professional manner, including inter alia, to ensure protection of confidential documents.

2. Intermediaries' assistance throughout proceedings

As explained above, there is a tendency to believe that the work of intermediaries as far as victim participation is concerned regards mainly the application process. However, the assistance of intermediaries has proved to be necessary to reach out to victims during the proceedings. Given the limited resources available to legal representation teams and, for some, the lack of presence in remote localities where victims live, use of intermediaries is unavoidable. It is often the same intermediaries who assisted victims in filling in applications who continue to help them be in touch with legal representatives during further stages of the proceedings. A strong relationship of trust is created between the victims and the intermediaries.

Intermediaries help reach out to victims for specific queries that legal representatives have or to provide information that needs to be relayed. They also assist victims in reaching legal representatives or their teams, highlight any security issue the victims may be facing and mobilise victims to meet the legal representative when they or their team are on mission in the area.⁷⁶ Indeed, while legal representation teams conduct missions to the areas and communities where victims live, they are not there permanently. In contrast, intermediaries are present in the communities on a permanent basis and that presents relevant advantages for both victims and legal representatives.

Legal representatives have emphasised the importance of maintaining a good relationship with intermediaries as they prove to be vital for bridging the gap with victims.⁷⁷ The relationship with intermediaries also requires that they are adequately informed and kept abreast of developments in the case and in the legal representation team. Intermediaries who work with legal representatives are trained either directly or indirectly: a good understanding of the work of the ICC and the messages that the legal representatives need to deliver is crucial to adequately informing or consulting victims. Relying on intermediaries does not come without risks. A recent filing in the *Ruto and*

⁷⁵ Interview with VPRS representative, 29 Aug 2013 (notes in file with the author)

⁷⁶ Interview with ICC legal representatives, 27 Aug 2013 (notes in file with the author)

⁷⁷ *Id.*

Sang case exposes the problems that may arise from the use of intermediaries, especially in polarised or unstable contexts.⁷⁸

Assistance of intermediaries is all the more required when the legal representation teams have little or no human resources in the field (for example, legal representatives in the *Lubanga* and *Katanga* cases). The need for the assistance of intermediaries is reduced when legal representatives have field assistants in the country, as they are physically close to the communities and can build a relationship of trust with the victims given their continuous presence in the field.⁷⁹ However, the extent to which a legal representation team relies on intermediaries depends on many factors, including the number of represented victims and their location. For example, if victims are located over a very vast area, it is likely that the legal representatives' field assistants will not be able to be present at all locations regularly, thus making assistance of intermediaries more relevant.

B. Grouping victims

Grouping of victims appears to be a necessary tool to facilitate the participation of large numbers of persons in judicial proceedings. The ICC, despite having dealt with victim participation for over seven years, has little experience in grouping victims. The issue has become more relevant lately as the Registry has been ordered to group victim applicants for the purpose of treating the applications for participation.⁸⁰ However, grouping can apply to different phases of participation and can serve diverse purposes. The criteria used for grouping victims for one purpose (for example, treatment of applications) may not be relevant for other purposes (for example, for legal representation of victims presenting a common interest). Given the diverse approaches that are necessary to facilitate participation and legal representation, it is likely that grouping will not be static and that criteria for grouping will change in accordance with the purpose of such grouping. While acknowledging that there is no unique approach to grouping, a few specific situations will be outlined below. It is relevant to note that there are inherent challenges to grouping victims for participation in judicial and quasi-judicial proceedings.⁸¹

1. Grouping for treatment of applications

Grouping victims is a recent development at the ICC. The first experience was grouping of applicants for the purpose of the partly collective application in the *Gbagbo* case. That experience highlighted the difficulties inherent in creating groups of victims (in the absence of pre-existing or self-identified groups) and bringing victims physically together for the purpose of the application process:⁸² victims may not be able to come together for security or logistical reasons; victims may not feel comfortable speaking about the harm they suffered in front of a group (for example, for fear of stigmatisation or due to tensions within the communities); and members of the community could lack trust in other members of the group (lack of trust may be exacerbated in a post-conflict context).

⁷⁸ ICC-01/09-01/11-896-Corr-Red

⁷⁹ Interview with ICC legal representative, 27 Aug 2013 (notes in file with the author)

⁸⁰ ICC-01/04-02/06-67

⁸¹ For an analysis of such challenges, see ICC-02/11-01/11-62

⁸² ICC-01/04-02/06-57

Overall, it was concluded that the experience of putting victims artificially into groups could adversely affect victims' experience.

Following the *Gbagbo* case experience, VPRS suggested, and the Chamber accepted, that grouping be made by the VPRS when treating applications⁸³ without a need neither for victims to physically meet to complete applications nor, in principle, for them to be considered a formal group beyond the application process. According to Pre-Trial Chamber II, criteria which could be used by the VPRS include: "(i) the location of the alleged crime(s); (ii) the time of the alleged crime(s); (iii) the nature of the alleged crime(s); (iv) the harm(s) suffered; (v) the gender of the victim(s); and (vi) other specific circumstances common to victims."⁸⁴

Taking into account the practical purpose of the grouping exercise and the need to avoid overlap in order to make allocation to groups as straightforward as possible, VPRS has considered that the use of simple criteria should be preferred.⁸⁵ For example, harm is a complex criterion because victims may have suffered different types of crimes and therefore groups could overlap as a victim could belong simultaneously to different groups. In contrast, location is a simpler criterion as most victims identify themselves with one location.⁸⁶ The location could be the one of commission of the crimes (grouping per incident) or the victims' current location. In some cases, those may be identical, but differences may apply in case of displacement or when victims have moved. It is important to determine at the outset which of the two will be used.

2. Grouping for the purpose of legal representation

Given the numbers of victims involved in ICC proceedings, the Chambers of the Court have requested that victims be grouped together and represented by Common Legal Representatives. The tendency in the most recent cases has been to group victims under one single Common Legal Representative per case, to the extent that that is possible, except when there is a conflict of interests⁸⁷ or when the number of victims is significantly high.⁸⁸ According to the ICC Rules of Procedure and Evidence, the determining criterion for grouping victims under one lawyer is identity of interests. Whenever there is a conflict of interest among groups of victims, they must be assigned different legal representatives.⁸⁹ Therefore, grouping for the purpose of legal representation requires consultation with victims in order to ascertain whether there is a conflict of interests.⁹⁰

The issue of victims' interests and actual or potential conflicts is complex and difficult to discuss in the abstract. Victims' experiences vary greatly and that invariably translates into their having different interests. But different interests will not always be in conflict with each other. For example, victims who suffered attacks in different villages will have an interest that charges be confirmed for the attacks of which they were victims.

⁸³ *Id.*; ICC-01/04-02/06-67

⁸⁴ ICC-01/04-02/06-67, para. 45

⁸⁵ Interview with VPRS representative, 29 Aug 2013 (notes in file with the author)

⁸⁶ *Id.*

⁸⁷ For example, in the *Katanga and Ngudjolo* cases, victims were divided in two groups: one group is constituted of former child soldiers and the other group is composed of all other victims (ICC-01/04-01/07-1328)

⁸⁸ In the *Bemba* case, victims were grouped according to their geographical location (ICC-01/05-01/08-1005)

⁸⁹ ICC Rules of Procedure and Evidence, Rule 90(4)

⁹⁰ The issue of consultation with victims regarding their representation will be addressed below, under the legal representation section of this report.

Depending on the context, they may have a view on crimes committed in other villages, or they may not. They will also likely have (strong) views on the way in which the attacks were conducted. In principle, all these victims could be represented by the same lawyer (unless, for example, victims have different views as to which militia committed the attack). However, if the question were whether crimes were committed in village X or in village Y, that would make representation by the same lawyer impossible because it would require litigation strategies that would be in conflict with each other. It has been suggested that, depending on the context, while it may be easier to identify a common litigation strategy during the trial phase, that will become more difficult in the reparations phase where victims' interests tend to vary more.⁹¹

The universe of interests is vast and it may be impossible to elicit the multitude of interests at the outset. Victims may have different and even opposing views on specific aspects of the proceedings, without that necessarily amounting to a conflict of interests. The extent to which a legal representative can represent those diverse views will depend on the context.⁹² At the ICC, exploring the issue of diverse conflicts genuinely (either in general or for specific proceedings) is very difficult because any consideration on common legal representation is driven by financial considerations.

In terms of criteria that could drive a conflict of interest, that will also depend on the context. For example, ethnicity may be a relevant factor in one country/area and not another. Ethnicity will be relevant when it was the reason (real or exploited) for division among the communities during the conflict. In cases where child soldiers and other victims are involved, the conflict becomes apparent very quickly as some victims were victimised by others who are seen as perpetrators in the community. For example, according to ASF's enquiries, Lendu victims have serious objections to being represented by the same lawyer as Hema victims in the *Ntaganda* case. In this case, the conflict is not simply or not only driven by ethnicity but also by the fact that Lendu victims were themselves victimised by some of the Hema victims (child soldiers).⁹³ Each group experienced victimisation in significantly different manners and the likelihood that their views will be different and often conflicting on the motivation for the attacks and the manner in which they were committed is high.

A criterion which is often sidelined but which may have a very relevant impact on victims' views is political affiliation. For example, given the political landscape in Kenya, it would not be unthinkable for Kalenjin victims to have different views from Luo victims in the Kenyatta case.⁹⁴ While on the surface one could argue that ethnicity is the determining factor, in practice it is the victims' political affiliation that drives the conflict of interests.

A relevant question is whether grouping should be used to promote reconciliation among victim communities pitted against one another during the conflict. Reconciliation is a sensitive issue and no assumptions should be made as to the victims' views and

⁹¹ For example, if a group of victims wants individual reparations, while another group claims collective reparations. Interview with Fidel Nsita, ICC legal representative, 27 Aug 2013 (notes in file with the author).

⁹² For example, in the Kenyatta case, when making observations on the place where the trial should sit, the legal representative provided figures and percentages of victims that had expressed themselves in favour of one or other option (ICC-01/09-01/11-786).

⁹³ See ASF, Victims' Consultation on the Grouping for their Legal Representation in the Bosco Ntaganda Case, November 2013

⁹⁴ The views of many Kalenjin and Kikuyu victims have changed after the main accused in the Kenya cases became President and Deputy President of the country (President Kenyatta is of Kikuyu origin; Deputy President Ruto is Kalenjin). They are less supportive of proceedings before the ICC, as they see that as an attack against their leaders.

preferences. Any attempt to promote reconciliation must be firmly rooted on the desire of all victims that that be facilitated. While efforts to promote peace and the rule of law are relevant, it is noted that the purpose of participation in judicial proceedings is not to achieve reconciliation among different members of the communities.

Another question that arose during interviews conducted for the purpose of this study is the number of victims which can be grouped together under a Common Legal Representative. It was argued that representing larger groups makes it more difficult to get to know each client in a detailed way, making it more likely that representation could become abstract.⁹⁵ On the surface, representing a large number of clients may not have an impact on the way in which representation is conducted before the Court. However, the fieldwork associated with representation will certainly be more intense and, while creative ways can be found to reach out to larger groups of victims (for example, through the use of technology, identification of focal points within the community, etc.), it is likely that more field resources (human resources, resources for travel to different areas of the country) will be needed. That will depend on factors such as security and location of the victims (i.e. the more widespread, the greater need for resources in principle).

3. Grouping for the purpose of organising legal representation and meeting victims

According to the Registry "grouping victims already at the application stage not only facilitates the application process itself, but can also facilitate the actual participation of victims subsequently, for instance making it easier for victims' legal representatives to manage their own interaction with their clients if they are already organised in groups according to location or crime."⁹⁶ In general, the location criteria guide grouping for the purpose of meeting their lawyer.⁹⁷

However, there are many factors at play, and criteria for organising representation or meeting victims could vary in accordance with the purpose sought by the legal representative. It is also possible to group victims by location (for practical and logistical reasons) and then organise sub-groups in accordance with victims' needs. All in all, there is no static criterion and the way in which victims are grouped for the purpose of representation may vary throughout the proceedings.

Criteria will be specific to the nature of the case and the characteristics of the group. For example, while location will be relevant when victims are spread out, it may not be so when victims are located within a limited geographical space. When victims speak different local languages, language could become a relevant criterion for organising meetings.

Grouping or sub-grouping may also depend on what the purpose of the meeting is. For example, meetings in which participants are expected to talk about their personal harm are particularly sensitive. In such cases, it may prove impossible to hold meetings with groups and the legal representative may need to meet with each client individually (for example in order to study their case for the purpose of reparations claims).⁹⁸ When

⁹⁵ Interview with ICC legal representative, 27 Aug 2013 (notes in file with the author)

⁹⁶ ICC-01/04-02/06-57, para. 7

⁹⁷ See also ICC-01/09-01/11-566-Anx; ICC-01/09-02/11-606-Anx

⁹⁸ Interview with Fidel Nsita, ICC legal representative, 27 Aug 2013 (notes in file with the author)

discussing harm or personal experiences is involved, grouping victims by type of harm or incident may prove useful. Special attention should be paid in these circumstances to victims of sexual violence, who may not want to speak about their experiences in front of other members of the group.

Regardless of the purpose of the meeting, it is important to ensure active participation by members of the group, so that all voices can be heard.⁹⁹ Specific measures may need to be taken to ensure that certain groups are not marginalised. For example, women (regardless of the type of harm) tend to speak less or not to speak at all if they are brought together in a group with men, either for cultural reasons or because they have a lower level of education and/or do not feel confident speaking the language in which the meeting is conducted. Organising meetings with sub-groups of women or other marginalised groups will ensure greater appropriation and involvement by members of such groups.

Finally, a legal representative may need to group victims for the purpose of argumentation before the Court or in order to obtain further information in relation to specific aspects during the presentation of the evidence. For example, in relation to testimony by a particular witness who will testify about one attack, the legal representative may need to gather and contact all clients who were victims of the particular attack or who suffered a specific type of harm during that attack. When representing large numbers of victims, it is essential that the legal representative has the necessary tools to undertake that task in an efficient and effective manner. Databases in particular are essential for representation of large numbers of clients. Unfortunately, legal representatives at the ICC do not have such tools.

⁹⁹ Independent Panel Report, para. 78

IV. LEGAL REPRESENTATION

Considering the complex and technical character of legal proceedings, representation by a lawyer becomes extremely necessary. Given that victims mostly express themselves through a lawyer, the quality of legal representation will have a strong impact on effectiveness of participation. As it will be explained below, support to legal representation involves a comprehensive set of actions.

The ICC was the first international criminal tribunal to allow for legal representation of victims. As such, it could not resort to any previous international experience in the set-up of a legal representation regime. The development of the ICC legal representation system has been tied to the evolution of the legal aid scheme, given that all victims who have so far come before the Court are indigent.

This study has identified a few relevant matters that play a significant role in the modes of legal representation. They will be discussed below.

A. Lawyers' appointment

Considering the impact of legal representation on the quality of participation, the choice of lawyer is crucial. We have identified in this regard two matters which are relevant to the selection of the lawyers that will assist victims in proceedings.

1. Consulting victims on the choice of lawyer

Every person has a right to be represented by the lawyer of their choice.¹⁰⁰ According to Rule 90.1 of the ICC Rules of Procedure and Evidence "A victim shall be free to choose their legal representative." That rule can be overridden when victims are unable to choose a Common Legal Representative within a time limit established by the Chamber.¹⁰¹

Trust is an essential element in all lawyer-client relationships. A longer duration of proceedings requires sustainability of trust over a prolonged period of time. Given the physical and cultural distance between the Court and the affected communities, Counsel's capacity to understand and convey the context of the victims' harm and ability to stay in touch with them despite the physical distance particularly relevant.

The ICC's practice regarding selection of Common Legal Representatives has changed over time. Prior involvement of a lawyer in the case could be a relevant factor in the appointment of a legal representative. While decisions as to whether to retain a lawyer that had already assisted victims at an earlier stage of the same case are often tied to the circumstances of the case, it is observed that the latest ICC decisions on common legal representation have considered that such prior engagement was not important

¹⁰⁰ International Covenant for Civil and Political Rights, article 14

¹⁰¹ ICC Rules of Procedure and Evidence, Rule 90(3)

enough.¹⁰² The evolution of the ICC's practice regarding appointment of Common Legal Representatives has also had an impact on consultation with victims. Given the difficulties inherent in consulting large numbers of victims on their personal choice of Counsel, the Registry has proceeded to consult victims on the requirements that victims would like to have their legal representative meet.

Thorough consultations were conducted, for example, in the *Katanga and Ngudjolo* case (2009). However, in later cases, consultation has been neglected and at times completely omitted.¹⁰³ At times, the argument provided for lack of consultation has been resource constraints. Lack of consultations on the victims' choice of lawyer is regrettable considering the central role that consultations should play in a victim participation regime, which is precisely designed to involve victims, listen to and consider their concerns. Consultations must also be broad and genuinely allow for victims' views to be gathered.

In the latest ICC cases, following consultations or in the absence of consultations, the Registry has put together a recruitment process which involves a call for applications and recruitment procedures.¹⁰⁴ Such a mode of appointment of a legal representative resembles the ICC staff recruitment process. While the nature of victim participation and the number of victims make straightforward appointment (such as for Defence Counsel) impossible, care must be taken so that the process adequately reflects the specific nature of legal representation. It is important that the views of victims are adequately incorporated and that the appointment process duly takes into account Counsel's independence. A very prominent involvement of the Court without the involvement of victims and adequate consideration of the specific characteristics of the legal profession could be problematic.

In this regard, it is observed that recruitment panels that interview candidates for the Legal Representative position are composed of ICC staff members only and exceptionally of members of other tribunals.¹⁰⁵ However, the panels do not include Counsel Who have experience in independent representation of victims or accused before international tribunals. CSS has explained that panels have been constituted in that manner because it has been considered that the ICC has all the expertise required regarding victim participation and representation¹⁰⁶.

It is submitted that independent Counsel bring a perspective that is unique and that the ICC cannot purport to have. It is strongly recommended that any future recruitment panel involves external Counsel (preferably with experience in legal representation of victims) among its members. It would also be preferable that external Counsel

¹⁰² The prior involvement of legal representatives was considered relevant in the *Katanga and Ngudjolo*, and *Bemba* cases. At the pre-trial stage of the Kenya case, the Registry stated "Until now the Registry has often prioritized existing legal representatives because this enables continuity of legal representation [...] The imposition of new Counsel at this point disrupts continuity of representation, which can be disorienting and upsetting for victims" (ICC-01/09-01/11-243-Anx1) and that it "consider[ed] that there are usually benefits in maintaining continuity of common legal representation. However such benefits must be assessed through the framework of the same criteria applied to other counsel [...] Based on this evaluation the Registry concludes that the benefits of continuity of representation are minimal in respect the existing private legal representatives" (ICC-01/09-01/11-243). Prior involvement of a Common Legal Representative was not considered relevant at the trial stage of the Kenya cases. In this regard, see dissenting opinion by Judge Eboe-Osuji in ICC-01/09-01/11-479.

¹⁰³ ICC-01/09-01/11-243; ICC-01/09-01/11-469

¹⁰⁴ For example, see information distributed to Counsel on the ICC List of Counsel, ICC-01/09-01/11-243-Anx4

¹⁰⁵ Interview with CSS, 2 October 2013 (notes in file with the author)

¹⁰⁶ *Id.*

representatives to the panel be appointed by members of the legal profession, as opposed to by the ICC.

The Registry's recommendations following the recruitment process are not always followed by the Chambers.¹⁰⁷

2. Requirements that a legal representative should meet

In addition to the legal requirements to represent victims (or accused) at the ICC,¹⁰⁸ ICC Chambers have established additional criteria that should be considered when selecting a legal representative. Those criteria are normally identified by the Registry on the basis of consultations with victims or through its own analysis. In other cases, the Chamber has come up with its own criteria on the basis of its own understanding of the case and the situation.

For example, in the *Bemba* case, priority was given to Counsel of the country and the nationality of the victims. Trial Chamber III stated, "Given the specific circumstances of the present case, the Chamber places particular emphasis on 'the need to respect local traditions' as set out under Regulation 79(2) of the Regulations of the Court and considers it advisable that the Common Legal Representative speak the victims' language, share their culture and know their realities in order for the victims' representation to be more meaningful."¹⁰⁹

In the pre-trial phase of the Kenya cases, the following criteria were considered relevant:

- (i) an established relationship of trust with the victims or ability to establish such a relationship;
- (ii) demonstration of an ability and willingness to take a victim-centered approach to their work;
- (iii) familiarity with the country where the crimes, in connection with which the victims are admitted to participate in the proceedings, have been allegedly committed;
- (iv) possession of relevant expertise and experience, demonstrated by previous experience in criminal trials, experience representing large groups of victims and specialised study in relevant academic fields;
- (v) readiness to commit a significant amount of time to maintain contact with a large number of clients, to follow developments in the Court's proceedings, to take any appropriate steps in the proceedings, and to maintain adequate contact with the Court; and
- (vi) basic IT knowledge.¹¹⁰

In the trial phase of the Kenya cases, Trial Chamber V considered that the victims' interests would be best served if the legal representative were based in Kenya. According to the Chamber, "the greater geographical proximity between victims and the Common Legal Representative is important to ensure that victims can communicate easily and

¹⁰⁷ E.g. ICC-02/11-01/11-138

¹⁰⁸ Those criteria are: ten years of experience in international or criminal law and procedure; fluency in one of the working languages of the Court and absence of convictions for a serious criminal or disciplinary offence which would be incompatible with the nature of Counsel's functions. See ICC Rules of Procedure and Evidence, Rule 22 and Regulations of the Court, Regulation 67.

¹⁰⁹ ICC-01/05-01/08-1005, para.11

¹¹⁰ ICC-01/09-01/11-249, paras. 69-74

personally with their representative and thus ensure meaningful representation.”¹¹¹ Representation in Court in the Kenya cases is ensured by representatives of the Office of Public Counsel for Victims (OPCV), who receive instructions from the legal representatives to make submissions on their behalf.¹¹²

It is important to underline that the requirements that victims will want a legal representative to meet will vary from one situation to another. This underscores the importance of adequately consulting with victims. While acknowledging that requirements will vary from one case to another, we analyse below a few of the criteria that have been identified by the ICC Chambers and which appear to be particularly contentious.

✧ ***A national of the country or member of the same ethnic group***

Being a national of the country where the crimes have been committed has been considered to be a requirement, for example in the *Bemba* case. While it is acknowledged that nationals of the countries concerned may (or may not) present significant advantages over other lawyers, it is important that the analysis on this point is not simplistic, but rather looks into the reasoning and implications of such a preference. Victims’ preferences for a foreign or a national lawyer are often rooted in broader notions including impartiality and capacity to understand the context and convey the victims’ experiences with accuracy.¹¹³ Victims’ choices made in a conflict or post-conflict situation will often involve trust issues. For example, victims in Kenya may prefer to have a foreign lawyer because they fear that a local lawyer could be corrupted. In another context, victims could prefer a lawyer from the same ethnic group because understanding of the root of the conflicts and their suffering is a priority. All in all, consultations with victims reveal the reasons behind the reasons which may make finding compromises among different groups of victims easier. This is why it is relevant that consultations are carried out in such a manner that allows victims to express the motivation for their views.

✧ ***Being based in the situation country***

In the Kenya cases, it was decided that that the Common Legal Representative should be based in the situation country. Consultations with those assisting victims directly for the purpose of this study have revealed that the importance of the lawyer being based in the country concerned can vary from one situation to another and will also depend on a number of factors. The following remarks can be made in this regard:

- Being based in the country will not always imply being in the proximity of the victim communities and having the capacity to consult them regularly. For example, a lawyer based in the capital city of a country (e.g. Kinshasa or Nairobi) may actually be very far from the victims.
- When the missions to the victim communities are conducted mainly by the legal representative’s field assistants, the presence of a lawyer in the country acquires

¹¹¹ ICC-01/09-01/11-460, para. 60; ICC-01/09-02/11-498, para. 59

¹¹² *Id.*

¹¹³ During focus group discussions, victims who expressed an initial preference for a lawyer who came from their own community came to believe that it would be satisfactory for a foreign lawyer to represent them, provided that person got to know the community well. Similarly, victims who expressed an initial preference for a foreign lawyer were often convinced by their peers that a local lawyer would be satisfactory, provided he or she was not corrupt or biased by affiliation to political factions. Interview with Chris Tenove (based on research conducted in Kenya), 29 Aug 2013 (notes in file with the author)

less relevance. The reasons for field assistants taking the lead in missions to the victim communities may be based on security or other considerations.

- Security and the need to ensure independence may be relevant considerations when appointing a lawyer and in order for him/her to be based in the country.¹¹⁴
- The presence of a lawyer in the country may be all the more important during the pre-trial stage of the case, for the lawyer to get acquainted with the victims' stories. If the lawyer is not a national of the country concerned, being based in the country at least for a limited period of time will also allow him/her to better understand the historical, political, social and cultural context of the victims' suffering. In contrast, in-country presence may be less relevant during trial, when judicial activity takes place physically before the Chamber and when the lawyer can rely on field assistants to contact victims to receive instructions on specific points required for questioning of witnesses and presentation of the evidence (missions can be undertaken during recess or whenever the Court does not sit in session). A system like the one put in place in the Kenya cases, where the lawyer is ordered to be based in the country and where representation in Court is ensured by another person, poses the following problem. Ensuring the most possible, direct and straightforward link between victims and the Court may have a relevant impact on effectiveness of participation. In Kenya, in particular, where victims follow the trials in the media, it may appear to them as a disconnection to see a different person in the courtroom from the one they have met in person. ASF is aware that victims in the *Katanga* case refused to have strategic discussions with the Counsel's legal assistance (based in the field) and asked to speak to the Lead Counsel. In conclusion, a unique bond is created between Counsel and clients to which victims attach particular importance.

✧ **Balance between support and independence**

The Committee of Budget and Finance (CBF) and the ASP have requested that the Court explore a more prominent involvement of the OPCV in legal representation of victims before the Court.¹¹⁵ The OPCV has a mandate to assist victims' Counsel and victims.¹¹⁶ It has been recognised that both the OPCV and the external Counsel bring unique expertise to victims' representation.¹¹⁷ However, the Court, the OPCV and Counsel are yet to find the right balance to make the best out of OPCV's expertise on ICC proceedings and jurisprudence, and external Counsel's valuable knowledge of the situation country and victim communities and capacity to reach out to them and communicate in a language they understand.

The Chambers in the Kenya cases and in the *Gbagbo* case have established 'mixed' systems involving both OPCV and external legal representatives in direct legal representation. As explained above, in the trial phase of the *Ruto and Sang* case and in the *Kenyatta* case Trial Chamber V appointed Common Legal Representatives based in Kenya and ordered that they be assisted and represented in Court by a member of the OPCV.¹¹⁸ Instead, in the *Gbagbo* case (pre-trial), Pre-Trial Chamber I appointed the OPCV

¹¹⁴ ICC-01/09-01/11-469, para. 16(b),

¹¹⁵ ICC-ASP/11/2/Add.1; ICC-ASP/11/5, para. 57; ICC-ASP/10/15, para. 10

¹¹⁶ Regulations of the Court. Regulation 81

¹¹⁷ E.g. Contribution du BCPV à l'étude sur la participation et la représentation légale des victimes (in file with the author)

¹¹⁸ ICC-01/09-01/11-460; ICC-01/09-01/11-498

as the Common Legal Representative and ordered that it be assisted by external Counsel based in the Côte d'Ivoire.¹¹⁹

Both experiences are relatively recent, which makes evaluation of these models premature. According to the OPCV's preliminary assessment, the model of the *Gbagbo* case should be preferred, *inter alia*, because the OPCV members assisting Counsel (in a model such as the one put in place in the Kenya cases) may not always be in a position to respond to judges given the communication difficulties between The Hague and the field.¹²⁰ On the other hand, a relevant downside of the *Gbagbo* case model is that external Counsel is only involved as an assistant. One of the greatest advantages of involving an external legal representatives in international criminal proceedings is the potential to empower lawyers from the situation countries. A relevant role for lawyers is the development of a legal strategy in full independence. It is unclear to what extent an assistant to Counsel can be genuinely, prominently and independently involved in the development of a litigation strategy when operating under instructions from the OPCV.¹²¹

B. Principles concerning lawyers' involvement in a case

Interviews with lawyers and victims conducted for this study sought to inquire about aspects of lawyers' involvement in the case which can be considered relevant for legal representation to be successful. Some of the principles referred to in those interviews are described below. The list should not be considered exhaustive.

1. Involvement of a lawyer at an early stage

This study has revealed that involving a lawyer at an early stage can have a significant impact on the preparation of the case. When ASF assists victims in filling in application forms for participation in ICC proceedings, it ensures that a lawyer is involved in interviews with victims and revision of application forms before they are transmitted to the ICC's Registry.¹²² The advantages of such a system are that lawyers can identify at the earliest possible stage contradictions in the applications that require clarification or supplementary information, which if not addressed at this stage could pose problems during evaluation of the evidence.¹²³ Even though victims' applications are not considered part of the evidence, they are part of the record of the case and could be used, *inter alia*, to assess victims' credibility should they testify or appear before the Court to present their views in person before the Chamber

The same applies to national proceedings, where it is more effective to identify inconsistencies at the investigation stage rather than trying to resolve those problems at

¹¹⁹ ICC-02/11-01/11-138

¹²⁰ *Id.*

¹²¹ External Counsel have also expressed concerns about the direct involvement of OPCV in direct representation of victims. See e.g. M.ANYAH and S.CHANA, Legal Aid Consultation 2012 – Addendum to the Comments by Legal Representatives in the Kenya cases, September 2012, http://coalitionfortheicc.org/documents/Addendum_to_legal_aid_comments_%28Sept2012%29_FINAL.pdf (last accessed 23 Oct 2013)

¹²² Assistance of a lawyer at this stage is not required by the ICC and not remunerated under the ICC legal aid scheme.

¹²³ Interviews with Fidel Nsita, ICC legal representative, 27 Aug 2013 and Sylvestre Bisimwa, 4 Sept 2013 (notes in file with the author)

trial. Lawyers normally look ahead and can anticipate incidents that may arise at subsequent stages of the proceedings on the basis of a preliminary evaluation of the available evidence. They can advise victims and make recommendations that will strengthen the victims' cases.

2. Consultations with victims

Consultations with victims constitute an essential aspect of victim participation. If victims are not consulted and lawyers represent the abstract interests of victims, there is no point in having victim participation. The added value of victim participation is that direct connection between the real views expressed by victims in a certain context and in relation to specific proceedings, and the Court. In order for those views to be channelled, regular, sufficient and genuine consultations must be organised between victims and their lawyers. Victims interviewed during this study noted that one of the qualities that they appreciated more in a lawyer was their capacity to 'represent' what the victims had told them.¹²⁴ Consultations are also essential for lawyers to be in a position to reflect the victims' views.

In order for victims to share their views with Counsel, trust must be built. Creating a relationship of trust takes time, especially when the lawyer has not been appointed by the victims themselves. Creating and maintaining such a special bond requires regular meetings over time as well as devoting considerable time to each meeting with victims. As a lawyer interviewed for this study put it, 'explaining complex legal proceedings to victims simply takes time'.¹²⁵

Even when a legal representative may have assistance in the field (be it field assistants in the context of the ICC or intermediary NGOs in the context of national proceedings), direct interaction between the victim and the lawyer is necessary. The appointment of field assistants as part of an ICC legal representative's team structure contributes to reducing the number of missions to the field but does not eliminate the need thereof.

Research conducted during this study revealed that legal representatives in some of the cases at the ICC have not always given victims' consultation the highest priority. While in some cases, this may have been due to the lack of field structure (which underscored the need for missions and made assistance of intermediaries all the more crucial), there appears to have been a certain level of neglect on the part of certain lawyers concerning the importance of consultations. The length and regularity of consultations may at times be affected by lack of sufficient resources.

¹²⁴ "Nous sommes satisfaits parce que nous leur avons raconté nos histoires et nous les avons entendus à l'audience. Ils ont été fidèles à nos histoires". Interviews with victims, 3 Sept 2013 (notes in file with the author)

¹²⁵ Interview with Fidel Nsita, ICC legal representative, 27 Aug 2013 (notes in file with the author)

C. Beyond Legal aid: support to lawyers

Access to justice for victims of international crimes is simply not possible without legal aid. Given the variety of needs that they face and the situation of extreme poverty and marginalisation in which they find themselves, most, if not all, victims do not have the means to pay for their involvement in legal proceedings. The ICC has developed a victims' legal aid scheme, which has evolved through jurisprudence. The legal aid regime has been reformed recently¹²⁶ and could be revisited further.¹²⁷

In addition to financial assistance, victims' lawyers often need other types of support in order to be in a position to represent their clients in an effective manner. Support needs change depending on the particular setting and Counsel's background and previous experience. However, during this study it was possible to trace common needs and concerns of those involved in victim representation before national tribunals in the DRC through ASF's programmes and before the ICC.

1. Other forms of support

It has been noted that legal representatives who have assisted victims before the ICC have different needs. Those include more training and support regarding procedural rules and practical aspects of ICC proceedings shortly after appointment; training in matters related to communication with victims of trauma and psychosocial support; and increased IT support. It was noted during this study that members of legal representation teams other than the Lead Counsel also have support and training needs, which are rarely met given their unstable employment status and lack of visibility of their work.

Legal representatives consulted during this study noted that the ICC annual counsel seminar is a relevant activity especially for those who are not based in The Hague or those who are on the list of Counsel but have not yet represented victims in proceedings before the Court.¹²⁸ The counsel seminar provides an opportunity to receive an update on the latest developments and constitutes a networking opportunity for lawyers. However, the counsel seminar falls short of addressing all of Counsel's training and support needs. It was observed that the OPCV would be in a position to fulfil such needs for training and practical support.¹²⁹ The Office has a mandate to assist legal representatives and given its expertise in ICC procedural law and jurisprudence, it has the necessary tools to

¹²⁶ ICC-ASP/11/2/Add.1, annex; ICC-ASP/11/43; ICC-ASP/11/Res.1

¹²⁷ Numerous reports and papers have been written on the ICC's legal aid regime. See e.g. Coalition for the ICC Legal Representation Team. Comments and Recommendations on Legal Representation to the Eleventh Session of the Assembly of States Parties (Nov 2012), Recommendations and Comments on Amendment Options Concerning the Legal Aid Consultation (July 2012), Submissions and Recommendations on the 'Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011' (Mar 2012), Comments and Recommendations on the 'Discussion paper on the Review of the ICC Legal Aid System (Jan 2012); International Federation for Human Rights (FIDH), FIDH Comments on the Proposed Changes to Legal Aid (Sept 2012); Legal Representatives of Victims, Comments of Legal Representatives of Victims to the Registry's Discussion Paper on the Review of the ICC Legal Aid System (Jan 2012). These and other resources are available at: <http://www.iccnw.org/?mod=legalrep> (last accessed 4 Nov 2013). While most of these papers were tailored to the consultations held in 2012, many of the comments made therein are still valid today.

¹²⁸ Interview with member of ICC list of Counsel, 3 Sept 2013 (notes in file with the author)

¹²⁹ Interview with ICC legal representative, 27 Aug 2013 (notes in file with the author)

adequately inform, train and coach legal representatives during the initial phase of representation.

The OPCV submits that external lawyers have expressed great satisfaction regarding the support provided by the Office and that it is not aware of any complaint.¹³⁰ However, Legal representatives have observed that the OPCV has generally prioritised direct representation of victims to the detriment of more specific, tailored and practical support to legal representation teams, with due respect to their independence. This has created a situation which is perceived by some lawyers as competition, rather than as a support.¹³¹

When it comes to other forms of support including training, it is not submitted that those should always be addressed by the Registry. However, it is suggested that legal representatives and members of their teams could be more actively considered. For example, information regarding institutions providing relevant training could be shared with Counsel and team members. Also, whenever relevant training courses are organised for ICC staff, consideration could be given to the possibility of inviting legal representatives and members of their teams. The following situation provides a clear example. In August 2013, the Registry organised training for Registry staff regarding communication with victims. Legal representation team members were not invited to such training. Attendance by those team members based in The Hague had no financial implications for legal aid. Legal representation team members are constantly in contact with victims and must communicate with them on a daily basis. Paradoxically, members of the Registry who do not interact with victims as part of their duties could attend the training. So could staff members of the Offices for Public Counsel (for victims and Defence) (OPCs).

In terms of IT support, legal representatives and team members have observed that the technology available for them at the Court is at times at odds with the team's needs (for example, team members' files are not easily accessible from the courtroom). The most prominent need appears to be the establishment and availability of a database for use by legal representatives. As discussed above, the use of databases is essential for adequate representation of large numbers of victims in an effective manner. The VRPS indicated that to date it can share information extracted from its database in the form of an excel file, but that in the future it will be able to grant access to legal representatives to information in the database that they are entitled to see.¹³² A few years ago, the OPCV announced the construction of a database which could be shared with legal representatives.¹³³ However, that database has not been made available to legal representation teams. Creation of a separate database would not be financially efficient, nor would it be possible to have different persons enter the same information regarding victims' applications into separate databases. While legal representatives should be able to enter information that is only visible to them, given professional secrecy and confidentiality requirements, a way should be found for them to make use of resources and data which are already available at the Court.

¹³⁰ Contribution du BCPV à l'étude d'ASF sur la participation et la représentation des victimes (in file with the author)

¹³¹ Interview with ICC legal representatives, 27 Aug 2013 (notes in file with the author)

¹³² Interview with VPRS representative, 29 Aug 2013 (notes in file with the author)

¹³³ ICC Counsel Seminar 2011 (notes in file with the author)

2. Consultation of lawyers and involvement of the legal profession

Legal representatives (and their teams) at the ICC are significantly isolated. Their interaction with other Registry sections is rare, given that all demands (for example, in relation to missions, security, finances, etc.) are channelled through CSS. While the support provided by CSS in this regard is appreciated, the side effect of such form of functioning is that there is little awareness among ICC sections about the work of legal representatives and the *modus operandi* of their teams. A better understanding could help tailor support provided by other Registry sections (field security, translation, etc.) to the specific needs of legal representation teams. Significantly, it was revealed during this study that judges have few opportunities to interact with legal representatives (and Counsel generally), while they do interact with other ICC organs (and sections thereof).

It is also noted that legal representation teams have little interaction among themselves. While each case is different, legal representatives share common challenges, which would warrant regular interaction among Counsel and members of their teams. Exchanges among legal representation teams could be encouraged by CSS, VPRS and OPCV, through specific (regular) activities to that end. However, it is also possible for legal representation teams themselves to approach other teams and establish regular communication. The support of an organisation like ASF to gather and foster increased exchanges among legal representatives and members of their teams would be highly worthwhile.

Last but not least, legal representatives are often not genuinely involved in consultations on Court-wide issues that affect their work. For example, issues such as the Court's practice regarding intermediaries and even legal aid. In contrast, the OPCs are often involved in such processes. The work of legal representatives is unique and it is submitted that the Court would significantly benefit from input provided by Counsel. Involvement is all the more important when the matter of consultation is intrinsically related to the nature of their work, such as the ongoing revision regarding victim participation and discussions on legal representation. In practice, legal representatives have been excluded from the great majority of those discussions. When Counsel has been consulted on certain initiatives, such as the 2012 legal aid reviews, such consultations were the exception and limited in time and scope. In addition, legal representatives are not always informed of the outcome of such consultations. For example, legal representatives interviewed for this study were not aware of the status of the ICC consultations in terms of intermediaries and had not received the Draft Guidelines. Significantly, the Draft Guidelines set out obligations for Counsel.

V. BEYOND PARTICIPATION: ASSISTANCE TO VICTIMS, A COMPREHENSIVE APPROACH

It is well known that victims have a variety of needs, some of which must be addressed without delay. Crimes have had a shattering impact on victims' lives and have profoundly affected all areas of their existence. When delivering legal assistance to victims, it is not possible to ignore other needs (depending on the situation those will range from housing and other types of material support to medical and psychosocial assistance).¹³⁴

Victims also often have an expectation that "legal representatives could advocate for material aid and describe victims' experiences."¹³⁵ The question is therefore what the role for legal representatives or organisations involved in legal assistance should be in such a context. While mandates cannot be broadened to cover other areas of support, some experiences suggest that there could be a role for legal representatives or organisations involved in legal assistance to promote, raise awareness and galvanise support for other forms of assistance to be delivered to victims.

For example, legal representatives at the pre-trial stage of the Kenya cases made use of their standing as legal representatives before the ICC to advocate for assistance to victims by raising awareness about victims' needs in meetings with donors and relevant agencies. In the same way, Wanda Akin and Raymond Brown, legal representatives in the *Al-Bashir* case and the Darfur situation, founded an NGO to support gathering of applications for participation in ICC proceedings and to channel other forms of assistance to victims in need. Their NGO, the International Justice Project (IJP), adopts a 'Transitional Justice approach' that involves a health and rehabilitation programme, an emergency response network, as well as advocacy for the arrest of Mr Al-Bashir.¹³⁶ Akin and Brown have pointed out that their standing as legal representatives places them in a unique position to liaise with a variety of actors for the benefit of victims.¹³⁷ Akin and Brown have explained that this work is done together with the Darfurian community and that it involves legal advice to victim clients regarding, *inter alia*, the interpretation of international treaties.¹³⁸

In the case of lawyers that represent victims before the ICC, it is not suggested that advocacy of this sort should be covered by legal aid. However, it is submitted that the ICC and other actors involved in international justice should be aware of the potential that legal representatives may have to galvanise support for other types of assistance to be delivered to victims.¹³⁹ All in all, legal assistance to victims does not happen in a vacuum but in a transitional justice context and any attempt to strictly compartmentalise the types of assistance provided to victims will fail to take into account the extent of the harm that victims have suffered and the wide-ranging character of their experience

¹³⁴ A. SEHMI, *A Luxury Victims cannot Afford: Meaningful Participation at the International Criminal Court*, Kenyans for Peace Truth and Justice Truth & Justice Digest, Issue 07/09 (June 2013). See also Registry's periodic reports in the Kenya situation (e.g. ICC-01/09-01/11-980-AnxA, ICC-01/09-01/11-661-Anx; ICC-01/09-02/11-701-Anx; ICC-01/09-02/11-776-AnxA; ICC-01/09-02/11-810-AnxA).

¹³⁵ Chris Tenove, *International Justice for Victims? Assessing the International Criminal Court from Victims' Perspectives in Kenya and Uganda*, (Waterloo: Centre for International Governance Innovation, 2013). p. 29. Also interview with Fidel Nsita, ICC legal representative, 27 Aug 2013 (notes in file with the author)

¹³⁶ For more information, see: <http://www.internationaljusticeproject.com/about-us/> (last accessed 2 Oct 2013)

¹³⁷ Interview with Wanda Akin and Raymond Brown, 28 Sept 2013 (notes in file with the author)

¹³⁸ Interview with Wanda Akin and Raymond Brown, 28 Sept 2013 (notes in file with the author)

¹³⁹ It is relevant to recall that victims who participate in proceedings before the ICC or who suffered harm which is within the case are not able to receive assistance from the Trust Fund for Victims (TFV), as per the TFV's policy not to assist victims who can participate in proceedings.

VI. CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

A. Conclusion

The ICC is a complex institution and so are judicial proceedings that unfold before it. Victim participation is a new feature in international criminal proceedings and adequate time must be allowed for the Court to acquire experience in the matter. Any consideration for revision of victim participation and legal representation must genuinely take into account the experience gained through practice in the different cases, as well as the fact that not a single cycle of proceedings has been completed and that all cases are considerably different. The ICC's practice regarding victim participation cannot be considered in isolation. Unfortunately, initiatives aimed at reviewing aspects of the victim participation regime and related matters, such as legal representation, have been fragmented. In addition, they have failed to uncover the underlying reasons which may have led to inefficiencies and, in most cases, have failed to consult with those most affected, including victims.

Lack of sufficient field engagement and inadequate or inexistent consultations with those most affected by the victim participation regime and legal representation scheme (in particular, victims and legal representatives) are highly problematic. Legal representatives are in a position to make very genuine contributions to such processes given their direct experience of interaction with participating victims. The reasons why they have not been genuinely involved are unclear and could range from mistrust and unawareness about their role of external Counsel to difficulties for the ICC and the ASP in interacting with the entities with which they are not familiar (those consulted include only ICC organs and sections, OPCs and, in some cases, NGOs). While Counsel has been consulted on some initiatives, such as legal aid, such consultations have been limited in time and scope.

Victim participation was designed to bridge the gap between the Court and the field. Victims' views must be considered and integrated not only in relation to judicial proceedings but also in all Court processes that have an impact on their ability to participate, such as legal representation or reforms to the victim participation scheme. Trials in a distant town thousands of miles away from the victim communities will have little relevance for victims if they are not adequately recognised as the constituency that the ICC has been created to serve.

B. Summary of recommendations

To THE ICC

Regarding the application process and related matters

- When considering the application system, look into the root causes that have led to difficulties in managing the system and consult those involved including legal representatives.
- Reconsider handling of the situation of participating victims who are left out of the scope of the case in subsequent proceedings, including allowing them to be informed by a legal representative and continuing to enjoy legal representation in relation to the case.
- Intensify the VPRS' field engagement, applying care to delegation of tasks, including in relation to informing victims about their rights and ensuring that they provide their informed consent for participation in ICC proceedings.
- Genuinely and thoroughly consult victims on all matters that have an impact on their experience of participation, including issues such as grouping victims and their choice of lawyer/choice of the requirements that a lawyer should meet, acknowledging that every case is unique and that the victims' interests in relation to specific issues cannot be inferred from general or abstract considerations.

Regarding common legal representation

- Involve external Counsel in recruitment panel for victims' legal representatives, and ensure that such external Counsel are appointed by their peers.
- Be more alert to the legal representation teams' need for support, including training and adequate access to databases. Communicate with legal representation teams in this regard.

To OPCV

- Share all relevant tools necessary for representation of large numbers of victims at the ICC, including, wherever possible, database or similar resources.

To LEGAL REPRESENTATIVES (INCLUDING OPCV)

- Adequately and regularly inform victims about developments in the proceedings and implications for their case, consult with them and receive instructions.

To THE ASP

- When studying victim participation, consider participation as a whole (as opposed to only through the application process), acknowledging the implications of victim participation, impact and consequences for the Court.
- Provide only general directions regarding any revision to the victim participation regime, requesting expert advice and delegating implementation to the Court.
- Ensure that all revision processes regarding victim participation and legal representation are adequately coordinated and that they are comprehensive, address all relevant matters, are not driven solely by financial considerations and involve genuine consultations with external Counsel. involve genuine consultations with external Counsel.

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