



## THE IMPORTANCE OF VICTIM PARTICIPATION

### Submission to the Hague Working Group of the Assembly of States Parties

8 July 2013

The Victims Rights Working Group (VRWG)<sup>1</sup> is pleased to share these remarks ahead of the meeting of the “Facilitation on Victims and affected communities and Trust Fund for Victims, including Reparations” of The Hague Working Group which will take place on 9 July 2013 in The Hague. The meeting will discuss victims’ participation before the ICC.

The participation of victims in proceedings – and the application process that enables them to exercise this right – is a unique feature of the International Criminal Court (ICC) and an essential part of its reparative mandate.

**Victims’ participation in ICC proceedings undoubtedly brings benefits to the victims themselves.** These include the possibility to be heard, to voice views and concerns and to request reparation. Participation also provides acknowledgement of the harm suffered by the victim, and recognition that the victim is “part of” the legal process meant to provide him/her with redress. The importance of victim participation in seeking justice has also been highlighted as key to enabling the restoration of victims’ dignity, which is the “ultimate objective in the provision of redress”.<sup>2</sup>

**Victims’ participation in proceedings brings crucially valuable benefits to the Court itself.** Victim participation helps bridge the gap between the Court and affected communities, thereby reinforcing the Court’s legitimacy by providing local ownership over the process and creating confidence in the system. In addition, victims who participate in proceedings can bring to the attention of the Judges important factual and cultural elements that assist the Chambers to understand the context in which crimes took place.<sup>3</sup> The participation of victims can also contribute to the establishment of the truth which, in turn, can be a form of satisfaction for affected communities.<sup>4</sup> Finally, judgments that take into consideration victims’ views and

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<sup>1</sup> The VRWG is a network of over 500 national and international civil society groups and experts created under the auspices of the Coalition for the International Criminal Court in 1997.

<sup>2</sup> CAT, General Comment No. 3: Implementation of article 14 by States parties, 2012, UN Doc. CAT/C/GC/3, para 4 “The Committee emphasizes the importance of victim participation in the redress process, and that the restoration of the dignity of the victim is the ultimate objective in the provision of redress.”

<sup>3</sup> Directions for the conduct of the proceedings and testimony in accordance with rule 140, Katanga & Ngudjolo (ICC-01/04-01/07-1665-Corr), Trial Chamber II, 1 Dec. 2009, para 82; Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, Katanga & Ngudjolo (ICC-01/04-01/07-2517), Trial Chamber II, 9 Nov. 2010

<sup>4</sup> Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Katanga & Ngudjolo (ICC-01/04-01/07-474), Pre-Trial Chamber I, 13 May 2008

concerns may play a positive role in changing the narrative of what happened and, as a result, reinforce the social rejection of such conduct and further contribute to the prevention of international crimes.

The VRWG notes and shares some of the recurring concerns that have been voiced by States and some Court officials with regards to the current system's inability to process large number of applications for participation.

However, from the outset, **the high numbers of victims wanting to engage with the Court should be seen as a measure of the Court's success.** Despite the limited number of cases that have proceeded to trial in the ICC's first ten years, thousands of victims nonetheless seek to exercise their right to participate in proceedings, reflecting victims' trust that the ICC can deliver fair and impartial justice and address glaring impunity for atrocities committed in specific situations. An increasing number of applications by victims to participate in the proceedings shall therefore be viewed positively as an indication of continued confidence in the Court and an expectation for justice and redress, particularly in the face of unprincipled attacks on the Court's legitimacy by alleged perpetrators or opponents to the fight against impunity.

Moreover, the high numbers of victims wanting to engage with the Court should not come as a surprise. Not only is it inherent to the type of crimes the Court is meant to investigate and prosecute, but the Court is mandated to act where justice is unavailable. Engagement by a large numbers of victims fulfils the Court's mandate that affords victims with the right to present their views and concerns and to claim reparation as integral to the justice process. It thus falls upon the Court, with the support of States Parties, to organise itself and devise its strategies to thoughtfully meet the challenges posed by this reality.

In this context, the ASP 11 Resolution on Victims, to be discussed in preparation of the upcoming 12<sup>th</sup> ASP session, "*requests* the Bureau to prepare, in consultation with the Court, any amendments to the legal framework for the implementation of a predominantly collective approach in the system for victims to apply to participate in the proceedings".<sup>5</sup> The VRWG submits that changes to the legal framework of the Court in this regard are premature, and that further reflection is required on the notion of collective approaches.

### ***Changes to the legal framework are premature***

- Any proposal for change to the legal framework of the Court must be preceded by a *comprehensive evaluation* of how the system has worked to date, including careful consideration of all the possible options for changes.
- In 2012 the Court submitted a *Report on the review of the system for victims to apply to participate in proceedings* in which it details six options for changes to the application process. The Court stated that all options "have both advantages and disadvantages" and that it still had "to evaluate some of the options identified in [the] report". The VRWG calls on the Court to further evaluate these options, particularly in light of the impact that any changes to the application system could have on the ability of victims to exercise their statutory right to participate in proceedings, and on the legitimacy of the Court. Any further discussion by the ASP should be informed by this evaluation.
- Any proposal for change should be considered on its own merits. The key objective should be to develop a system of meaningful participation as anticipated by the drafters of the Rome Statute.<sup>6</sup> Financial considerations should constitute one of a number of objectives in addressing the system.

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<sup>5</sup> Resolution ICC-ASP/11/Res.7 on Victims and Reparations, adopted at the 8th Plenary meeting of the Assembly of States Parties on 21 November 2012, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP11/ICC-ASP-11-Res7-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res7-ENG.pdf)

<sup>6</sup> The Participation of Victims in International Criminal Court Proceedings – A Review of the Practice and Consideration of Options for the Future', Redress Trust, October 2012, page 24, at [http://www.redress.org/downloads/publications/121030participation\\_report.pdf](http://www.redress.org/downloads/publications/121030participation_report.pdf)

While it is legitimate for the Court, and for States Parties, to seek to develop processes that are efficient and cost effective, calculations of cost effectiveness should be done fairly, have a long-term perspective and take fully into account the non-financial benefits attached to the different proposals for review.

- Ahead of any proposal for change to the legal texts of the Court, the VRWG recommends that the Court undertake further efforts to streamline the way it processes applications within the existing legal framework. In particular, the VRWG notes that some recommendations made in the 2012 *Court report on the review of the system for victims to apply to participate in proceedings* relate purely to operational processes. For example, the ICC suggests that templates could be designed for parties to provide observations on applications to participate, or the development of a database accessible to parties in the proceedings, which would allow a quicker review of victims' applications. On the face of it, such options do not, in our view, appear to adversely affect the rights of the accused and of victims and could lead to increased efficiency.
- The VRWG notes that the *Working Group on Lessons Learnt*, composed of ICC Judges, established to discuss amendment proposals to expedite the Court's judicial proceedings, has yet to consider the issue of victims' participation.
- The VRWG further notes that some ICC Judges have commented that victims "have not 'significantly' extended the proceedings."<sup>7</sup>

### ***Further reflection is required on the notion of 'collective approach'***

At first sight, one could consider that a collective application process could appear not only logical but also sensible in light of the high number of victims applying to participate; particularly considering that participation itself will often take place "through" a common legal representative.

However, the term "collective" carries multiple meanings and is in itself a complex concept. The VRWG believes that there is a need for more reflection around what is meant by this term and recommends that the Court and States Parties thoroughly examine the concept, and engage all stakeholders in the process. One useful approach would be to reflect further on the distinction between:

- a) collective application processes;
- b) "grouping" victims for the purpose of processing applications (such as is being done in the *Ntaganda case* where victims will apply individually but applications will be grouped by the Registry for the purpose of transmission to the Chamber); and
- c) collective participation.

The VRWG would like to offer a number of preliminary reflections on "collective approaches" to be borne in mind in future discussions:

- Any collective approach should always acknowledge the right of a victim to be recognised and voice his or her views and concerns on an individual basis, as this flows from the individual right vested in the victim by the Rome Statute. Collective applications should contain information on the individual harm individual victims in the group have suffered, as required by Rule 85 of the Rules of Procedure and Evidence.
- It should not be imposed on a victim to be part of a group. Victims should be consulted on their willingness to exercise their participatory right collectively as well as on the composition of the

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<sup>7</sup> Judge Sir Adrian Fulford, 'The Reflections of a Trial Judge', (2011) *Criminal Law Forum* 22:215–223, p. 222.

proposed group. Mechanisms to validate victims' genuine willingness to be part of a group should be developed.

- In particular, a collective approach to the application process may not be suitable to fulfil the right of victims to have their status recognised and their individual dignity respected.<sup>8</sup>
- To be efficient and meaningful to victims, a collective approach will require that victims have a common "collective" such as similarities in relation to the victimisation suffered, the victims' interests in the proceedings, or an overall objective for participation. A collective approach must not ignore or altogether silence those in the group with a different or marginalised voice.<sup>9</sup> Challenges in relation to the determination of who is the "legitimate voice" or leader of the group are also likely to arise and strategies to address them should therefore be developed.
- If financial efficiency is sought, it must be noted that a collective approach may not necessarily be less costly. In order to guarantee that victims' participation is fully and meaningfully realised, mechanisms will need to be set up and supported to allow individuals or all members of "the group" to be consulted and informed on the proceedings.
- In light of the above, the need for flexibility must be recognised, as all cases and situations will be different, covering different crimes and facing different contextual challenges.

Finally, the VRWG encourages the Court and States Parties to further explore aspects of the interactions and experiences of the justice process that actually matter to victims with regards to their participation in proceedings. The review of the system as it has worked so far should not merely seek to find efficiencies; it should consider how to ensure that victims' explicit participatory rights set out in the Statute fully achieve their reparative potential. The VRWG encourages future discussions in the context of this facilitation to consider how to render the participation of victims before the ICC meaningful and effective for all. The VRWG also calls on State Parties to ensure that such discussions include consultations with victims themselves, NGOs and victims legal representatives.

The VRWG looks forward to continuing the constructive dialogue with States Parties on this important issue.

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<sup>8</sup>Strong concerns were voiced by OPCV about the detrimental effect such a system was likely to have for victims' participation and the ability to check the credibility of the applications, Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on the specific issue of victims' application process, *Gbagbo* (ICC-02/11-01/11-40), Pre-Trial Chamber II, 14 Feb. 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1331914.pdf>; Second Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to the victims' application process, *Gbagbo* (ICC-02/11-01/11-51), Pre-Trial Chamber I, 8 March 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1367762.pdf>.

<sup>9</sup>The Participation of Victims in International Criminal Court Proceedings – A Review of the Practice and Consideration of Options for the Future', Redress Trust, October 2012, p.36.