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Report of the Court on the review of the system for victims to apply to participate in proceedings

Content

List of abbreviations and acronyms

ASP	Assembly of States Parties
IR	ECCC Internal Rules
ECCC	Extraordinary Chambers in the Courts of Cambodia
HWG	Hague Working Group
ICC	International Criminal Court
LRV	Legal Representative of Victims
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PIDS	Public Information and Documentation Section
RoC	Regulations of the Court
RoR	Regulations of the Registry
RS	Rome Statute
RPE	Rules of Procedure and Evidence
STL	Special Tribunal for Lebanon
SGG	Study Group on Governance
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit
WG	Working Group

I. Introduction

1. At the 10th Assembly of States Parties ("the Assembly"), the Assembly noted with concern the International Criminal Court's ("the Court") reports on the continued backlogs in processing victims' applications.[1] Given the negative impact of the backlog, the Assembly requested the Court to review the system for victims' applications to ensure its sustainability, effectiveness and efficiency, and to report thereon to the Assembly at its 11th session.[2] At the same time, the Assembly's Study Group on Governance ("SGG") invited the Court to take stock of the lessons learnt in its first decade of operations and to reflect upon measures that may expedite the judicial proceedings and enhance their efficiency. In response this request, the Court identified the system for victims' participation as an area to be addressed in the Lessons Learnt Review.[3]

2. This report contains the outcome of the Court's preliminary review of the current system for victims' applications and identifies possible options for ensuring sustainability, effectiveness and efficiency of the process. The preliminary review will further be considered in the context of the Court's Report on Lessons Learnt.[4] This report primarily addresses the application process for victims seeking to participate in proceedings and, to a lesser extent due to the lack of experience to date, also for reparations. This report does not address the legal requirements for granting victim status, modalities of participation, legal representation or the provision of reparations. However, it was noted during the consultations that these issues are relevant in relation to the nature and degree of risk if wrongly-approved victims participate in the proceedings or if legitimate victims are excluded from participating, and to the resources expended to determine their applications.[5]

3. The report analyses some possible options for amendments to the application system on the basis of their compatibility with the letter and spirit of the Rome Statute to allow meaningful participation of victims, while at the same time being sustainable, efficient and effective, and preserving the fairness of proceedings. The options identified include ones that could be done within the current system, and ones that could require amendments to the Court's practices, Regulations, Rules and Statute. This may also include options previously or currently the subject of litigation between parties and judicial determination.

II. Background

4. The right of victims to participate and their entitlement to reparation is often highlighted as one of the Rome Statutes most innovative features. Article 68(3) of the Rome Statute creates a right for victims to participate where their "personal interests…are affected" and "at stages of the proceedings determined to be appropriate by the Court". It also creates a duty for the Court to facilitate their participation "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".

5. The crimes within the Court's jurisdiction are, by their nature, mass crimes that involve large numbers of victims. The precise number of potential victims linked to a case depends on the scope of the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber. However, the number of victims applying to the Court has increased as a natural consequence of the proliferation of proceedings. The rate at which the Court received applications has increased by 300 per cent, from 187 applications received on average per month in 2010, to 564 in 2011. As at the end of April 2012, 19,422 applications for participation and for reparations have been submitted, and 4,107 victims have been

[1] ICC-ASP/10/Res.5, paragraph 49.
[2] Ibid.
[3] Lessons Learnt: First Report to the Assembly of States Parties, 21 August 2012, Section III.
[4] Those consulted in drafting this report were Registry, the independent offices the Office of Public Counsel for Victims and for Defence, the Office of the Prosecutor, legal advisors in Chambers, and Presidency. The judges were not involved in the preparation of the present report but will consider it as part of the Lessons Learnt exercise. While this is a Court report, the views put forward by those consulted are reflected for completeness but are not necessarily endorsed by the Court as a whole.
[5] For example, the application form is used by the parties to make submissions on whether particular forms of participation are warranted as concerns a particular victim (such as their right to put questions to a specific witness), and can also serve to put the Defence on notice concerning the content of proposed testimony, if the victim is authorised to testify.

accepted to participate in proceedings before the Court.[6] In the future, while the number of victims who decide to apply to the Court may fluctuate, it can be predicted that they will continue to involve the same high numbers as currently received.

6. While these numbers are testimony to the interest of victims in the ICC, such numbers have, however, also put a strain on the Court. The Court is experiencing difficulties processing applications in a timely manner so as to keep pace with the proceedings and enable victims to effectively exercise their rights under the Statute. One of the main reasons for this difficulty is the lack of appropriate resources in the Registry, parties, legal representatives of applicants and Chambers to deal with the volume of applications.

III. Current legal framework for victims' applications

A. Procedure for dealing with victims' applications before the ICC

7. While Article 68(3) provides that victims may present their views and concerns to the Court, it does not stipulate the process for determining victim status.[7] Rule 85 of the Rules of Procedure and Evidence (RPE) defines a victim before the ICC and the legal framework for the determination of victim status is set out in the Court's Rules of Procedure and Evidence (RPE), the Regulations of the Court (RoC), Regulations of the Registry (RoR), and in its jurisprudence. Chambers have established criteria for determining victim applications according to the Court's legal framework.

1. Role of the Registry

8. The Registry is responsible for informing victims of their rights, assisting victims to make their applications, receiving and acknowledging applications, following up on missing information, and managing the documentation received. To participate in proceedings or seek reparations, victims must present a written application to the Registrar.[8] The Registry has prepared standard forms, approved by the Presidency, to enable victims to file their application, although victims are not required to use them. The application must contain specific information, to the extent possible.[9] Applicants must demonstrate that they are victims of crimes that fall under the Court's jurisdiction in the proceedings commenced before it.

9. The Registry supports Chambers by reviewing the applications and preparing reports thereon.[10] The report may include information relating to, *inter alia*, specific issues in relation to a country, victims legal representatives, legal assistance paid by the Court, and requests relating to confidentiality.[11] The applications and the reports are then transmitted

[6] The following numbers of victims were accepted to participate in proceedings currently at trial stage: 129 *Lubanga*, 366 *Katanga/Ngudjolo Chui*, 4,121 *Bemba*, 89 *Banda and Jerbo*, 560 in the two *Kenya* cases.

[7] Article 68(3) of the Rome Statute provides: "where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".

[8] Rule 89(1) RPE. Applications may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or a victim who is disabled. Rule 89(3) RPE. Regulation 106(1) RoR.

[9] Including the victim's identity, address, description of the incident and the harm suffered, personal interests affected, and the relief sought. Regulation 86(2) RoC. The Registrar may request further information to complete the application, see Regulation 86(4) RoC. Even though Reg 86(2) states that such information must be provided "to the extent possible", the jurisprudence has uniformly provided that some of this information shall appear in the application in order for it to be considered complete (for example, identity, date and location of the incident, description of the harm, etc.).

[10] See Regulation 86(5) and (6) RoC. The Registry also converts hard copy applications into image file format, see Regulation 107(1) – (4) RoR.

[11] Regulation 109(2) RoR. In the reports, VPRS has been tasked by the Court to conduct an initial assessment of the applications in light of Rule 85 RPE, considering whether the victim applicant is a natural person or an organization or institution, whether a crime within the jurisdiction of the Court appears to have been committed, whether the applicant has suffered harm, and whether such harm arose "as a result" of the alleged crime within the jurisdiction of the Court. See, for example, Situation in Uganda, Pre-Trial Chamber II, *Decision on Victims' Participation in Proceedings Related to the Situation in Uganda*, ICC-02/04-191, 9 March 2012.

to the relevant Chamber for determination.[12] Applications that are not linked to ongoing proceedings are retained by the Registry and prepared for filing at any moment should a relevant judicial proceeding arise.

2. Reply by the parties

10. According to Rule 89(1), the Registrar must also transmit copies of the applications (but not the report thereon), to the parties who shall be entitled to reply within a time limit set by the Chamber. The Registry prepares redacted versions of applications when so ordered by Chambers, to remove information that could lead to the identification of the applicant, before transmitting them to the Defence and sometimes also the prosecution for their observations.[13] The form chosen by the parties to submit their observations to Chambers may differ from case to case and between the Defence and the OTP.

3. Judicial determination

11. Upon receipt of the applications, the VPRS report and the observations by the parties, Chambers examine each application and decide whether or not the applicant is entitled to participate as a victim in proceedings and at what stage.[14] In taking their decisions, and in accordance with Article 68(3) RS, Chambers evaluate the different interests and concerns, including the rights of the Defence and the interests of a fair trial.[15] A Chamber may reject the application if it considers that the criteria set out in Article 68(3) RS and Rule 85 have not been fulfilled.[16] Those granted victim status by the Pre-Trial Chamber have generally been authorised to participate in the proceedings at the trial stage without the need for their applications to be re-assessed by the Trial Chamber, unless those applications had been granted on the basis of a crime that falls outside the scope of the charges as confirmed.[17]

4. Resources lacking to keep pace with applications

12. Within the Registry, the Victims' Participation and Reparations Section (VPRS) has the duty to process the applications and to file them in a timely manner in accordance with Chambers' instructions.[18] In practice, the VPRS was tasked to process 564 applications per month in 2011, in relation to seven situations, with the same resources that it had in 2007 when it received 28 applications per month in only four situations. The VPRS attempted to meet this demand by hiring additional temporary staff, which is neither efficient nor sustainable under the current budget constraints, and by prioritising the processing of applications linked to cases (rather than situations) and to immediate proceedings (particularly confirmation hearings or trial). Despite having done its utmost to avoid causing delays in the proceedings or preventing victims from exercising their rights, at several times during 2011 the Registry was obliged to inform Chambers that it was not in a

[12] Regulation 86(5) RoC, Regulation 110(1) RoR, and Rule 89(1) RPE.

[13] An exception was made, for example, in the DRC situation where unredacted applications were transmitted to the OPCD for observations. In practice, redacted and unredacted versions are also provided to the legal representatives concerned.

[14] Rule 89(1) RPE. Once the proceedings move on to a new stage, the victim does not have to make a new application, as the Court will automatically consider whether they are entitled to participate also in the new stage, if the victim has indicated in the original application the desire to participate also in later stages.

[15] Rule 89(4) states that where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

[16] Rule 89(2) RPE.

[17] *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-933-tENG, "Decision on the treatment of applications for participation", Trial Chamber II, 26 February 2009, para 10; and *Prosecutor v. Bemba*, ICC-01/05-01/08-699, "Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants", Trial Chamber III, 22 February 2010, paras 17-22; and Trial Chamber, *Prosecutor v. Banda and Jerbo, Decision on the Registry Report on 6 applications to participate in the proceedings*, ICC-02/05-03-/09-231, 17 October 2011, para 15.

[18] For the VPRS this involves: scanning and registering applications, maintaining physical records, checking applications received for completeness and requesting missing information in the field; checking which proceedings, if any, applications are linked to; transmit the applications to the relevant legal representatives; enter key data in a database; conduct legal analysis and prepare reports for the Chambers; prepare redacted versions for the defence and/or prosecution; transmit applications to the parties for observations; manage the records and be ready at any time to retrieve and produce originals, differently redacted versions, other information; track what happens to each application in the proceedings in order to be able to respond to any order of a Chamber.

position to comply with orders by the deadlines imposed. At present, the Registry is unable to keep pace and a sizeable backlog of applications exists.

13. In addition to the work of the Registry, the work of the parties and the Chambers in reviewing and determining applications also requires significant time and resources. At the extreme, in *Bemba* alone, 4,121 applications were submitted.

B. Procedure for dealing with victims' applications before other international judicial institutions

14. The Court is mindful of other international judicial institutions that permit victim participation in proceedings or requests for reparations. Apart from the ICC, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) allow participation by victims. While the focus of the regional human rights courts, including the European Court of Human Rights, is state responsibility rather than individual criminal responsibility, such courts permit victims to petition and seek a remedy. Such procedures can be relevant for the ICC's own process of determining applications.

15. While quasi-judicial in nature, other international bodies or organisations also deal with large claims by victims for reparations, compensation etc. The practice and procedure of such organisations can be relevant to the ICC for the purposes of identifying and analysing potential mass application processing methods. The International Organization for Migration (IOM) and the UN Compensation Commission (UNCC) are two examples of such bodies that have established proven procedures to determine mass claims by victims. This report considers the systems and experiences of these institutions at the annex.

IV. Sustainability, efficiency and effectiveness

16. The Assembly requested the Court to review the system for victims' applications with a view to ensuring its sustainability, efficiency and effectiveness.[19] This section identifies the key elements constituting sustainability, efficiency and effectiveness of a system established for victims to apply to participate in proceedings and seek reparations.

17. The sustainability of an application system refers to its ability to use the necessary resources in a way that does not deplete or permanently damage them. In the context of this report, to be sustainable an application system must be designed to process numerous applications, must not place an undue burden on victims or unreasonably risk their security. In order to be sustainable, it is essential that a system also be adequately resourced to be performed in a timely manner by all involved actors and to allow for appropriate and necessary follow-up.

18. The efficiency of an application system refers to its ability to operate in a manner that allows victim applicants to have their forms duly and timely received and assessed, and that is productive without misusing or wasting resources. To be efficient, an application system must not unnecessarily duplicate work between the actors and all resources (both human and otherwise) must be used judiciously. In order to be efficient, it is essential that ongoing training about the system is provided to the relevant actors, including intermediaries and external legal representatives.

19. The effectiveness of an application system refers to its ability to produce the desired result. In the context of this report, an effective system is one that upholds the rights of victims to meaningful participation, the rights of Defence, and other fair trial guarantees. The system must also be reasonably clear and transparent, such that victims can understand and engage with the system as well as having certainty about their status, rights and obligations in relation to applications.

[19] ICC-ASP/10/Res.5, para 49.

V. Possible options for dealing with victims' applications at the ICC

20. The possible options analysed in this section aim to improve the current system of application at the ICC and may lead to the adoption of a new system that would require modification of the Court's legal framework. The possible options identified in this preliminary report are not exhaustive and others not yet identified at this stage[20] may also deserve consideration. These possible options could be used in different combinations and need not be mutually exclusive. It is unlikely that one option would suit all situations and cases.

21. For each option, the legal and budgetary implications, the advantages and disadvantages for all the stakeholders involved as well as the victims themselves, have been examined according to the framework of sustainability, efficiency and effectiveness explained above. The following six possible options are analysed below:

(a) Continue to implement current system;

(b) Partly collective application process;

(c) Collective processing of applications by Registry;

(d) Registry report as the basis for observations and decision-making;

(e) Decision-making on the status of victims performed by Judges, not litigated between the parties; and

(f) Dealing with victims' applications only at the pre-trial stage.

A. Continue to implement current system

22. The first possible option would be to continue to implement the Court's current victim application system, but to make it is more sustainable and effective by funding it adequately to enable it to function as initially foreseen in the Statute and the Rules. There may also be ways in which the current system could be adapted to be more efficient and effective that would not require additional resources, but may require changes in practice.

23. An example of such an adaptation would be to separate the application process for participating in the proceedings from applications seeking reparations.[21] Currently, there is a joint application form for participation and reparations and most victims indicate their wish to apply for both, even though some may believe that they are only applying for reparations. If applications for reparations could only be made at a later stage, such as after a conviction (involving an application form or other process at that stage), this may reduce the number of applications that have to be processed at the situation or pre-trial stage, as it would be clear to victims that applying for participation in the proceedings was not an application for reparations.

1. Implications: legal, practical and resource

24. The continuation of the current victim application system does not require any amendment to the legal framework or significant changes to established practice. However, this option is not sustainable without additional resources to the actors involved in determining applications. The measure of separate applications for participation and reparations could be implemented if the clear separation between participation and reparations applications were established as a reparations principle under Article 75(1) RS.

25. The Registry would require additional staff in the field (two persons in each place where the Court has a field office) to manage the application process, ensure that accurate

[20] The Lessons Learnt Review by the Court, as requested by the ASP in the Study Group on Governance, is ongoing and may identify and consider further options.

[21] Prior to 2010, the application forms for participation and reparations were separated due to concerns expressed in the early situation countries that having a joint form would create unrealisable expectations among victim communities concerning reparations at an early stage in proceedings.

information is communicated and maintain effective supervision of intermediaries. The VPRS would also require limited additional staff for managing the application process in The Hague and for processing applications. For legal representatives, one or two assistants in the field (depending on the circumstances) would be needed, as well as one or two persons dedicated to assessing and reviewing applications.[22] Defence teams and the OPCD also require additional human resources to process applications.

2. Advantages

26. Continuation of the current system is effective in that it allows the parties to be heard, respecting the rights of the Defence. After several years of practice, the process is reasonably clear and transparent, with the criteria for acceptance being issued by Chambers and made known to victims and the parties. The system allows victims individually to decide whether or not they wish to take advantage of their right to apply to participate in proceedings or seek reparations, to have their applications considered and to participate in proceedings on an individual basis.

27. The advantage of the proposed measure of separating applications for reparations from participation would be that it may reduce the number of applications received early on in the proceedings and, therefore, the time and resources of the Registry, parties and Chambers necessary to consider the applications. However, it will be necessary for the VPRS, legal representative or intermediary dealing with the victim to carefully explain the two applications and their differing purposes and impact for the victims.

3. Disadvantages

28. As noted above, the current victim application system would only be sustainable if the Registry, Chambers, parties and participants are provided with sufficient resources to review and process the applications. However, this solution may not be suitable in the long-term, in that as the number of situations before the Court increases, so will the volume of applications, which will require an increasing amount of resources. For example, this has been the problem faced by the European Court of Human Rights, which cannot manage the large – and growing – volume and backlog of applications.[23]

29. It is difficult to predict the impact of separating the application forms on the numbers of applications to participate received. The experience of the ICC to date is that most victims, once they understand the difference between participation and reparations, confirm that they wish to apply for both. Separating the forms may not reduce the number of applications, but could instead create duplications if victims fill in reparations applications at a later stage, thus placing a larger burden on intermediaries, the Registry, and on the legal representatives of victims. Moreover, such a system could put applicants and victims at a greater risk of re-traumatisation as it implies that they would have to recall and to explain twice their harm suffered. Such a system of separate applications may therefore reduce the effectiveness of the right of victims to seek reparations.

4. Conclusion

30. While certain efficiencies can be introduced, the current victim application system would only be sustainable and effective with additional resources. While upholding victim and Defence rights as enshrined in the Statute and the Rules, this option of continuing the current system with additional resources may not be sufficiently tailored to the volume of applications expected given the scale of the crimes under the Court's jurisdiction. It is noted that, given the current budgetary environment, this option may not be attractive to States

[22] The OPCV suggests that enhanced cooperation between the VPRS and legal representatives could reduce duplication. For example, coordination between the OPCV and the VPRS in gathering supplementary information has proved to be an efficient measure to complete applications in a timely manner without multiplying the interlocutors contacting the applicants.

[23] The number of staff in the ECtHR Registry was 521 in 2005, which had doubled in the preceding six years. At that time, the internal and external audits estimated that the Court needed 1280 extra staff: 660 for coping with incoming applications, and 620 for tackling the growing backlog of applications. Lord Woolf, "Review of the Working Methods of the European Court of Human Rights", December 2005, page 11.

Parties. The current system could, in any event, be retained as an available option, whether used exclusively or in combination with other options, depending on the case.

31. Certain measures, possibly such as separating the application process for participating in the proceedings and seeking reparations, could be implemented without amending the current system and could provide a measure of immediate relief. However, it is untested and difficult to predict the extent to which it would impact the Court's procedures for victims, manage expectations, or reduce the number of applications received.

B. Partly collective application process

32. At the request of the Pre-Trial Chamber in *Gbagbo*, the Registry implemented a partly collective approach to victim applications. In this process, each applicant completed an individual declaration (confirming their wish to participate in proceedings and detailing their harm suffered), but information relating to the crime/incident and other elements common to the group was recorded in a collective form. Only VPRS facilitated the process, and the form was not made available to intermediaries.[24] While this application process is partly collective, victims' applications were determined individually and, if accepted, they participated individually. This partly collective approach may be appropriate in other cases involving large numbers of victims linked to specific incidents or other criteria. [25]

1. Implications: legal, practical and resource

33. The approach adopted in *Gbagbo* was found to comply with the Court's existing legal framework.[26] The approach was challenged in the proceedings before the Single Judge but was upheld on the basis of Article 68(3) RS.

34. In relation to resources, whilst implementing a partly collective application process saves a certain amount of time for processing of applications, it would require more rather than less resources for several Registry sections in the field (VPRS, Public Information and Documentation Section (PIDS), Victims and Witnesses Unit (VWU)) and legal representatives of victims. However, in future it could be implemented with the greater involvement of intermediaries, thus lessening the burden on the Registry.

2. Advantages

35. As this option involves somewhat less paperwork, some time may be saved in processing and considering applications by the Registry, parties and Chambers. For the Pre-Trial Chamber, this partly collective option in *Gbagbo* has simplified its work and saved time. However, it was simplified and more expeditious due to the order made by the Chamber that only VPRS staff deal with the application process: this has ensured that collective applications were accurate, therefore, greatly simplifying Chambers' work. The parties would continue to review and give observations on the individual or partly collective applications.

3. Disadvantages

36. Concerns were raised regarding the *Gbagbo* experience by the Defence and legal representatives, *inter alia* because it did not enable them to have sufficient information to consider the merits of the applications or to represent their clients effectively. The OPCD expressed the view that this approach does not reduce its work and that the group form offers fewer judicial guarantees than the individual form as less information on each applicant is provided. The OPCV also expressed concerns, warning against possible tensions between the current legal framework based on individual application and

[24] The reasons the form was completed with the assistance of Registry staff and not provided to intermediaries was to ensure the effective implementation of the partly collective application process, minimise the risk of duplicate applications and ensure that sensitive categories of victims are properly represented: *Second decision on issues related to the victims' application process*, ICC-02/11-01/11, 5 April 2012, paras 27 to 29.
[25] The same system was adopted for the Situation in Uganda, Pre-Trial Chamber II, *Decision on Victims' Participation in Proceedings Related to the Situation in Uganda*, ICC-02/04-191, 9 March 2012.
[26] *Second decision on issues related to the victims' application process*, ICC-02/11-01/11, 5 April 2012.

participation and the partly collective approach. They asserted that the partly collective application system, in which victims do not provide details of the incident, could undermine the victims' participation system as victims would not be able to provide the full extent of information necessary for the consideration of their request.

37. Another concern expressed was that such a mixed individual/collective application method may result in discrepancies in information provided by victims of the same incident which could generate additional work. The OPCD noted that no significant gain in time was achieved as the Defence had to verify, to the extent possible, that information in the form and in the individual declaration are consistent. In OPCD's view, this approach should only used if Registry staff assist victims with the applications, rather than intermediaries, in order to enhance the reliability of the procedure and the outcome. While using intermediaries may result in temporary savings, overall costs may increase due to litigation associated with the fact that the resultant product is unreliable.

4. Conclusion

38. Partly collective options would have some impact on efficiency and resource requirements in that they may involve some time saving for the Registry, parties and Chambers. However there are differing views on its efficiency and effectiveness. The Court is currently evaluating the *Gbagbo* experience and while there are some indications that it may be more satisfying for some victims than an individual approach, this still has to be verified.[27] A complete assessment of the advantages and disadvantages will be possible after the conclusion of the full participation cycle - namely the end of the pre-trial phase in *Gbagbo*. Indications are that the option may not be suitable for all circumstances, especially where no natural or pre-established groups can be identified and/or where victims are scattered over a wide geographical area. It could be used in combination with other options, including Option A. Other ways of making the processing by Registry and consideration by Chambers more streamlined seem possible but have not been tried.[28]

C. Fully collective application process leading to collective participation in proceedings

39. This approach involves fully collective applications, allowing a group of applicants to present information and to participate on a collective basis. Applications could be accepted from a representative of a community on behalf of a community, and/or on behalf of a recognized association. This application process would represent a major shift, as it involves not only moving away from the individualized approach to dealing with victims' applications in the legal framework, but also a shift from individual to collective participation. Several possibilities under this option heading include:

1. Allowing a group of applicants to present information and to participate on a collective basis. This could require a modification of Rule 85 RPE to recognize as victims not only individuals or those institutions referred to in Rule 85(b), but also communities. The representative of the community could act on behalf of victims of the community even if the entire community was not victimized. A similar approach was taken at a preliminary phase in relation to Kenya, where the Pre-Trial Chamber ordered the Registry to receive representations by community leaders representing communities of victims.[29]

[27] This preliminary view reached by the Registry is based on input from psychologists and preliminary consultations in the field in Kenya.

[28] A variation on the partly collective approach would be for the Registry to continue to receive individual or partly collective applications, but to deal with them collectively in its reporting to the Chambers. Particular variables would be entered by the Registry into the database (time, place, crime, perpetrator etc.) and extracted so as to group applicants linked to a particular incident. The Registry report to the Chamber would summarise the incident and list all the victims claiming to have suffered harm as a result. The Chamber's decision would accordingly list the victims accepted or rejected per incident, but would not give an individualised treatment to each victim. This has not been judicially considered, so it is not clear whether or not it would require amendment to the legal framework. The VPRS has also identified other modifications to the *Gbagbo* model, such as improving the integration of steps taken in the field and The Hague in processing the applications.

[29] This option would potentially require a modification of Article 68(3) RS, which requires a demonstration of the personal interests of victims. It will have to be determined how personal interests of the victims can be assessed in a collective manner. The lessons learned by the Registry from the experience during the preliminary phase in

2. Victims to constitute an association (the criteria for which would need to be defined) and apply for recognition. It may not be necessary for this association to be constituted solely of victims of "the case", but at least a majority of victims of the case. The association could have been constituted before or after the crimes. The Registry would verify if the association, constituted either under national law or recognized by the Court, is constituted of a majority of victims of the case.

3. Transfer the burden of constituting groups of victims outside the Court and do away with a detailed application process altogether. There are a number of ways to achieve this, including appointing a legal representative to represent victims in the case generally (or more than one if there is a conflict of interest between different groups of victims), and delegating it to the legal representative to define who she or he represents.[30]

40. These possible options would require the strong involvement of VPRS and other Registry sections *in situ*. It may be necessary to give individual victims the right to "opt out" of the association or community for the purposes of participation in proceedings before the Court. This could be decided by the Chamber on the basis of a report presented by the Registry.

1. Implications: legal, practical and resource

41. As the fully collective application options are untested it is uncertain whether they would require amendments to the legal framework, especially Article 68(3) RS, Rules 85 and 89 of the RPE and Regulation 86 of the RoC. It would be important to clearly distinguish between what is proposed and the existing definition of a victim that is an organisation in Rule 85(b). In terms of resource requirements, the implications of the greater involvement of the Registry in the field would need to be assessed, but the resources required by the Registry, parties and Chamber to determine the applications received could be expected to reduce considerably. The impact on the victims applying and participating should be carefully evaluated.

42. The view was expressed that the second possibility may present problems if an association is not only constituted of persons who have a personal interest in the case, RS, and that variations on the third possibility could potentially require amendment to Rule 89(1) RPE and Regulation 86(2) RoC. This option could place the main burden on the legal representative, which may have some impact on legal aid and/or the resources required by legal representatives.

2. Advantages

43. In terms of efficiency and sustainability, this option could save significant time, and therefore require fewer resources for the Registry in the processing, legal analysis, preparation of summaries and reports for the Chamber and redaction, as individual applications would no longer be received. For the same reasons, this collective option could save time for the parties and Chambers. The third possibility listed would avoid the need for victims to go through a detailed application process, which potentially better protects their identity if they have security concerns.

3. Disadvantages

44. The concern was expressed that these possible collective options may create numerous practical and legal obstacles relating to the constitution of an association and the selection of representatives, which may require significant and time consuming engagement by the Registry and also judicial consideration. It was asserted that formation of an

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Kenya were that it required a significant engagement by the Registry in the field, but considerably reduced the burden of processing applications. Importantly, seeking representations from community leaders as per Article 15 RS is different from participating in proceedings under Article 68(3) RS.

[30] The Court notes that the recent decisions on victims' representation and participation in the Kenya cases appear to establish the procedure as well as the modalities for the participation of victims as proposed in this potential option. See the Situation in the Republic of Kenya, in the case of The Prosecutor v. William Samoei Ruto and Joshua Arab Sang, ICC-01/09-01/11-460 and The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, ICC-01/09-02/11, both dated 3 October 2012.

organized group may be difficult for victims in some circumstances, including for security reasons, and could cause local tensions. Where victims do not already identify themselves as part of a group, they may not readily have confidence in someone designated as "representative of the community" to speak on their behalf. The Pre-Trial Chamber in *Gbagbo* rejected the idea that a representative of the group would be designated for each collective application. Concerns were also raised that a large administrative burden may be placed on victims in countries where registration fees may be high, or where documents have not been preserved or retained in a war context. Where natural groups or formed organizations do not exist, the question also arises whether it is appropriate for the Court to be involved in creating them or encouraging their creation.

45. OPCV raised the concern that the second possibility will be challenging where national legislation differs from the criteria established at the international level. They assert that this could create discrimination between groups of victims represented at a very early stage – before submitting applications – and the majority of the victims who are not represented at that stage. Accordingly, it may be counterproductive and prevent victims from applying to participate. Further, allowing an association constituted after the commission of the crimes to be a victim opens the risk of opportunistic constitution of an association whose legitimacy and seriousness could be questioned. They recommended judicial control on the modalities of the constitution of associations, the probity of their representatives and the validity of the consent of the victims.

46. In the OPCV's experience, victims of gender crimes cannot be part of a collective action as, in most of instances, the crime they have been suffering from is hidden from the community, often even their own family. Encouraging the use of a collective form may discourage the participation of such victims or place them in a potentially (re)-traumatizing situation. For the victims themselves, this option may be disadvantageous in that victims lose their individual right to apply and participate and may not be able to meaningfully present their individual views and concerns. It also leaves victims open to manipulation and without direct access to the Court.

47. A further concern raised was that the information provided in collective forms may be insufficient to assess the credibility of the applicant, and that if an association is allowed to participate as a group of victims, all of their members should have demonstrated that they are potential victims of the case.[31] The view was expressed that since this possibility deprives the parties of the opportunity to properly assess whether each individual victim satisfies the conditions to be admitted as a victim in the case, it fails to guarantee the fairness of the proceedings or the rights of the accused. Concerns were raised that the third possibility presented would do away not only with input from the parties and participants, but also with judicial scrutiny of victims participating in proceedings, and that effectively, legal representatives would be presenting to the Court views and concerns on behalf of unknown/unidentified victims.

4. Conclusion

48. This possible option may have a significant impact on efficiency for the Registry, parties, participants and Chambers (particularly the third variation), but may give rise to important challenges and increased engagement by the Registry in the field and by the legal representative of victims. The third variation would also be likely to add to the legal aid budget. The option may be appropriate in certain circumstances, such as where natural or already formed groups exist, but may not be appropriate in all cases. It could be used in combination with other options, including Option A.

49. The impact on the victims would need to be assessed, and in particular, the extent to which it leaves them vulnerable to manipulation in the absence of Court control. As these

[31] In some civil law systems, association can participate in proceedings, for example under French law. However, the French code has restricted the access to association legally existing five years before the events (Articles 2 to 2-20 of the Code de Procédure Pénale). The purpose of this is to limit access to the Court only to non-frivolous or opportunistic constitution of association. In addition, under French law, an association can only act on behalf of a person if it can justify to have received the express consent of the victim to be represented by it. Consequently, if French law allows some association to be a "partie civile" in a case, it is submitted to strict legal safeguards. Such safeguards would need to be incorporated into such a proposal at the ICC.

collective options are untested, there is insufficient information to properly assess the advantages and disadvantages.

D. Registry report as basis for observations and decision-making

50. This option involves the preparation and disclosure of a *prima facie* Registry report on the victims' applications that serves as the basis for observations by the parties, legal representatives, and decision-making by the Chamber. The Registry would prepare a report applying Chambers' instructions and jurisprudence and highlighting borderline cases requiring adjudication. This report would be notified to the parties and participants for their observations together with the applications, and the Chamber would adopt/amend the report.

51. A variation could be that the Registry report does not only provide a first assessment of the applications, but that the report is structured in such a way that it constitutes a tool for the parties and the Chamber to submit their observations in a unified and more efficient way. Currently, the parties do not provide their observations on victim applications to the Chamber in the same format. The adoption of a table with unified entries could, for example, render the work of the parties, and particularly of the Chambers, more efficient and avoid duplication of the work. A database of the applications accessible by the parties, Chambers and Registry could also be an option to explore for greater efficiency and effectiveness.

1. Implications: legal, practical and resource

52. This option entails a different role for the Registry, which, on one view, could be seen as compromising its neutrality or encroaching on judicial functions. For example, a concern was raised that the Registry's loss of neutrality may occur and that a challenge may be made to the Registry's assessment of an application. However, such a role is commonly played by registries or their equivalent in other institutions, including the European and Inter-American Courts of Human Rights, as well as the STL's Victim Participation Unit.[32] It is not clear whether this option would require a change to the RPE or RoC in order to permit disclosure of the Registry's report to the parties. Even if it could be introduced by Chambers without requiring a change to the relevant legal provisions, it is preferable that this were introduced uniformly and applied by all Chambers in the interests of consistency and certainty. This option would not require a significant (if any) increase in resources for the Registry to produce the reports as this is already taking place.[33] However, training would be necessary and the creation of a specific tool or a database may require additional resources.

2. Advantages

53. The advantages of this report based option would be that the parties, concerned legal representatives, and the Chamber would benefit from the Registry's review of the applications. This would ensure the transparency of the proceedings and avoid the parties entering into a parallel analysis of same applications. This would be expected to result in cost savings for legal aid as well as for the Prosecution and Chambers and could significantly improve the effectiveness of the process.

54. The advantage of the second permutation outlined above is that it may not violate the neutrality of the Registry, if the Registry does not make assessments but rather simply allows their review to be utilized by the parties as well as Chambers. A tool or database could be created that incorporates the information from the application and allows for multiple entries that could also reflect the observations of the parties.

3. Disadvantages

55. There would be no gain of time or efficiency for the Registry if this report based option was adopted in isolation, as the Registry would still need to process and prepare

[32] Special Tribunal for Lebanon, *Transmission of Applications for the Status of Victim Participating in the Proceedings*, 9 February 2012, STL-11-01/PT/PTJ, para 11.

[33] Possible factors that could increase the costs for the Registry include, for example, if Chambers determine that different information is to be included in the reports or if the scope is greatly enlarged.

reports on the applications. The report may also need to be redacted before being provided to the parties, which would create some additional workload for the Registry. In the view of some, this option may compromise the Registry's neutrality if they make an assessment – rather than a summary - of the applications. In the OPCD's view, this could result in the Registry acting as a party/advocate for the applicants, which is properly the role of the victims' counsel or OPCV. This could create an inequality of arms and impinge on the rights of the defence.

4. Conclusion

56. This Registry report based option for processing applications would avoid unnecessary duplication and make for a more streamlined and transparent process of dealing with victims' applications. It would have a limited impact on sustainability, bringing some – potentially significant - time savings for parties, legal representatives of victims and Chambers, but no benefit for the Registry unless introduced in combination with other possible options that involve greater efficiencies for the Registry. Views differ on whether or not this option would impact on the neutrality of the Registry. This application process would not significantly impact on victims' experience of application to participate. However, the option is untested and further assessment is necessary to properly assess the advantages and disadvantages.

E. Decision-making on status of victims by Judges, not litigated between the parties

57. This option envisages victims' applications being determined by Chambers without prior submissions by the parties. Decision-making on whether or not victims will be given the status of participant is given to the Pre-Trial or to the Trial Chamber, with either no or limited opportunity for observations by the parties. This option is inspired by a recent interpretation by a Pre-Trial Judge of the Special Tribunal for Lebanon (STL) of that Tribunal's Rules, [34] in which the Judge interpreted Rule 86 narrowly and decided that the question of whether an applicant victim is entitled to victim status "is not a matter that falls to be litigated by the parties".[35] This restriction on the parties' input at the STL is limited to the application process and the parties may seek the exclusion of accepted victims during trial. [36] In order to build in some safeguards for the victim applicants, their legal representatives could also be given a right to appeal under Article 82(1)(d)) RS.

58. There are several possibilities under this option:

(a) Partial information is provided to the parties for observations, but not the applications themselves;

(b) Chambers may seek submissions of the parties on relevant legal issues, but no transmission of the applications themselves; or

(c) No opportunity for the parties to give observations at all.

1. Implications: legal, practical and resource

59. This option would likely require amendment of Rule 89.1 RPE (requiring transmission of the applications to the parties) and the RoC. It would not require further change for the judicial role and would have no real impact on the application process for victims.

[34] Rule 86(C)(i) of the Rules of Procedure and Evidence of the STL provides: "The Pre-Trial Judge shall decide a request for the status of victim participating in the proceedings, after seeking submissions from the Parties and the Victims' Participation Unit on relevant legal issues."

[35] R119728 Decision on Defence motion of 17 February 2012 for an order to the Victims' Participation Unit to re-file its submission *inter partes* and inviting submissions on legal issues related to the applications for the status of victim participating in the proceedings, 5 April 2012, para 27.

[36] Ibid, paras 32, 33 and 39. The Pre-Trial Judge added in a later decision that the parties could "be granted access to some or all of the […] applications" at a subsequent stage of the proceedings. The Pre-Trial Judge, the Prosecutor v. S. J. Ayyash, M. A. Badreddine, M.H.H. Oneissi and A. H. Sabra, *Decision on victims' participation in the proceedings*, STL-11-01/PT/PTJ, F0236/20120508/ R121249-R121291/EN/nc, 8 May 2012, para 130.

2. Advantages

60. Not transmitting applications to the parties would obviate the need for redacted versions of the applications to be prepared, which would represent a significant time saving for the Registry. This could serve to protect victims' identities until the trial has commenced. It would also entail a time saving for the parties, who would require fewer resources at the application stage, thus enabling a reduction in legal aid. This approach could expedite decision-making on victims' applications, and avoid delaying judicial proceedings, as the time needed for the parties to give their observations would no longer be required.

3. Disadvantages

61. Concerns were raised that this option deprives the parties of the right to be heard, constituting a violation of the rights of the Defence under Article 67(1) RS. According to the OPCD, the ICC legal framework should not be amended to include parts of a civil law inspired system without simultaneously implementing the safeguarding counterparts of the system. They refer to civil law, for example French law, in which safeguards are provided to avoid frivolous applications, including deposits and preventing victims from appearing as witnesses.[37] At the ICC, some witnesses are also victims participating in the case. The OPCD notes that Rule 113 of the STL Rules provides that victims participating in the case must disclose all exculpatory materials in their possession,[38] whereas the ICC Appeals Chamber has rejected such an obligation.[39] The OPCD concludes that integrating elements of a system without their balancing safeguards could negatively impact on the fairness of the proceedings.

62. A disadvantage of this option would be that while it delivers time and resource savings at the earlier stages of a judicial proceeding, it merely defers the parties' right to make submissions on the victim applications to a later stage. As such, this might not represent a saving in the long-term. While an initial *prima facie* decision on the applications may be taken at the pre-trial stage, this is subject to challenge by the parties during trial, which may create duplication of work for Chambers.

63. The concern was raised that this may be disadvantageous also for victims, who would lack certainty regarding their status until potentially the end of the trial. This could be mitigated if the relevant procedure to appeal contains guarantees such as grounds and specific time-limits for an appeal to be made.[40] It was also asserted that this option might cause distress for the victims, particularly if their applications are ultimately deemed inadmissible despite their participation during trial. This has been the experience of some victim applicants before the ECCC. This could also currently be the case at the ICC regarding those participating victims who also testified (so-called dual status victims and victims who appeared in person before the Chamber as in the *Lubanga* case).

4. Conclusion

64. This option could be used in combination with other options presented in this report to bring certain benefits in terms of efficiency at the earlier stages of proceedings, but may simply postpone the time and resource burden to a later stage, with significant

[37] A deposit has to be done by applicants when they file their application), and such a deposit is not made in cases where the victim has obtained legal aid. Even if the victim has not obtained legal aid, the judge may make an exception. See Article 88 of the French Criminal Procedural Code. In the STL legal framework, a victim cannot be called as witness. See Rule 87(B)(v) of the STL Rules.

[38] Rule 113 Disclosure of Exculpatory Material: (A) Subject to the provisions of Rules 116, 117 and 118, the Prosecutor shall, as soon as practicable, disclose to the Defence any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence. (B) Victims participating in the proceedings shall have the same obligations as set out in paragraph (A) (added 30 October 2009).

[39] The Appeals Chamber, *the Prosecutor v. G. Katanga and M. Ngudjolo, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at trial"*, ICC-01/04-01/07-2288, 16 July 2010.

[40] Appeals may have the effect of delaying a case and being detrimental to the efficiency of the Court. In practice, the workload would be transferred from individual chambers to the Appeals Chamber, which may have less capacity to deal with it in an expeditious manner given their jurisdiction over all cases.

disadvantages to the victims participating. As noted, this could be mitigated if the relevant appeal procedure contains safeguards such as grounds and specific time-limits for appeals. On one view, therefore, the goal of enhancing the effectiveness and efficiency of the victims' application process will not be achieved by this option, as the possibility for the parties to submit observations and challenge applicant victims is merely delayed. However, it may be that the parties will not challenge all the victims who are accepted; currently, in the majority of cases they tend to present observations on all the applications. As this application method is untested at the ICC there is potentially insufficient information to properly assess its advantages and disadvantages. Further assessment is required and could be carried out as part of the Lessons Learnt Review.

F. Dealing with victims' applications only at the pre-trial stage

65. This possible option would involve streamlining the application process such that victims' applications would be dealt with prior to the confirmation of charges and not thereafter unless the charges are widened in accordance with the RPE. Currently, victims admitted to participate at pre-trial phase are admitted again for participation in the trial phase by the Trial Chamber.[41] Some Chambers have continued to receive and make determinations on victims' applications for participation during the trial. In *Bemba,* several thousand applications were dealt with in the course of the trial, some of which were still pending at an advanced stage of the trial. According to the Defence, this impacted on the right of Defence to have adequate time and facilities to prepare (Article 67(1)(b) RS).

66. An alternative would be to open the application process at the earliest possible stage of pre-trial proceedings, with a deadline for submitting applications for participation (though not applications for reparations). These applications would be reviewed before the confirmation of charges, and after the completion of the pre-trial stage, the victims linked to the confirmed charges would automatically be admitted to participate in trial proceedings. No new applications would be accepted, except and in very limited circumstances where the charges confirmed are broader than those initially submitted for confirmation, as per the RPE. A further alternative would be to give the Pre-Trial Chambers the role of decision-making on the status of victims at all stages of the proceedings, even after a case moves on to trial stage or beyond.

1. Implications: legal, practical and resource

67. Such an option could be introduced by amendment to Rule 89(1) RPE and Regulation 86 RoC, and may require amendment of Article 68(3) of the Statute. It would have to be determined whether this proposed division between the work of the Pre-Trial and other Chambers can be supported by the Rome Statute, in particular Articles 39, 57, 61 and 64 RS.

2. Advantages

68. Removing the need to consider victims' applications for participation in the lead up to and during the trial would entail savings for the Trial Chamber. Setting a deadline at the Pre-Trial stage would also limit the number of applications and render the system more sustainable. Giving the Pre-Trial Chambers the role to decide on victim applications may also have the positive effect of ensuring that the Trial Chamber is not influenced by any other information than the evidence presented at trial by the parties and participants. This option would also allow the parties to avoid spending their resources on reviewing and making observations on victims' applications at the trial stage.

3. Disadvantages

69. Such a system would only be sustainable if significantly more resources are given to Pre-Trial Chamber, and could only be effective if there is sufficient time available before the confirmation of charges hearing, which is often not the case. The Document Containing

[41] Regulation 86(8) RoC.

the Charges, which is generally used as the basis for identifying which victims are within the scope of the case, is only issued relatively late in the pre-trial stage. This option would also require the Registry – as well as the legal representatives of the victims - to have sufficient means to be present very early in the affected communities, in order to inform potential victims, provide assistance and process the applications before the end of the pre-trial phase. If insufficient time or resources were available prior to the confirmation of the charges, the effect would be to prevent victims from applying.

70. This could be ameliorated by extending the pre-trial phase or, for example, by requiring the Prosecutor to finish her investigation before the confirmation of charges and disclose all evidence to the Pre-Trial Chamber. However, this could result in extending the time for hearing a case and conflict with rights of the Defence. The OPCD maintained that the right of the suspect under the Rome Statute to expeditious proceedings should not be infringed by victim participation, and that any delay to the proceedings negatively impacts upon all of the stakeholders. This could be seen as an improvement, however, if a longer pre-trial phase allows a significant reduction in the length of the trial phase.

4. Conclusion

71. While the possible option of closing the door to victim applications for participation at the end of the pre-trial stage may decrease the workload for Trial Chambers, it would increase the workload of Pre-Trial Chambers, which would require more resources. It could provide greater certainty to the victims who are participating, but could severely restrict the numbers of victims admitted to participate, unless the pre-trial phase is longer. Reopening the possibility for victims to apply during the trial phase, but giving the job of determining the applications to the Pre-trial Chamber, would save the time of the Trial Chamber, but would only displace the burden onto another Chamber, and would not beneficially impact on the Registry, parties or participants. Further analysis of this option is needed to more conclusively determine its impact and suitability for the ICC.

VI. Conclusions

72. This report detailed the outcome of the Court's preliminary review of the current system for victims' applications as requested by the Assembly. While the right of victims to participate and seek reparation is one of the most innovative features of the Rome Statute, given the mass nature of the crimes under the Court's jurisdiction, the current system with the existing resources is unsustainable. In these circumstances, the Court concurs that it is necessary to improve the process by which victims apply to participate in the proceedings or seek reparations.

73. Six possible options identified in this report were analysed regarding their compatibility with the letter and spirit of the Rome Statute to allow meaningful participation of victims, while at the same time being sustainable, efficient and effective, and preserving the fairness of the proceedings. It is important to note that all of the possible options have both advantages and disadvantages and that, rather than being mutually exclusive, they could be used together in different combinations. It is, however, also important for the victims (as well as legal representatives and intermediaries) to have clarity around the process and to know what to expect.

74. The Court has still to evaluate some of the options identified in this report. The Court considers it premature to recommend a specific option at this stage, and rather recommends further consideration of the legal, financial and practical implications of the possible options already identified. These possible options for improving the victim application process, along with other relevant options, will be further considered by the Court in the context of the lessons learnt exercise and the SGG facilitation and as per the Court's proposed road map.[42]

[42] Lessons Learnt: First Report to the Assembly of States Parties, 21 August 2012, Section III.

Annex

Procedure for dealing with victims' applications before other international judicial institutions and organizations

75. This Annex details the procedures and experiences of other international judicial institutions that permit victim participation in proceedings or to seek reparations, as referred to in Section III of the report. This includes the Special Tribunal of Lebanon, the Extraordinary Chambers in the Courts of Cambodia and the European Court of Human Rights. Mass claim proceedings, where groups of claimants are treated more or less collectively, aim at an efficient settlement in circumstances where individual proceedings would be too cumbersome, time consuming and/or expensive. While not applying the same standards as judicial institutions, procedures at institutions such as the UN Compensation Commission (UNCC) and the International Organization for Migration (IOM) are still relevant for the purposes of this review.

A. Special Tribunal for Lebanon procedure for victims' applications

76. The Special Tribunal for Lebanon (STL) is one of a few international legal bodies that recognise a role for victims in judicial proceedings. While victims can participate, they are not considered a party in the proceedings and nor can they claim damages from the STL.

77. To participate in the proceedings, victims must complete an application form and submit it to the Victims' Participation Unit (VPU). The VPU receives applications, verifies their completeness and transmits them to the Pre-Trial Judge (PTJ).[1] Deadlines have been set for filing victim applications in a case[2] and those who fail to file within the deadline must provide valid reasons to justify their inclusion out of time.[3] The VPU provides the PTJ with an executive summary of each individual application and an overview of all the applications.[4] To date, the VPU has filed the applications, their summaries and overview confidential *ex parte*, as they contain names and other identifying information relating to potential victims.[5] The PTJ has set a strict deadline for the Legal Representatives to either file a justified request for protective measures to maintain the anonymity of each applicant, or disclose the identity of the applicant to the parties.[6]

1. Factors for the STL Pre-Trial Judge to consider

78. To determine whether an applicant can participate as a victim, the PTJ must consider a number of factors.[7] Mandatory considerations include whether the victim has *prima facie* evidence; whether their personal interests are affected; and whether the applicant's participation would be prejudicial to the rights of the accused.[8] The PTJ may also consider whether their participation would cause unnecessary delay; negatively impact on security; be in the interests of justice; and whether the applicant having relevant factual information pertaining to the guilt or innocence of the accused is likely to be a witness.[9] Rule 86C(i) provides that the PTJ shall decide applications for the status of victim after seeking

[1] Rule 51(B)(iii) Rules of Procedure and Evidence.
[2] Rule 89(B) Rules of Procedure and Evidence provides: "The Pre-Trial Judge shall ensure that the proceedings are not unduly delayed. He shall take any measures necessary to prepare the case for a fair and expeditious trial".
[3] *Scheduling Order Regarding the Deadline for Filing Applications to Participate in the Proceedings as a Victim*, 8 September 2011, STL-ll-01/I/PTJ.
[4] *Transmission of Applications for the Status of Victim Participating in the Proceedings*, 9 February 2012, STL-11-01/PT/PTJ, paras 6 and 7.
[5] Non-disclosure in respect of the applicants' identities, and/or the identities of other persons mentioned in applications, is a measure that may be requested under Rule 133(A), or provided under Rule 50. It can also be foreseen that applications for non-disclosure may ultimately be made regarding such information under Rule 115 or 116. Ibid, para 10.
[6] *Order On A Working Plan And On The Joint Defence Motion Regarding Trial Preparation*, 25 October 2012, STL-11-01/PT/PTJ, para 48.
[7] The VPU reviews and verifies the applications in light of these considerations. *Transmission of Applications for the Status of Victim Participating in the Proceedings*, 9 February 2012, STL-11-01/PT/PTJ, para 11.
[8] Rule 86 B(i) – (iv) Rules of Procedure and Evidence.
[9] Rule 86 B(v) – (x) Rules of Procedure and Evidence. *Decision on Victims' Participation in the Proceedings*, 8 May 2012, STL-11-01/PT/PTJ, paras 24 and 25.

submissions from the parties and the VPU on relevant legal issues. It was recently held by a PTJ that the question of whether an applicant is entitled to victim status "is not a matter that falls to be litigated by the parties".[10] A PTJ may seek submissions of the parties on specific legal questions if they so determine, but the victims' applications are not transmitted to the parties.

2. Observations by the parties at the STL

79. Neither the STL Statute nor the Rules determine whether, or at what stage of proceedings and subject to what modalities, the parties are to have access to the victims' applications.[11] The Pre-Trial Chamber (PTC) held that the parties do not have an entitlement to receive applications at the pre-trial stage and that no prejudice is occasioned thereby.[12] Such a decision is without prejudice to any future determination of whether or not the parties should have access to the applications or the information contained therein, and if so, to what extent and subject to which modalities.[13] The PTJ noted that the parties may seek their exclusion during the course of the trial, for which purpose they could request to be heard by the Trial Chamber, as well as request to receive the applications.[14]

B. Extraordinary Chambers in the Courts of Cambodia procedure for victims' applications

80. Victims have enhanced recognition before the Extraordinary Chambers in the Courts of Cambodia (ECCC), and may be called as witnesses, participate actively in proceedings by filing complaints with the Co-Prosecutors[15] or by applying to be joined as a Civil Party.

1. Role of the Victims Support Section of the ECCC

81. Any victim of a crime within the ECCC's jurisdiction may apply to join those proceedings as a Civil Party and seek reparations.[16] Civil Parties are formal participants in the proceedings.[17] Civil Party applications must be made on the Victim Participation Form[18] and submitted to the Victims Support Section (VSS).[19] Co-Investigating Judges have set deadlines for filing applications[20] and have not accepted applications beyond that deadline. The VSS processes complaints and Civil Party applications and prepares reports thereon. The VSS forwards the applications and reports to the Co-Investigating Judges,[21] the Pre or Trial Chamber[22] as appropriate.[23] Subject to the Internal Rules,[24] the Co-Investigating Judges must notify the Co-Prosecutors and the Charged Person when Civil Party applications are made.[25]

[10] *Decision on Defence motion of 17 February 2012 for an order to the Victims' Participation Unit to refile its submission* inter partes *and inviting submissions on legal issues related to the applications for the status of victim participating in the proceedings*, 5 April 2012, STL-11-01/PT/PTJ, paras 27 and 54.
[11] Ibid, para 35.
[12] Ibid, paras 40 and 54. The PTC disagreed that Rule 86(C) amounted to an infringement of the rights of the accused or prejudiced the fairness of the proceedings.
[13] Ibid, para 53.
[14] Ibid, paras 32, 33 and 39.
[15] For the complainant process see Article 2 Practice Direction on Victim Participation 02/2007/Rev.1. Complainants do not participate as parties and are not entitled to seek reparations. Civil Parties cannot appear as witnesses, see Rule 23(4) IR.
[16] Rule 23(1) IR.
[17] Ibid and Article 3.1 Practice Direction on Victim Participation 02/2007/Rev.1.
[18] Rule 23*bis*(4) IR and Article 3.5 Practice Direction on Victim Participation 02/2007/Rev.1.
[19] Victim Participation Form, Practice Direction on Victim Participation 02/2007/Rev.1, Appendix A.
[20] Rule 23*bis* (2) IR. See also ECCC Pre-Trial Chamber, Case 002, *Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications*, D411/3/6, 24 June 2011, para 11.
[21] ECCC, Office of the Co-Investigating Judges, *Order on the Admissibility of Civil Party Applications Related to Request D250/3*, 13 January 2010, D250/3/2.
[22] IR 23(4), Rev.3.
[23] Article 3.4 Practice Direction on Victim Participation 02/2007/Rev.1.
[24] Rule 29(1) IR.
[25] Rule 23*bis*(2) IR.

2. Determination of applications at the ECCC

82. The Co-Investigating Judges decide on the admissibility of applications at any time until the date of the Closing Order (indictment). When considering a Civil Party application, the Co-Investigating Judges must assess whether there are *prima facie* credible grounds to suggest that the applicant suffered harm directly linked to the alleged crimes under investigation,[26] and that the facts alleged in support of the application are more likely than not to be true.[27] According to Rule 23*bis*(3) IR, when issuing the Closing Order, the Co-Investigating Judges decide on the admissibility of all remaining Civil Party applications by a separate order. Such orders shall be open to expedited appeal by the parties or the Civil Party applicants as provided in Rule 77*bis* IR. Unless and until rejected, as per Rule 23*bis* (2) IR, Civil Party applicants may exercise Civil Party rights.

83. With respect to protective measures vis-á-vis the parties, it has not been necessary to redact the identifying information of Civil Parties and their statements at the investigative stage, given the confidential nature of the investigations, which prohibited anyone who had access to the case file from disclosing the information therein.[28] Regarding protective measures vis-á-vis the public, the Trial Chamber confirmed the Office of the Co-Investigating Judges' decision that in applying for protective measures, the identity of the Civil Parties seeking to benefit from the measures must be provided, in addition to an explanation as to how, in the absence of such measures, the lives and well-being of the applicants or their families would be imperilled.[29] In most cases, the Prosecution, who applied for the protective measures on behalf of the third parties, failed to provide this information and the applications were denied.[30] Protective measures were only granted in relation to two Civil Parties. At the trial stage, the Trial Chamber ordered that "in relation to public proceedings before the Trial Chamber in Case File 001 … all Civil Parties (with the exception of [the two Civil Parties]) will henceforth be referred to by name".[31]

3. Final determination and submissions by the parties on applications before the ECCC

84. Decisions on the admissibility of Civil Party applications are open to appeal before the Pre-Trial or the Supreme Court Chamber, depending on the stage of the proceedings.[32] On appeal, all parties to the proceedings can make submissions, or reply to the submissions of other parties.[33] During the trial, the parties also have the opportunity to challenge Civil Party applications.[34] Co-Investigating Judges have noted that, at the pre-trial stage, they are not in a position to make final determinations concerning the harm suffered by victims and that final determinations will only be made by the Trial Chamber in its Judgment based on all of the evidence submitted in the proceedings.[35] In Case 001, the Supreme Court Chamber held that it was not an error of law for the Trial Chamber to determine the merits of victims' applications in its Judgement and find against victims who had participated in the proceedings.[36]

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[26] ECCC Pre-Trial Chamber, Case 003, *Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant*, 28 February 2012, D11/1/4/2, para 3. For the admissibility test, see ECCC Pre-Trial Chamber, Case 002, *Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications*, 24 June 2011, D411/3/6, paras 29, 42 and 71.

[27] Rule 23*bis* (1) IR, and ECCC Pre-Trial Chamber, Case 002, *Decision on the Reconsideration of the Admissibility of Civil Party Applications*, 1 July 2011, D364/1/6, para 13.

[28] Rule 54 IR. See also *Prosecutor v. Kaing Guek Eav* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC, Decision on Protective Measures for Civil Parties, 2 June 2009, para 9.

[29] Ibid, para 7.

[30] Ibid, para 8.

[31] Ibid, page 7.

[32] Article 3.8 Practice Direction on Victim Participation 02/2007/Rev.1.

[33] See, for example, ECCC Pre-Trial Chamber, Case 002, *Decision on the Reconsideration of the Admissibility of Civil Party Applications*, D364/1/6, 1 July 2011, paras 2 -3.

[34] ECCC, Supreme Court Chamber, Case 001, *Kaing Guek Eav alias Duch, Appeal Judgement*, No. 001/18-07-2007, 3 February 2012, paras 455 and 463.

[35] ECCC Pre-Trial Chamber, Case 002, *Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications*, D411/3/6, 24 June 2011, para 29.

[36] Cambodian criminal procedure clearly obliges a court of first instance to finally decide on civil party admissibility in its judgement. ECCC, Supreme Court Chamber, Case 001, *Kaing Guek Eav alias Duch, Appeal Judgement*, No. 001/18-07-2007, 3 February 2012, paras 495 – 496 and 500.

C. European Court of Human Rights procedure for victims' applications

85. Applications to the ECtHR can be made by any individual or legal entity located within the jurisdiction of a State Party to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). There are around 800 million people within the Court's jurisdiction and in the last decade the ECtHR has been inundated with applications and a significant backlog – 139,500 applications - exists.[37] Recent measures adopted to reduce the backlog include reducing the deadline for applications from six to four months, prioritising applications for the most important and serious cases, implementing a pilot judgment procedure for repetitive cases, and appointing additional judges to process applications.[38]

1. Role of the Registry at the ECtHR

86. An applicant must complete an application form and submit it to the Registry.[39] Applications must be made within four months of the date of the final decision at a national level and will not be accepted after that date.[40] It is the principal function of the Registry to process and prepare applications for adjudication and it is for the Court to decide on the admissibility of applications. The Registry case-processing lawyers act as non-judicial rapporteurs and prepare files and analytical notes to assist the judges' determination. In January 2011, a Filtering Section was set up in the Registry with the principal function to carry out a thorough, accurate and immediate sifting of cases to ensure that all applications are placed on the appropriate procedural track. [41]

2. Determination of applications and parties' observations before the ECtHR

87. The three procedural tracks for an application are prompt determination by a Single Judge; examination by a Committee of three judges; or determination by a Chamber in accordance with the Court's priority policy. Protocol No. 14 was implemented to increase the Court's ability to process high volume applications. Under this Protocol, a Single Judge can declare applications inadmissible where they clearly fail to meet the admissibility criteria. The Single Judge decides the application on the basis of a note prepared by, or under the responsibility of, a non-judicial rapporteur from the Registry. [42] The Single Judge may decline to decide the application and refer it instead to a Committee or to a Chamber for examination.[43]

88. A Committee of three judges may, by a unanimous vote and at any stage of the proceedings, declare an application inadmissible or strike it out of the Court's list where such a decision can be taken without further examination.[44] The Committee may also declare an application admissible and render a judgment on the merits if the underlying question in the application is the subject of the Court's well-established case law.[45] In such circumstances, the parties observations can be provided to the Committee as per Rule 54(2)(b) of the Rules of the Court. If no decision is taken by the Single Judge or the Committee, according to Article 29(1), a Chamber must decide on the admissibility and merits of applications.

89. Whereas an application may be declared inadmissible without communicating it to the respondent State, it cannot be declared admissible without communicating it to the State. Under Rule 54(2) Rules of the Court, before taking a decision, the Chamber may decide to

[37] European Court of Human Rights, *Pending Applications Allocated to a Judicial Formation* (30 September 2012).
[38] See generally the High Level Conference on the Future of the European Court of Human Rights, *Brighton Declaration* (20 April 2012).
[39] Rule 47(1) Rules of the Court.
[40] Article 35(1) ECHR. See also High Level Conference on the Future of the European Court of Human Rights, *Brighton Declaration* (20 April 2012P para 15(a).
[41] European Court of Human Rights, *Filtering Section speeds up processing of cases from highest case-count countries*, <http://www.echr.coe.int/NR/rdonlyres/F484672E-0C6A-4815-9449-44157ED9C89C/0/Bilan_filtrage_EN.pdf> accessed 23 October 2012.
[42] Rule 52A(1) Rules of the ECtHR. See Rule 18A regarding non-judicial rapporteurs.
[43] See generally Article 27 ECHR.
[44] Article 28(1)(a) ECHR and Rules 53(1) Rules of the Court.
[45] Article 28(1)(b) ECHR.

request the parties to submit factual information, documents or other material; or invite the parties to submit observations in writing. The applicant must be able to justify her or his status as a victim throughout the proceedings[46] and the respondent State can challenge the admissibility of an application against it. A plea of inadmissibility must be raised by the respondent in its observations on the admissibility of the application – and a State may be estopped from raising such issues subsequently at the merits stage.[47]

D. UN Compensation Commission procedure for victims' applications

90. The UN Compensation Commission was established to resolve claims against Iraq as a result of its invasion and occupation of Kuwait, after a determination of Iraq's liability under international law by the Security Council.[48] Therefore, claimants did not have to prove Iraq's liability in their claims. The UNCC was created as a claims resolution facility that could determine large number of claims in a reasonable time and, as such, the UNCC operated more in an administrative than an adversarial manner.[49] The UNCC processed over 2.6 million claims for approximately US$352.5 billion in compensation from individuals, corporations, governments and international organisations in 96 different countries in only 15 years.

1. Claimant application process before the UNCC

91. The UNCC's Provisional Rules detailed the procedures for claimants to file claims, for the Secretariat to process claims and for the Commissioners to decide claims.[50] Claimants were required to file a claim through their government to the Secretariat, which registered claims and performed preliminary assessments to ensure that all formal requirements were followed.[51] The claims had to be submitted on the official UNCC form.[52] Lawyers in the UNCC Secretariat reviewed the claims and worked with the Commissioners to draft reports and recommendations to the Governing Council, which approved the claims.

92. For efficiency, claims were divided into categories A – F, each with specific evidentiary thresholds, different processing techniques and specific standards for compensation. Deadlines were set for filing of the various categories of claims and also for the Commission to review the claims.[53] The Governing Council gave priority, both in processing and payment of claims, to individual claimants.[54] The UNCC trended away from the traditional standard of proof in an effort to cope with the large number of claims and the paucity of evidence in some cases given the circumstances of the loss.[55] For expedited claims, the claimant only had to "demonstrate satisfactorily" that a particular claim is eligible for compensation.[56] A heightened standard of proof was applied to larger and more complex claims.[57]

2. Determination of claims by the UNCC

93. The UNCC employed matching, sampling and also precedent-setting procedures to determine similar claims. To the extent that claims in a particular category or sub-category possessed similar legal and factual characteristics, the UNCC sought to resolve common

[46] *Burdov v. Russia*, App. No. 59498/00 (ECHR 7 May 2002) para 30.
[47] Rule 55 Rules of the Court.
[48] S.C. Res. 687, UN Doc. S/RES/687 (3 April 1991).
[49] UNCC claims processes <http://www.uncc.ch/clmsproc.htm> accessed 25 September 2012.
[50] UNCC Provisional Rules available at <http://www.uncc.ch/decision/dec_10.pdf> accessed on 2 November 2012.
[51] Articles 14 and 16 UNCC Provisional Rules.
[52] Ibid, Article 6(1).
[53] Howard Holtzmann and Edda Kristjánsdóttir, "International Mass Claims Processes: Legal and Practical Perspectives" (Oxford University Press 2007) page 171. See also Articles 36 and 38 UNCC Provisional Rules.
[54] See UNCC Governing Council Decision 1 of 2 August 1991, *Criteria for Expedited Processing of Urgent Claims*, UN Doc. S/AC.26/1991/1; and Decision 10 of 26 June 1992, *Provisional Rules for Claims Procedure*, UN Doc S/AC.26/1992/10.
[55] Holtzmann and Kristjánsdóttir, supra n 53, page 211.
[56] Article 35 UNCC Provisional Rules. UNCC Claims Processing <http://www.uncc.ch/clmsproc.htm> accessed 27 September 2012.
[57] Article 35 UNCC Provisional Rules and UNCC Governing Council Decision 7 of 28 November 1991, as revised on 16 March 1992, *Criteria for additional Categories of Claims*, UN Doc. S/AC.26/1991/7/Rev.1, para 3.

issues and develop standard valuation methods of such claims.[58] Once the legal and factual precedents were established, the Commissioners applied them to their review of subsequent claims, thus limiting their work to the verification and valuation of the claims and the calculation of allowable compensation.[59] Large or complex cases (ie those in category D – F) could, however, receive detailed review as appropriate.[60]

3. Comment on claims before the UNCC

94. While not a party to the proceedings, Iraq was given an opportunity to express its views. As per Article 16 of the Rules, claims undergoing formal review were included in quarterly reports that noted factual and legal issues raised by the claims. The reports were available to the Government of Iraq and to all Governments and international organisations that had filed claims, with an invitation to submit additional information and views they may have on the issues raised. The information submitted was subsequently taken into consideration by the Commissioners.[61] Pursuant to Article 36, Commissioners could also invite the claimants and Iraq to present views in oral proceedings, however oral hearings were rare.[62] There was no right to appeal or seek a review on procedural, substantive or other grounds.[63]

E. International Organization for Migration procedure for victims' applications

95. Two mass claims processes for Holocaust survivors and other Nazi victims, the German Forced Labour Compensation Programme including the Property Claims Commission ('GFLCP'), and the Holocaust Victim Assets Programme ('HVAP') were operated as independent projects within the IOM. The GFLCP was co-funded by the German Government and industry, and the HVAP was funded through a Swiss Banks Settlement Fund in connection with the settlement of a US class action law suit.[64]

1. Claimant process before the IOM

96. The IOM used standard claim forms covering the various categories of claims. The forms contained information that could easily be entered into a database for processing. Deadlines were set for claims relating to both Programmes.[65] All claims were processed and decided by members of the Secretariat. Claimants did not have to establish liability for their claim to be approved. In the case of the GFLCP, the Secretariate's recommendations were sent to the German Foundation for approval and for HVAP, to the US supervising Court.[66] Claim review and recommendations at both GFLCP and HVAP was coordinated by Secretariat legal staff and each category of claims was handled by a team of processors. For example, the claims processors reviewed the claim forms and the accompanying evidence, entered the information into a database, created an electronic profile for each claim indicating whether basic showings of slave or forced labour were made according to the criteria.[67]

[58] Article 38(a) UNCC Provisional Rules.
[59] UNCC Claims Processing <http://www.uncc.ch/clmsproc.htm> accessed 27 September 2012.
[60] Article 38(d) UNCC Provisional Rules, and Linda Taylor, 'The United Nations Compensation Commission', in C Ferstman, M Goetz and A Stephens (eds.), *Reparations for victims of genocide, war crimes and crimes against humanity: Systems in place in systems in the making* (Martinus Nijhoff Publishers 2009) page 207.
[61] UNCC Claims Processing <http://www.uncc.ch/clmsproc.htm> accessed 27 September 2012.
[62] See UN SC, UNCC Governing Council, *Decision concerning the review of current UNCC procedures taken by the Governing Council of the United Nations Compensation Commission at its 101st meeting, held on 7 December 2000 at Geneva*, S/AC.26/Dec.114, 7 December 2000.
[63] Article 40(4) UNCC Provisional Rules. Correction of clerical errors could be made under Article 41.
[64] For more information see <swissbankclaims.com> accessed 24 October 2012.
[65] Holtzmann and Kristjánsdóttir supra n 53, page 162.
[66] Ibid, page 127.
[67] Ibid, page 323.

2. Determination of claims by the IOM

97. Relaxed standards of proof were used to take into account the lapse of time between the loss and the claim as well as the circumstances in which the loss occurred.[68] A fact was considered established for the GFLCP if it was "credibly demonstrated" and a claim could not "be rejected on the sole ground that it is not supported by official documentary evidence".[69] Presumptions were developed by compiling different information received from individual claims and historical research conducted by the Secretariat, and were applied to fill gaps in a claimant's evidence.[70] The HVAP generally employed a standard of "plausibility", requiring a claimant to submit a statement "explaining the nature of the slave labor performed and all evidence … that the claimant may reasonably be expected to possess".[71]

98. For the verification of slave and forced labour claims in GFLCP and HVAP, grouping, profiling, sampling and matching were used. The claims processes utilised extensive computer technology with the claims forms designed for the various claims categories in such a way that maximum use could be made of the information collected through computerised claims databases.[72] For matching, two databases were created, one containing the claims and another verification database with the information collected from sources such as banks, property registers and historical archives. Computer software matched the claims data against the verification data to determine a sufficient basis for resolving a claim.

99. The IOM also used precedent setting in addition to grouping,[73] which involved resolving certain claims - identified for the common issues they raised - as the precedent that was then followed in all subsequent cases.[74] Grouping of claims meant that claims with the same fact patterns or similar legal or other profile were identified with the help of the information contained in the claims database and were then treated together. Once groups of claims were created, it was possible to supplement one claim with the necessary information that was lacking with information provided in another claim. All remaining claims in the group were then expeditiously decided according to the precedent.[75]

3. Comment on claims at the IOM

100. Decisions on GFLCP claims were made only on the basis of written materials and neither the constituting documents nor the operating procedures provided for hearings.[76] GFLCP gave claimants (only) the possibility to appeal against a decision to an independent appeals organ.[77] While the Swiss banks were involved in negotiating the Settlement Agreement at the centre of the HVAP, the Agreement did not determine how funds were to be distributed. The Agreement directed a representative of the Court to determine the Distribution Plan, which was ultimately approved by the Court (but not the parties). Some claims to the HVAP could be appealed by claimants to the same body as the GFLCP claims, while others could be reviewed by an independent review officer designated by the IOM.

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[68] IOM Property Claims Commission Supplemental rules, Section 22(1).
[69] Holtzmann and Kristjánsdóttir, supra n 53, page 220; and ibid.
[70] IOM, "Property Restitution and Compensation Practices and Experiences of Claims Programmes" (2008) page 4.
[71] Plan of Allocation and Distribution. See Holtzmann and Kristjánsdóttir, supra n 53, page 220.
[72] Holtzmann and Kristjánsdóttir, ibid, page 343.
[73] The Rules of the Property Claims Commission provided that to the extent possible, claims raising similar factual and legal issues shall be processed together, see section 20(1).
[74] Holtzmann and Kristjánsdóttir, supra n 53, page 246.
[75] IOM, "Property Restitution and Compensation Practices and Experiences of Claims Programmes" (2008) page 5.
[76] Holtzmann and Kristjánsdóttir, supra n 53, page 235.
[77] IOM, "Property Restitution and Compensation: Practices and Experiences of Claims Programmes" (2008) page 137. See also section 25.1 of the Property Claims Commission Rules.