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Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries

Note by the Secretariat

Pursuant to paragraph 6 of resolution ICC-ASP/11/Res.7 and paragraph 58 of resolution ICC-ASP/11/Res.8, of 21 November 2012, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on Victims and affected communities and Trust Fund for Victims, including reparations and intermediaries. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court and other stakeholders.

I. Introduction

1. At its ninth session, the Assembly of States Parties (“The Assembly”) to the Rome Statute “[requested] the Bureau to report on the developments in the victims-related issues”.¹ During its tenth and eleventh sessions, the Assembly invited the Bureau to report on reparations, victims’ participation and any appropriate measures.² Likewise, the Assembly, at its eleventh session, “[took] note of the presentation by the Court of its ‘Draft Guidelines governing the Relations between the Court and Intermediaries’ and [invited] the Bureau to engage in a more in-depth discussion with the Court on this issue.”³ Then, the Bureau “agreed to the recommendation of The Hague Working Group (“the working group”) that the topic of intermediaries be subsumed under the [co-]facilitation on victims and affected communities.”⁴

2. Pursuant to the mandate referred to above, the working group co-facilitation on “Victims and affected communities and Trust Fund for Victims, including reparations and intermediaries”, as a subsidiary body of the Assembly, dealt throughout 2013 with four main topics: i) victims’ participation, ii) victims’ reparation, iii) Trust Fund for Victims and iv) intermediaries. Since 13 March 2013, the co-facilitators, Ambassador Mohamed Karim Ben Becher (Tunisia) and Ambassador Eduardo Pizarro Leongómez (Colombia), have pointed out that there are some cross-cutting topics that could be treated by other facilitations and, indeed, the Study Group on Governance,⁵ informed the working group of their intention to advance the agenda they were in charge of and, in this regard, that the expected outcomes of the facilitation were a draft resolution (annex) and a draft report for the consideration of the Bureau.

II. Discussion

3. When discussing victims’ rights and intermediaries there are two main aspects to be considered.

4. Firstly, it should be highlighted that the informal consultations have taken place in the context of an incomplete judicial cycle enshrined in the Rome Statute, since to date the Court has issued two trial judgments under article 74 in the cases against Mr. Lubanga and Mr. Ngudjolo Chui which have been appealed and the appeals proceedings are ongoing. This is a critical matter that should be taken into account, since the Court has emphasized that some topics assigned to the working group co-facilitation on “Victims and affected communities and Trust Fund for Victims, including reparations and intermediaries” will be defined via jurisprudence on a case-by-case basis and that “Principles established by one trial chamber do not create a *stare decisis* effect on future trial chambers.”⁶

¹ ICC-ASP/9/Res.3, para. 49.

² ICC-ASP/10/Res.3, para. 5; ICC-ASP/11/Res.7, para. 6 ; ICC-ASP/11/Res.8, para. 58.

³ ICC-ASP/11/Res.8, para. 50.

⁴ International Criminal Court. Assembly of States Parties. Bureau of the Assembly of States Parties, First meeting. 12 February 2013, Agenda and Decisions.

⁵ In fact, one of the issues identified by the organs of the Court that requires discussion with a view to expediting proceedings and enhancing their quality is “victims’ participation and reparation”. International Criminal Court. Assembly of States Parties, *Study Group on Governance: Lessons learnt: First report of the Court to the Assembly of States Parties*, document ICC-ASP/11/31/Add.1. The Roadmap that “facilitates the establishment of a structured dialogue between all stakeholders within the Rome Statute system to consider proposals aimed at expediting the criminal process of the International Criminal Court” was endorsed by the Assembly in resolution ICC-ASP/11/Res.8, para. 41. Additionally, there are matters assigned to the facilitations on cooperation and legal aid that have links with the “Victims and affected communities and Trust Fund for Victims, including reparations and intermediaries” facilitation.

⁶ International Criminal Court, Informal Court Paper on the Question of Principles Relating to Reparations, 15 May 2013, footnote 8.

5. Secondly, there is a need to close the gap between expectations, rights and resources.⁷ In other words, whilst stakeholders should bear in mind that victims' rights are a cornerstone of the Statute and, therefore, the debate on victims cannot be reduced to a cost-driver, they should be aware that the world is still facing a financial crisis that has consequences in terms of the allocation of resources. As a result, finding that balance is a matter of priority.

A. Consultation process

6. Twelve informal consultations - to which States Parties, the Court, the Trust Fund for Victims, observer States, as well as NGOs were invited - took place throughout the year; four of these were negotiation rounds on the draft resolution. The first one, on 26 February, was devoted to the presentation and adoption of the schedule for the first half of the year. During the second meeting, on 13 March, co-facilitators introduced a concept-note they had prepared to encourage the debate, explained the expected outcomes of the co-facilitation and focused the discussion on intermediaries. The third consultation held on 25 April, focused attention on the Trust Fund for Victims. On 16 May, the parameters of indigence related to reparation was the item under consideration. On 28 May, the working group discussed the question of principles related to reparations. On 9 July and 5 September, the working group addressed the issue of victims' participation based on the outcome of an Expert Panel that took place in The Hague in late April and which was organized by Amnesty International and Redress. On 10 September, the working group had its first round of negotiations on the draft resolution on victims. On 19 September, the working group dealt again with victims' participation and was briefed by the Court and discussed the topic in light of the "Report of the Court on the review of the system for victims to apply to participate in proceedings".⁸ On 26 September, the working group held its second round of negotiations on the victims' draft resolution. On 1 and 3 October, the working group continued debating the victims' draft resolution and the draft report.

B. Conclusions

7. Regarding intermediaries, the main concern is the lack of a clear legal framework and/or legal ground in the core legal texts. As acknowledged in the "Draft Guidelines governing the Relations between the Court and Intermediaries", the Regulations of the Trust Fund for Victims is the only legal text that expressly enshrines a legal ground on intermediaries. The Court has briefed the working group on its current practice and governing rules on the subject, which include, out of the *Draft Guidelines*, a *Code of Conduct* and a *Model contract*. These documents have been adjusted to take into account the lessons learned in the Lubanga case. However, there may be a need for further discussions on the issue, taking into account any developments in the case law, the duty of overseeing the functions carried out by intermediaries, the possible liability of the Court if an intermediary suffers harm or damage as the Court discharges its mandate and, *inter alia*, the consequences its use could have for a fair and expeditious trial. Furthermore, after the experience gained in the Lubanga case, the use of intermediaries has become an issue that deserves attention⁹ to prevent and/or address, as appropriate, any alleged offence against the administration of justice under article 70 of the Rome Statute.¹⁰

⁷ The issue of inflated expectations has also been pointed out by the Court: "4.1 Existing perceptions about the Court [...] 18. On some issues it appears that unrealistically high expectations already exist about what the ICC can achieve [...] It is clear that [...] there are a number of widespread misapprehensions [...] Some key examples of these are: [...] • The desire of many victims to give evidence about their experiences (albeit Under secure conditions), and the belief that most or many victims and eye-witnesses will have a chance to testify at the ICC. • A belief that the ICC will be in a position to provide comprehensive protection measures to all victims and witnesses who are at risk [...]". International Criminal Court. Pre-Trial Chamber II, *Situation in the Republic of Kenya. Public Redacted Version of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and annexes 2 to 10*, document ICC-01/09-6-Red of 29 March 2010.

⁸ ICC-ASP/11/22.

⁹ International Criminal Court. Trial Chamber I, *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo. Public Judgment pursuant to article 74 of the Statute*, document ICC1-01/04-01/06 of 4 March 2012, para. 482.

¹⁰ In this regard it should be borne in mind that last year the United Nations General Assembly adopted a declaration on the Rule of Law at the International and National Levels, A/Res/67/97.

8. With respect to the Trust Fund for Victims, the main points for consideration are i) the need to strengthen the Fund while preserving its independence and ii) the importance of prioritizing fines and forfeitures for the purpose of reparations to victims. Despite the fact that the convicted person is the only party legally liable for reparations awards, this is particularly relevant as article 75(2) of the Rome Statute states that “[w]here appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79” and the Trust Fund’s resources come from voluntary contributions.¹¹

9. Concerning reparations, there are four main issues to mention. Firstly, the principles relating to reparations. The Assembly has stressed that it is critical to establish coherent and consistent principles relating to reparations in accordance with article 75.¹² The Court has stated “that the Judges had decided in plenary that principles would be developed through the jurisprudence of the Court and finally unified by the Appeals Chamber”.¹³ The decision of Trial Chamber I of 7 August 2012 established a number of principles and procedures for reparations in the case against Thomas Lubanga Dyilo. Secondly, different stakeholders agree on the fact that the parameters of indigence related to the enforcement of a reparations order are and should be different to those criteria which determine indigence for the purposes of legal aid, as it was set up in resolution ICC-ASP/11/Res.7. The basis for this approach is the presumption of innocence of the accused, while reparations awards rely on a criminal conviction. Nonetheless, it is worth bearing in mind that the Court has underlined that this - the determination of disposable property and assets for the purposes of the enforcement of a reparations order - is a topic subject to judicial decisions. Thirdly, all stakeholders involved are aware that it is of the utmost importance to adopt and implement, according to the obligations enacted in parts 9 and 10 of the Statute, the necessary tools to identify, trace and freeze or seize any assets owned by the convicted persons for the purposes of reparations. Fourthly, the debate on the individual approach and the collective one will continue.

10. With regard to victims’ participation, both the Court and other stakeholders agree that there is a need to review the participation system with the aim of simplifying it. In general terms, the main concern in this matter is the existence of different approaches within the Court considering the victims’ right to participate and the resources that are needed to implement the different options.¹⁴ Likewise, it has been suggested that participation must be meaningful for victims but also for the purposes of the proceedings, in other words, to provide sufficient relevant information for the Judges, the parties and participants. While States Parties have expressed the need for a uniform system, the Court has stressed that it is up to the Judges within their judicial independency to choose the method of participation, bearing in mind the fact that the number of victims seeking to participate in the cases before the Court can vary greatly. Finally, it was proposed that discussions on victims’ participation should continue, considering, *inter alia*, the issue of the stage of the proceedings at which the status of victims will be decided.

¹¹ See The Trust Fund for Victims, *Note on the Trust Fund for Victims. Unofficial document. Hague Working Group facilitation on victims, affected communities, TFV and intermediaries*, 25 April 2013.

¹² Article 75. Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. [...].

¹³ On 15 May, when this matter was the main item on the agenda, the Court maintained this position, referring to the “Report of the Bureau on the Study Group on Governance, ICC-ASP/10/30, of 22 November 2011”.

¹⁴ The Court has explained that different approaches have been adopted by different Chambers since 2012, notably in the Gbagbo, Bosco Ntanganda and the Keny proceedings. In the Report of the Court on the Review of the System for victims to apply to participate in proceedings, ICC-ASP/11/22 of 5 November 2012, the Court also set out six possible options.

III. Recommendations

11. The Bureau submits the following recommendations for the consideration of the Assembly:

a) To adopt the draft resolution in the annex, entitled “Victims and affected communities, reparations and Trust Fund for Victims”, following the plenary session on victims and affected communities.

b) To continue to monitor the implementation of victims’ rights under the Rome Statute through its Bureau and to focus debate on victims’ participation, and also to engage with the Court and other stakeholders for this purpose.

c) To further consider the issue of intermediaries.

d) To delete the relevant paragraphs concerning victims from the draft omnibus resolution for the twelfth session of the Assembly to avoid duplication of language and/or messages, if necessary.

Annex

Draft resolution on victims and affected communities, reparations and Trust Fund for Victims

The Assembly of States Parties,

Recalling its resolution ICC-ASP/11/Res.7;

Determined to ensure the effective implementation of victims' rights, which constitute a cornerstone of the Rome Statute system;

Reaffirming the importance of the Rome Statute to the victims and affected communities in its determination to hold to account the perpetrators of the crime of genocide, crimes against humanity and war crimes, thus contributing to their prevention;

Reiterating that victims' equal rights to present their views and concerns in the proceedings where their personal interests are affected, under article 68 of the Rome Statute, and to expeditious and effective access to justice, protection and support, adequate and prompt reparation for harm suffered, and access to relevant information concerning violations and redress mechanisms are essential components of justice and, in this regard, *emphasizing* the importance of effective outreach to victims and affected communities in order to give effect to the unique mandate of the International Criminal Court towards victims;

Noting that the crimes within the jurisdiction *ratione materiae* of the Court may affect large numbers of victims targeted either individually or collectively;

Noting that certain principles and procedures for reparations are set out by Trial Chamber I in its 'Decision establishing the principles and procedures to be applied to reparations' in the case against Thomas Lubanga Dyilo, dated 7 August 2012, and are subject to an on-going appeal;

Aware that, pursuant to article 75, paragraph 2, of the Rome Statute, the Court may order, where appropriate, that the award for reparations be made through the Trust Fund for Victims, and *mindful* of the current financial situation of the Trust Fund;

Acknowledging that the Board of Directors of the Trust Fund for Victims, in accordance with its Regulation 56, shall determine whether to complement the resources collected through awards for reparations, and, noting the request of the Board to strengthen the Fund's reserve for reparations;

1. *Welcomes* the ongoing and continuous work of the Court in implementing and monitoring its Revised Strategy in relation to victims and its report on the matter, as was requested by the Assembly at its eleventh session;
2. *Recalls* its concerns about the difficulty the Court has encountered, on some occasions, in processing applications from victims seeking to participate in proceedings, and *notes* the efforts of the Court to ensure that such a process impacts positively on the effective implementation and protection of the rights and interests of victims under the Rome Statute;
3. *Reaffirms* the need to review the system for victims to apply to participate in proceedings, in order to ensure the sustainability, effectiveness and efficiency of the system, including any necessary amendment to the legal framework, while preserving the rights of victims under the Rome Statute and *calls upon* the Court to explore ways to harmonize the application process for victims to participate in the proceedings before the Court, and in consultation with all relevant stakeholders;
4. *Takes note* with appreciation of all the efforts to enhance the efficiency and effectiveness of victim participation, and *invites* the Bureau to explore, in consultation with the Court, the need for possible amendments to the legal framework for the participation of victims in the proceedings;

5. *Notes* the importance, when recruiting officers in charge of victims and witnesses affairs, of ensuring that they have the necessary expertise to take into account cultural traditions and sensitivities and the physical, psychological and social needs of victims and witnesses, particularly when they are required to be in The Hague or outside their country of origin to participate in proceedings before the Court;
6. *Reiterates* the need for the Court to continue to ensure that principles relating to reparations be established in accordance with article 75, paragraph 1, of the Rome Statute, and *further requests* the Court to report back to the Assembly at its thirteenth session;
7. *Reiterates* its call to States Parties, where crimes under the Court's jurisdiction have been committed, to adopt and implement victim-related provisions, as appropriate, consistent with the 1985 United Nations General Assembly resolution 40/34 "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", the 2005 United Nations General Assembly resolution 60/147 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" and other relevant instruments;
8. *Recalls* its invitation to States Parties where crimes under the Court's jurisdiction have been committed to act in solidarity with victims by, inter alia, playing an active role in sensitizing communities on the rights of victims in accordance with the Rome Statute in general, and on victims of sexual and gender based violence as well as other vulnerable groups in particular; combating their marginalization and stigmatization; assisting them in their social reintegration process and in their participation in consultations; and promoting a culture of accountability for these crimes;
9. *Reiterates* that liability for reparations within the framework of the Rome Statute is exclusively based on the individual criminal responsibility of a convicted person, therefore under no circumstances shall States be ordered to utilize their properties and assets, including the assessed contributions of States Parties, to fund reparations awards, including in situations where an individual holds, or has held, any official position;
10. *Stresses* that as the identification, tracing and freezing or seizure of any assets of the sentenced person are indispensable for reparations, it is of paramount importance that all necessary measures are taken to that end, in order for relevant States and relevant entities to provide timely and effective assistance pursuant to articles 75, 93, paragraph 1(k), and 109 of the Rome Statute, and *calls upon* States Parties to enter into voluntary agreements, arrangements or any other means to this end with the Court;
11. *Reaffirms* that the declaration of indigence of the accused for the purpose of legal aid bears no relevance to the ability of the convicted person to provide reparations, *takes note* of the Court report on this matter, and *further requests* the Court to continue to develop a scheme in that regard and to report back to the Assembly;
12. *Reasserts* that the enforcement of reparations awards, in accordance with the Rules of Procedure and Evidence, shall be prioritized when deciding on the disposition or allocation of fines and forfeitures of property or assets belonging to the sentenced person;
13. *Renews* its appreciation to the Board of Directors and the Secretariat of the Trust Fund for Victims for their continuing commitment towards victims, and *encourages* the Board and the Secretariat to continue to strengthen its ongoing dialogue with the Court, States Parties and the wider international community, including donors as well as non-governmental organizations, who all contribute to the valuable work of the Trust Fund for Victims, so as to ensure increased strategic and operational visibility and to maximize its impact and ensure the continuity and sustainability of the Fund's interventions;
14. *Calls upon* States, international and inter-governmental organizations, individuals, corporations and other entities to contribute voluntarily to the Trust Fund for Victims also in view of possible reparations, the current financial situation of the Fund and in light of article 75, paragraph 2, of the Rome Statute, in order to substantively increase the volume of the Trust

Fund for Victims, broaden the resource base and improve the predictability of funding; and *renews* its appreciation to those that have done so;

15. *Recalls* the responsibility, under the Regulations of the Trust Fund for Victims, of the Board of Directors to endeavour to manage its resources originating from voluntary contributions in such a way as to ensure an adequate reserve to complement any Court-ordered reparations awards, without prejudice to its activities under the Trust Fund's assistance mandate including those funded by earmarked contributions;

16. *Requests* the Court and the Trust Fund for Victims to develop a strong collaborative partnership, mindful of each other's roles and responsibilities, to implement Court-ordered reparations;

17. *Invites* States Parties to consider making earmarked voluntary contributions to the Trust Fund, in accordance with their financial ability, for the purpose of strengthening its reparations reserve, in addition to any regular voluntary contributions to the Fund, and *expresses its appreciation* to those that have already done so;

18. [*Welcomes* the constructive exchange between States Parties, observer States, the Court, the civil society, among other stakeholders, during the plenary discussion on victims and affected communities, held during the twelfth session of the Assembly];

[Placeholder paragraph for concrete outcomes and recommendations from the plenary session]

19. *Decides* to continue to monitor the implementation of the rights of victims under the Rome Statute, with a view to ensuring that the exercise of these rights is fully realized and that the continued positive impact of the Rome Statute system on victims and affected communities is sustainable;

20. *Decides* to continue discussions on this topic focusing, through its Bureau, on victims' participation.
