



Review of the International Criminal Court and the Rome Statute System

**Submission on the Plan of Action
for the assessment of the Independent Expert Review**

10 June 2021

Asia Justice and Rights (AJAR) is a regional organization, based in Jakarta, Indonesia, whose aim is to contribute to strengthening human rights and the alleviation of entrenched impunity in the Asia-Pacific region. Its work focuses on countries involved in transition from a context of mass human rights violations to democracy. AJAR's mission is to increase the capacity of local and national actors, particularly victims' organizations, in the fight against entrenched impunity, and contribute to building cultures based on accountability, justice and a willingness to learn from the root causes of state-sanctioned mass human rights violations in Asia to help prevent their recurrence.

In relation to the International Criminal Court (ICC), AJAR monitors the Court's work in relation to implementation of victims' rights, engagement with affected communities and outreach, as well as monitors developments in the Myanmar/Bangladesh situation.

AJAR is pleased to submit to the Assembly of States Parties' Review Mechanism and the International Criminal Court (ICC) its views and recommendations as to the assessment of the Independent Expert Review (IER) recommendations and the development of an Action Plan. Given AJAR's mandate and expertise, the submission will focus on topics related to victims' rights and engagement with affected communities, as well as issues that have an impact on the Court's capacity to implement victims' rights adequately, in particular support States must provide to the Court.

This paper specifically addresses the following issues:

1. Victims' right to participation and legal representation before the ICC
2. Victims' right to reparations
3. ICC's outreach, engagement with affected communities and field presence
4. States' support of the Court

1. Victims' rights to participation and legal representation

Victims' rights are at the heart of the Rome Statute. Their inclusion is what makes the ICC system most meaningful. Without victims' effective access to the Court, the framework is deprived of its purpose. The current shortcomings in the implementation of victims' rights have a direct impact on how the Court is perceived, and on its credibility and legitimacy among affected communities and beyond. A review of the Court's performance should, therefore, place victims' rights at the centre of its work. The Review Mechanism must prioritize these issues in the Action Plan.

First of all, AJAR welcomes the Experts' finding that, despite some criticisms of victims' participation, *"there is no basis for suggesting any curb on the right of victims to participate in proceedings of the Court."* This is an important conclusion that State Parties and the Court should keep in mind moving forward.

However, significant progress is still needed to ensure meaningful modalities for victims to participate in ICC proceedings and be legally represented. This includes ensuring that victims' rights are not interpreted in an overly restrictive way by Chambers and the Registry, in particular at the early stages of proceedings; harmonizing policies and practices across situations and cases in order to provide legal certainty to victims; and safeguarding victims' right to effective legal representation of their choice.

The Experts have indeed identified some of the concerns raised by civil society on these aspects, but have fallen short of making comprehensive recommendations that strengthen the system when it comes to victims' participation, legal representation and protection. In AJAR's view, this missed opportunity to suggest concrete solutions for improving victims' access to justice is regrettable.

However, AJAR welcomes the Experts' recommendation to establish a Standing Coordination Body aimed at coordinating the work of Court actors with a victim-related mandate. AJAR believes that this recommendation should be given priority by the Review Mechanism and identified as urgent in the Action Plan as a very first step in identifying solutions to strengthen victims' participation before the Court.

AJAR therefore urges the Review Mechanism to prioritize the following IER recommendations:

IER rec.	Priority?	Categorization (limited to Court organs)	Remarks
R337	Priority	Registry Judicial divisions	It is crucial that supporting victims to apply for participation and the procedure for their admission start as early as possible in order to facilitate access to the Court for as many victims as possible. This recommendation should be implemented immediately.

R338	Priority	Registry Judicial divisions	Simplifying processes to admit victims to participate in cases will go a long way in making the Court more accessible to a larger number of victims and lessen the burden on the Court, including automatically admitting victims who participate in another case for the same events.
R339, R359	Priority	Registry The Court as a whole	A lack of adequate coordination and cooperation among all ICC actors with a victim-related mandate leads to inconsistent processes, unclear procedures and overall inefficiency. This shortcoming has a direct impact on victims' capacity to access justice at the ICC. The establishment of a body in charge of facilitating cooperation and leading discussions aimed at streamlining processes is a crucial first step. Such a body should ensure that a comprehensive appraisal of the system is undertaken, including through consultations with civil society and victims' legal representatives, in order to identify concrete solutions to make victim participation meaningful and effective. This body should develop a Court-wide victim strategy, as well as corresponding policies and procedures.
R341	Priority	Registry The Court as a whole	Insufficient support is provided by the Registry to victims' legal representatives at early stages of the proceedings, in particular during preliminary examinations and requests for authorisation to open an investigation. This hinders victims' capacity to fully exercise their rights before the Court at those stages. This is due, in part, to the fact that the Registry only provides significant support to Court-appointed counsels (as opposed to those designated by victims). Encouraging appointment of counsels at those early stages could greatly facilitate victims' access to the Court. However, priority should be given to external counsels who have been chosen by victims. The Office of Public Counsel for Victims (OPCV) should be appointed only when there is a vacuum of representation.

2. Victims' rights to reparations

As identified by the Experts, the implementation of reparations at the ICC has so far been characterized by significant shortcomings and failures. While important progress has been made in terms of developing jurisprudence and practice on a number of key issues, the implementation of reparations has seen unacceptable delays, as well as a lack of clarity and coherence among the Chambers' various approaches.

The experience so far has also highlighted serious deficiencies in the capacity of the Trust Fund for Victims (TFV) to fulfil its mandate in this regard.

AJAR therefore welcomes the detailed assessment made by the Experts in relation to reparations, which testifies to the importance the Experts rightfully attributed to this innovative and key feature of the Rome Statute. Many of the Experts’ findings and recommendations are a good starting place for the Court to undertake a profound overhaul of the reparations system and streamline its processes.

However, despite the Trust Fund’s shortcomings, AJAR is not convinced that a complete transformation of its mandate is necessary to increase the efficiency of the system, contrary to what is suggested by the Experts. It does not feel appropriate to limit the role of the Trust Fund as drastically as suggested in the Experts’ recommendations (R354), nor should its responsibilities and resources in terms of implementation of reparations and assistance be moved to the Registry’s Victims’ Participation and Reparations Section (R347, R358). Moving this extremely complex dual mandate from one body to another does not appear to be a solution to the underlying issues. What is needed is to clarify the processes related to reparations and strengthen the Trust Fund’s capacity in terms of governance, management and fundraising. And most importantly, it is fundamental that the Trust Fund and the Registry work together on these issues in order to complement each other’s capacity and expertise. A lot would be gained in terms of transparency and accountability if their joint work were made public.

In light of the above, AJAR urges the Review Mechanism to prioritize the following recommendations:

IER rec.	Priority?	Categorization (limited to Court organs)	Remarks
R342	Priority	Judicial divisions Registry	The development of institutional principles on reparations, as mandated by Article 75(1) of the Rome Statute, is a necessary step to cement and consolidate the Court’s jurisprudence to date. It will help provide legal clarity and certainty to victims and those who assist them. Chambers should finalise these principles in consultation with other relevant actors under the umbrella of the Standing Coordination Body (see below R359, R360) and civil society organisations.
R343	Priority	Judicial divisions Registry	Policies and procedures in relation to reparations need to be harmonised across Chambers and cases in order to provide legal certainty to victims. Incorporating them in the Chambers Practice Manual would go a long way in ensuring that Chambers use consistent standards and procedures. It is crucial that such policies and procedures are identified in coordination with all

			actors involved under the umbrella of the Standing Coordination Body (see below R359, R360).
R345, R349	Priority	Registry Judicial divisions	It is in victims' interest that existing applications for reparations be collected, processed and assessed as early as possible. AJAR supports the Experts' recommendations in this regard as a way to facilitate the possibility for the maximum possible number of victims to apply and to ensure sufficient time for the Court to process applications in due time. However, when implementing this recommendation, it is important to keep in mind that the application process should not be the only way for victims to access reparations. The identification of beneficiaries for reparations does not necessarily entail individual application forms.
R348	Priority	Registry Judicial divisions	It is of utmost importance that any barriers to victims' ability to access the reparations process be removed and that everything possible be done to give them adequate time to present themselves to the Court. There is no valid reason for the collection of applications to be suspended during trial proceedings, as this goes against the spirit of the Rome Statute. The Registry must continue to assist victims to apply for reparations throughout all the proceedings, and continue to collect and process applications at all times. At the same time, as mentioned above, the application process should not be seen as the only way to identify beneficiaries for reparations.
R350	Priority	Registry	The Registry must take all necessary steps in a proactive manner to widen the pool of reparations experts on the list of experts, as a way to ensure the Court benefits from a range of skills and knowledge relevant to and required to address the wide range of issues in cases before the Court.
R352, R353, R355, R357	Priority	TFV	The Rome Statute's reparations framework is fully dependant on the Trust Fund's capacity to implement reparations orders. Initiatives aimed at strengthening its capacity, including in terms of governance, partnerships and strategies, will help ensure that it is able to address its past shortcomings in this regard.
R356	Priority	TFV	In particular, the Trust Fund has had significant shortcomings in terms of financial capacity to complement reparations orders at the same time as initiating assistance programmes. It is therefore

			crucial, and urgent, that the Trust Fund strengthen its fundraising capacity and diversify its sources of funds.
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3. ICC’s outreach, engagement with affected communities and field presence

Victims and affected communities are the ICC’s primary constituents and stakeholders. The Court must have the capacity to adequately explain its work to affected communities and let victims know how they can exercise their rights before the Court. The contrary would defeat the purpose of the Rome Statute and the existence of the ICC itself. Strengthening the ICC’s capacity to conduct effective outreach and engage meaningfully with victims should be a priority in assessing the Experts’ recommendations.

AJAR therefore urges the Review Mechanism to prioritize the following recommendations:

IER rec.	Priority?	Categorization (limited to Court organs)	Remarks
R80-86	Priority	OTP Registry	Strengthening field offices’ capacity and maximising their use is key to improving the Court’s field presence and its ability to engage meaningfully with affected communities. This is an important aspect of closing the gap between the Court and affected communities.
R154-159	Priority	OTP Registry	It is important for the Court to continue strengthening its work with civil society, in particular for the Office of the Prosecutor] (OTP). Appointing an OTP field staff member to be responsible for relations with relevant civil society organisations and the media (R157) could especially go a long way in improving victims’ access to the Court.
R163-167	Priority	The Court as a whole Registry	It is crucial that the Court develops a comprehensive and effective outreach and communications strategy across organs. Outreach should start as soon as a preliminary examination is opened in order to fulfil victims’ rights to information. Delaying the start of outreach until the opening of an investigation leads to significant gaps in terms of victims’ access to the Court. The Court should have sufficient resources to conduct adequate outreach. Budget items for outreach should be incorporated into the programme budget of any new investigation.

R267	Priority	OTP	It would be extremely useful to establish a focal point within the OTP to be in charge of communication with civil society and other stakeholders during preliminary examinations. This would greatly improve the amount, regularity and relevance of information channelled to affected communities that would, in turn, improve perceptions of the Court and frustrations regarding its slow progress.
R293-298	Priority	OTP	It is necessary for the OTP to increase and improve its field presence, in particular the field presence of its investigators, in order to improve its understanding of the local realities, and increase access to the Court for victims and witnesses. This is key in closing the gap between the Court and affected communities.

AJAR is concerned by the last part of the Experts' recommendation R165 that, given the budget challenges facing the Court, consideration should be given to "*drawing on the expertise and resources of civil society*" in relation to outreach. While AJAR and other organisations are willing to collaborate with the ICC in relation to outreach and engagement with victims, and are already doing so, we strongly believe it is inappropriate to suggest that the ICC should rely on the very limited resources of civil society groups to conduct this work. It is neither realistic nor suitable to make such an assumption. Civil society organisations lack proper resources for this task and should not be expected to speak on behalf of the Court. AJAR therefore urges that recommendation R165 be reviewed carefully in light of the above comments.

4. States' support of the Court

The Review is an important landmark in the life of the ICC. AJAR believes it is an unprecedented opportunity to improve access to justice for victims. We are keen to support the Court in this endeavour and contribute our expertise to the process. However, without a commitment by States to adequately support the Court in necessary areas, including financial support, this process will fall short of its objectives.

In particular, without a commitment by States to address the difficulties faced by the Court over many years regarding its insufficient budget and lack of resources, it will not be possible to implement most of the reforms needed to address the Experts' findings. In this context, AJAR finds it regrettable that the Experts were not able to recommend an increase in the Court's budget. We call for the Review Mechanism's Plan of Action to address this issue by including a detailed assessment of the resources needed to meaningfully implement the IER recommendations in key areas. In addition, AJAR

recommends that the Experts’ recommendations aimed at improving the budgeting process and developing a long-term strategy be treated as a priority.

The importance of adequate financial support can be seen in a worrying recommendation made by the Experts that the OTP should deprioritize and hibernate investigations if situations reach the investigation stage without sufficient resources available to consider serious investigations (R244). AJAR believes it is unacceptable to suggest hibernating investigations for financial reasons. Such a suggestion is particularly egregious when applied to a situation like the Myanmar/Bangladesh one, which is, at present, the only viable path for criminal prosecutions of crimes against the Rohingya. The international community, including members of the ICC Assembly of State Parties, have a responsibility to provide justice to victims, and this includes funding the Court adequately. Mass crimes against persecuted groups, such as the Rohingya, must not remain unpunished. The ICC provides an avenue for this and States must walk the talk on accountability.

In addition to financial support, States’ political support is necessary for the Court to operate and fulfil its mandate, including to provide victims’ access to justice. IER recommendations aimed at strengthening state cooperation should be prioritized.

AJAR therefore urges the Review Mechanism to prioritize the following recommendations:

IER rec.	Priority?	Categorization (limited to Court organs)	Remarks
R132-143	Priority	The Court as a whole	Measures aimed at strengthening the budgeting process of the Court should be assessed as a priority with a view to addressing the challenges faced by the Court in terms of lack of resources.
R363	Priority	The Court as a whole	It is essential that all stakeholders, including State Parties, the Court and civil society, discuss a strategic vision for the Court in order to match expectations vis-à-vis the Court to necessary resources and support.
R169 R284-285 R289-290	Priority	ASP OTP	Cooperation by State Parties, including in areas such as arrests of suspects and preservation of evidence, as well as active and vocal political support in response to attacks against the Court, are crucial in ensuring the Court is able to carry out its mandate and provide justice to victims.