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**ENSURING EFFECTIVE AND
EFFICIENT REPRESENTATION OF
VICTIMS AT THE INTERNATIONAL
CRIMINAL COURT**

WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
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COVER PHOTOGRAPHS (from left)

*A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad,
2007, courtesy Shane Bauer*

*The International Criminal Court building in The Hague, courtesy
Aurora Hartwig De Heer*

A village elder meets with people from the surrounding area.

Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer

*Archbishop Desmond Tutu and Minister Simone Veil at the second
annual meeting of the Trust Fund for Victims, courtesy ICC Press
Office*

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EXECUTIVE SUMMARY

Nearly a decade after the entry into force of the Rome Statute governing the International Criminal Court (ICC), many questions

representation for victims, and providing information to victims or their legal representatives. In addition, VPRS has undertaken a number of field missions to countries where the Court is active and has worked to develop relationships with various non-governmental and governmental groups for the purpose of circulating information about

contrast, is a wholly independent unit of the Court that falls within the remit of the Registry solely for administrative purposes. According to Regulation 81(4) of the Regulations of the Court, the mandate of OPC(-vrrt,-8(t10(ist)-11a)4vide supp11(a)tprov pns t

interests of the applicants. More recently, the *Bemba* Trial Chamber representative of victim applicants, appointing OPCV to represent the making opening statements on their behalf. Finally, in the *Abu Garda*

suspects,

roles of VPRS and OPCV and minimize inefficiencies that may be

However, for the most part, VPRS and OPCV serve very different functions on behalf of victims, and it makes sense to maintain a distinction between VPRS, which is a neutral body under the direction of the Registrar charged with facilitating the process by which victims gain participation rights before the Court, and OPCV, an independent office charged with providing legal support on behalf of victims in the context of adversarial proceedings.

Of course, it is critical that any unnecessary overlap in the roles filled by VPRS and OPCV be avoided. One area of potential inefficiency appears to be that both VPRS and OPCV have undertaken to perform is unclear, it seems appropriate to leave the role of conducting general outreach in the hands of VPRS, which regularly undertakes field missions to countries where the Court is active and has developed relationships with various organizations that work with victims. This approach will allow OPCV to focus on providing legal support and assistance to victims and their legal representatives.

OPCV Should Serve as Counsel to Unrepresented Victim Applicants to Protect Their Interests as Applicants, But Not to Generally Present
Vjgkt"ōXkg yu"cpf"Eqpegtpuö"qp"kuuwgu"Tgncvgf"vq"vjg"Ecug"

As reviewed in detail below, different Chambers have taken different approaches in determining whether OPCV should be permitted to

discussed below have established that the Section is extremely overworked, suggesting it has limited resources available to assist individual victims. Furthermore, the Registrar, as a neutral organ of the Court, lacks standing to make legal arguments to the Chambers in the interests of individual victim applicants. Finally, appointing OPCV as the representative of victim applicants who would otherwise be unrepresented ensures that those victim applicants who are able to secure external legal assistance prior to applying to the ICC do not enjoy an advantage over those who do not have the means to obtain outside counsel.

At the same time, the Rome Statute and the other documents governing the ICC do not, as a general matter, provide participatory

intervening before the Court on behalf of applicants on those issues that affect their interests *as applicants*, such as issues related to their protection or their ability to obtain victim status, as appropriate. At the same time, the Chambers should refrain from adopting the approach taken by the *Bemba* Trial Chamber in permitting OPCV to make opening arguments on behalf of victim applicants. Of course, in the event that circumstances arise under which a Chamber seeks the views of victim applicants on a given question, the Chamber may request observations from OPCV on that particular issue pursuant to Regulation 81(4)(b), which expressly authorizes OPCV to appear

discussed below, OPCV has demonstrated an impressive ability to organizations and present those views cogently to the Court.

One or More Common Legal Representatives Should Be Appointed as Early as Possible in a Case, With the Possibility of Further Legal Representatives Being Appointed as Needed

With the exception of the *Lubanga*

processing applications for participation, and ideally complete the process before the Chamber has made its first decision on such applications. Of course, additional legal representatives may need to be appointed in the event that conflicts of interest arise or as necessary

As a General Matter, OPCV Should Not Be Appointed Legal Representative of Victims Granted Participation Status

Chamber to appoint OPCV as the legal representative for victims, there are several reasons that the Chambers should refrain from making use of this authority, absent exceptional circumstances. First, because the resources of OPCV are not unlimited, any decision to appoint the Office as the legal representative of victims participating in proceedings is necessarily going to detract from the ability of OPCV to provide support and assistance to external legal representatives of victims. The provision of such support and assistance is critical in the context of an institution such as the ICC, which operates in several jurisdictions simultaneously, making it difficult for individual teams of

experiences built up over time or enjoy the advantages of economies of scale. As a permanent body of the ICC, OPCV has a unique ability to track legal developments across situations and cases at the Court and incorporate the experiences of various teams of legal representatives into lessons learned for future cases. As the *Lubanga* and *Bemba* Trial Chambers held, OPCV should focus its resources on providing legal support to *all* victims and their legal representatives, rather than engaging in direct representation of a limited number of victims. Another reason that Chambers should generally refrain from appointing OPCV as the legal representative of victims participating in proceedings is that, should conflicts arise among groups of victims, OPCV may be prevented from providing support and assistance on behalf of those victims it is not representing. Finally, as the Chambers have stressed in multiple cases, it makes sense to have victims represented by lawyers from their community, or at least their country.

Of course, there may be times when it is necessary for OPCV to step in and serve as temporary, *ad hoc* counsel to victims who would otherwise lack legal representation. One such instance will be where an individual has been granted victim status by a Chamber, but has not

proceedings in the *Katanga & Ngudjolo* case. At the same time, the Chambers should continue to request submissions from OPCV when specific issues arise that are not adequately addressed by the parties and participating victims. Given its unique position as a permanent body dedicated to developing legal expertise on issues relating to victims before the ICC, OPCV is able to serve as an invaluable resource to the Chambers when questions arise that are likely to affect

with by the Court to date and to recommend responses to the questions that can be applied with consistency across cases.

INSTITUTIONAL SUPPORT FOR VICTIMS AT THE ICC:

Trial Chamber presiding over the confirmation proceedings in the first two cases arising out of the Kenya situation,¹⁴ VPRS is not only authorized to request additional information for purposes of ensuring

the

application.¹⁸ In addition, during its review of the applications it receives, VPRS assesses whether disclosure of information contained in the applications to the parties



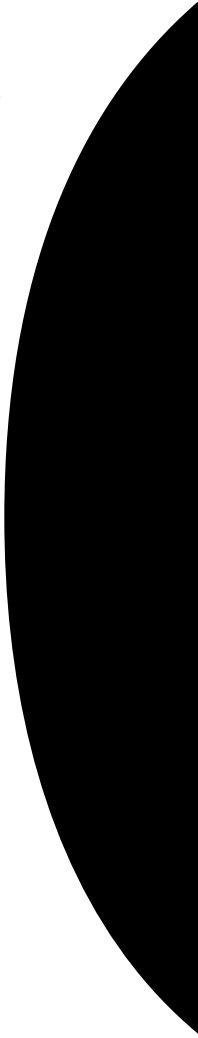
assessment that
and out whether any victims are eligible for the ICC protection
Where information exists regarding danger victims,
collaboration with VWU, necessary
to the applications prior to transmitting the applications to
Prosecution, Defense, and victims already granted participation
in the case.²¹

and submitted 332 reports and filings to Chambers.²²
y, as both the number of cases being tried by the Court
number of individuals applying to be as victims in



also Situation in the Republic
of the Statute, ICC-01/09-4
in the Republic of Kenya, P
); *The Prosecutor v. Germai*
Treatment of Applications f

Chamber II, 10 December
ersion of Report
Pre-Trial Chamber II,
thieu Ngudjolo Chui,
ICC-01/04-01/07-933



each case have grown, VPRS has been unable to process applications in a timely manner. For instance, in the context of the *Mbarushimana* case, the Pre-Trial Chamber presiding over the confirmation of charges hearing set a deadline of 30 June 2011 for the receipt of applications for participation at that stage of proceedings, but on 6 June 2011, the Registry informed the Chamber that VPRS would be able to process and transmit only about half of the completed applications it had received by the deadline.²³ The Registry explained that it was in the process of scanning and registering some 738 applications, but stated:

[G]iven the human resources currently available to [VPRS], and the demands created by other judicial proceedings on that section, the Registry estimates that it would require approximately two months to process and transmit all of the complete applications (estimated to be up to 530) together with reports thereon as required by regulation 86(5) of the Regulations of the Court. The preparation of redacted versions of the applications for transmission to the parties would require a [sic] fBT1 0 0 1 108.02 430.15Court. ThWArfn Tm 1 108.02 430.15

participated in the *Ruto, et al.* confirmation proceedings,²⁷ despite the fact that the Registrar had received approximately 1,800 applications for participation,²⁸ and 233 victims participated in the *Muthaura, et al.* confirmation proceedings,²⁹ although approximately 550 victims had applied to participate.³⁰

2. *Organizing Legal Representation for Victims*

Pursuant to Rule 90 of the ICC Rules of Procedure and Evidence, victims participating in proceedings before the ICC have the right to be represented by an attorney,³¹ and to date, all participating victims have been represented by a lawyer.³² As of March 2011, VPRS had

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s

approach to organizing legal representation for victims, and how it has evolved over time, is discussed in detail in Section III.B below.

3. *Field Missions and Outreach*

In a 2004 report to the Assembly of States Parties, the ICC described VPRS as the

Public Information and Documentation Section of the Registry on the preparation of victim-

34 As stated above, VPRS has undertaken a number of field missions to countries in which the Court is active to educate victims about the Court and develop relationships with victims groups.³⁵ As of March 2011, VPRS had undertaken 135 missions in the field and organized 518 meetings and seminars.³⁶ In addition, VPRS disseminates information regarding

workshops; web sites; posters; brochures; print advertisements; radio and TV spots, and fact

4. *Representing the Views of Victims to the Court*

Finally, although VPRS is not expressly authorized to make submissions to the Court representing the views of victims, it has twice

the Pre-Trial Chamber in the context of a request from the Prosecutor to open an investigation *proprio motu* under Article 15 of the Rome Statute. The first

request to investigate crimes occurring during the 2007-2008 post-election violence in Kenya.³⁸ Specifically, because Article 15(3) of

the Pre-

³⁴ International Criminal Court, *Report on Participation of and Reparations to Victims*, ICC-ASP/3/21, ¶ 3 (25 August 2004).

³⁵ See, e.g., ICC Newsletter #6, *VPRS: Frequently asked Questions*, *supra* n. 10, at 7; ICC, *Victims Before the Court*, *supra* n. 10, at 1.

³⁶ ICC, *Registry and Trust Fund for Victims Fact Sheet*, *supra* n. 9, at 2.

³⁷ ICC, *Report on Participation of and Reparations to Victims*, *supra* n. 34, ¶ 7.

³⁸ See generally *Situation in the Republic of Kenya*, Order to the Victims

to Article 15(3) of the Statute, ICC-01/09-4 (Pre-Trial Chamber II, 10 December 2009).

request to open a *proprio motu* investigation,³⁹ the Pre-Trial Chamber summarize the representations into one consolidated report.⁴⁰

from 396 victims and presented a report reflecting the views communicated in these representations to the Chamber.⁴¹ VPRS was charged with filling a similar role in relation to the request to open an investigation *proprio motu* into alleged crimes⁴²

B.

The Office of Public Counsel for Victims, a wholly independent unit of the Court that falls within the remit of the Registry solely for administrative purposes,⁴³ was established in September 2005 pursuant to Regulation 81 of the Regulations of the Court.⁴⁴ According to Regulation 81(4) of the Regulations of the Court, the mandate of OPCV is to:

provide support and assistance to the legal representative[s] for victims and to victims, including, where appropriate:

³⁹ Rome Statute, *supra* n. 4, Art. 15(3).

⁴⁰

- (a) Legal research and advice; and
- (b) Appearing before a Chamber in respect of specific issues.⁴⁵

In addition, Regulation 80(2), which deals with the appointment of legal representatives for victims, permits a Chamber to appoint OPCV as the legal representative for victims.⁴⁶

Thus, OPCV may potentially play a variety of roles in the context of a given case before the Court. Importantly, the Chambers have repeatedly stressed that it is up to the relevant Chamber presiding over

⁴⁷ and various Chambers have taken different approaches in that determination.

1. Providing Support and Assistance to the Legal Representatives of Victims

According to OPCV, during its first five years of operation, the Office assisted thirty external legal representatives of victims and provided

representatives.⁴⁸ Specifically, OPCV has provided support and assistance to external legal representatives of victims, upon request, by supplying factual background documents, research papers, advice, and draft submissions.⁴⁹ The Office has also compiled a manual for

⁴⁵ Regulations of the Court, *supra* n. 3, Reg. 81(4).

⁴⁶ *Id.*

⁴⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Role of the Office of Public Counsel for Victims and its Request for Access to Documents, ICC-01/04-01/06-1211, ¶ 30 (Trial Chamber I, 6 March 2008). *See also The Prosecutor v. Joseph Kony, et al.*,

-02/04-01/05-243, at 5-6 (Pre-Trial Chamber II, 16 April 2007).

⁴⁸ OPCV, *Helping Victims Make Their Voices Heard*, *supra* n. 44, at 6.

⁴⁹ International Criminal Court, *Report of the Court on Legal Aid: Legal and Hkpcepkn"Curgewu"qh"Hwpfkipi"Xkevko uø"Ng i cu" Tgr t g u g p v c v k a p " D g h q t g " v j g " E q w t v*, ICC-ASP/8/25, ¶ 42 (5 October 2009) (citing a background document prepared by the OPCV and presented to The Hague Working Group on 10 June 2009).

2. *Appearance before the Chambers on Specific Issues*

Regulation 81(4)(b) provides for OPCV, where appropriate, to appear before a Chamber with regard to a specific issue.

5. Outreach

Finally, although not expressly a part of its mandate under Regulation 80, OPCV has reported that it engages in outreach activities for _____ ion, and the [sic] civil society in countries [where] investigations and/or cases are ongoing, as

⁶⁶

_____, ICC-01/04-01/10-381, at 5 (Pre-Trial Chamber I, 18 August 2011). Note that, in the Kenya cases, the Pre-Trial Chamber recognized that many of the applicants were represented by legal representatives other than OPCV, but nevertheless restricted observations on behalf of applicants to those made by OPCV for purposes of efficiency. *The Prosecutor v. William Samoei Ruto, et al.*, Second Decision on the Motion of Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings and Article 19 Admissibility Proceedings, Case No. ICC-01/09-01/11-40, ¶11 (Pre-Trial Chamber II, 6 April 2011).

⁶⁶ OPCV, *Helping Victims Make Their Voices Heard*, *supra* n. 44, at 11.

SPECIFIC ISSUES RELATING TO THE LEGAL REPRESENTATION OF VICTIMS BEFORE THE ICC

As explained above, the key questions that practice to date in relation to representation of victims include: whether applicants should receive representation prior to a determination on their applications for victim status; when and how victims should be appointed common legal representation; and whether legal representation should be provided solely by external

for Victims should engage in direct representation of victims. The following provides a summary of how different Chambers have dealt with these questions to date.

A.

Although there is no provision in the documents governing the ICC supporting the notion that victim applicants have a right to legal representation, in nearly every case thus far, the Pre-Trial and Trial Chambers have ordered that OPCV provide support to or represent applicants from the time that their applications are filed until such time as their status has been determined. However, the rationale behind

decision, saying that the tasks described by OPCV

forth under [Regulation 81(4)] since they consist in activities to be performed *vis-à-vis* ⁷⁴ However, Judge Politi refused to ac

information for all incomplete Applications, the Chamber deems it appropriate to appoint the OPCV to provide support and assistance to⁸⁰ Thus, Pre-Trial Chamber I seemed to

in providing the Registry with information necessary for the completion of their applications. Trial Chamber I, in the context of the *Lubanga* case, agreed with this approach, citing favorably to the Pre-

for this decision was that the applicants may need to receive support and assistance from the Office when the Registry requests additional information on the applicatio⁸¹

on to hold that, upon request, OPCV would be permitted to access certain do

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applicants remained restricted,⁸³ it was, unlike in the *Kony, et al.*

referred to in sub-regulation 2, before transmission to a Chamber. The Registrar may also seek additional information from States, the Prosecutor and intergovernmental or non-governmental organizatio⁸⁶⁽⁴⁾ *supra* n. 3, Reg.

⁸⁰ *Situation in the Democratic Republic of Congo*, Decision on the Requests of the

and Legal Representation, *supra* n. 77, ¶ 43.

⁸¹ *Lubanga*, Decision on the Role of the Office of Public Counsel for Victims and its Request for Access to Documents, *supra* n. 47, ¶ 34.

⁸² *Id.* ¶¶ 36-38.

⁸³ For instance, Trial Chamber I rejected a request by OPCV that the Office be consulted on t applications are transmitted to the parties, holding that VPRS is charged with redacting confidential information from applications under the Regulations of the -equ

The Prosecutor v. Thomas Lubanga

Dyilo

Applications for Participation of Victims issued on 6 May 2008, ICC-01/04-01/06-1333, ¶¶ 9-10 (Trial Chamber I, 16 May 2008). In addition, the Appeals Chamber ppeal of a Trial Chamber

The Prosecutor v. Thomas Lubanga Dyilo, Decision, *in limine*, on Victim Participation in the Appeals of the Prosecutor and the Defence against Trial

case,⁸⁴

appropriate to respect the difference in nature and scope of the functions respectively vested in the

task of contacting the applicants with a view to the finalisation of the would be tantamount to unduly blurring the

⁹³ This decision meant that, unless victim applicants were able to secure outside counsel to represent them pending a ruling on their status, they would receive no representation or other support unless and until they were granted participation rights by the Chamber.

B.

legal representation of victims before the Court. It provides, in part, as follows:

1. A victim shall be free to choose a legal representative.
2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative orremETWa6sives

4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1,⁹⁴

of whom was individually represented.⁹⁷

of the enlistment of child soldiers, who took an active part in the attack
¹⁰³ For its part, the Registry agreed that a conflict may arise between these child soldiers and other victims, but saw no other potential conflicts, and thus recommended that victims be organized into just two groups, noting that this approach would likely contribute to the efficiency of the proceedings.¹⁰⁴ Ultimately, the Chamber agreed with the Registry and ordered that all victims *other than* these child soldiers be joined in one group under a common legal representative, and that the child soldiers form a second group under a common legal representative.¹⁰⁵ Since that time, more than three hundred additional victims have been authorized to participate in the *Katanga & Ngudjolo* case.¹⁰⁶

2. *The Bemba Case*

In the *Bemba* case, the Pre-Trial Chamber attempted to establish a limited number of common legal representatives early in the process. Specifically, after having granted more than fifty victims the right to participate in the confirmation process, the Chamber determined that

effectiveness of pre-
¹⁰⁷ Recognizing that Rule 90(4)
 proceedings must be taken into consideration and that any conflict of
 a common legal repr

victims, (iv) the views of victims, and (v) respect of local

¹⁰⁸ In line with these factors, and noting that the victims granted participation rights in the case alleged to have suffered many of the same crimes on the territory of the Central African Republic (CAR), the Chamber charged the Registry with organizing common legal representation.¹⁰⁹ It went on to hold that, if the victims were unable to agree to a single common legal representative within a three-week period, the Registrar should choose a lawyer from the CAR.¹¹⁰ Ultimately, two counsel from the CAR, Mr. Goungaye Wanfiyo and Ms. Marie Edith Douzima Lawson, were appointed as legal representatives for the majority of victims, while OPCV acted as legal representative for those victims who had expressed a wish to be so represented.¹¹¹ Unfortunately, Mr. Wanfiyo passed away prior to the confirmation hearing, thus all of the victims participating in the hearing were represented by either Ms. Douzima or OPCV.¹¹²

When the *Bemba* case moved to the trial stage, the number of participating victims grew significantly, and thus the Trial Chamber revisited the question of common legal representation for victims.¹¹³ Specifically, noting that 135 victims had been granted participation rights and a further 1200 applications were under examination, the Trial Chamber issued a decision in November 2010 ordering the Registry to appoint two common legal representatives to represent the totality of victims that would be participating in the trial.¹¹⁴ It further determined that victims would be assigned to one of the two common

¹⁰⁸ *Id.* ¶¶ 8-9.

¹⁰⁹ *Id.* ¶ 10.

¹¹⁰ *Id.* ¶ 11; *id.* at 7.

¹¹¹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Observations on Legal Representation of Unrepresented Applicants, ICC-01/05-01/08-651, ¶ 11

representative in proceedings, including in the *Bemba* case, *see infra* n. 148 *et seq.* and accompanying text.

¹¹² *Bemba*, Decision on the Observations on Legal Representation of Unrepresented Applicants, *supra* n. 111, ¶ 12.

¹¹³ *See The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Common Legal Representation of Victims for the Purpose of Trial, ICC-01/05-01/08-1005, ¶ 6 (Trial Chamber III, 10 November 2010).

¹¹⁴ *Id.* ¶¶ 6-7.

legal representatives based on geographical considerations, thereby

Chamber presiding over the *Banda & Jerbo* case issued no similar decision for the purposes of the confirmation proceedings in that case. As a result, eighty-nine victims were represented by five separate attorneys at the confirmation stage.¹²⁴ However, once the charges were confirmed and a Trial Chamber was constituted, the Registry submitted a report to the Trial Chamber requesting that it initiate a process for the appointment of one or more common legal

¹²⁵ The Registry also recommended that, in line with proper case management, no more than two legal teams should represent victims in the case.¹²⁶ Following the

that had participated in the confirmation proceedings made submissions to the Chamber requesting that they be appointed the common legal representative,¹²⁷ while two of the other legal

recommendations of the Registrar and refuse the requests sought in its
¹²⁸ amber

victims [was] necessary in order to safeguard the expeditiousness of the proceedings and the effectiveness of victim participation in the
ance of the Registry, to
 agree to common legal representation within two months.¹²⁹ The Chamber further stipulated that, if the victims were unable to agree by

to appoint common legal representation.¹³⁰

¹²⁴ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Report RecomBTdgree to commoci2.09 D(h)-5(is00B4o)-3(nnmm)-3(ocTmB7nnmm)c 0 0 1 -e

choose common legal representation, the Registry submitted a further report, informing the Chamber that its order could not be implemented within the contemplated time frame.¹³¹ While the Registry had

unable to conduct meaningful consultations with the victims
-to-face
meetings with the victims, assisted by interpretation, and allowing

Registry staff of at least P-
time frame and given the limitations on the
resources of the Registry.¹³² Thus, while recognizing that Regulation

the views of victims in the selection of common legal representatives,
¹³³ To

this end, the Registry concluded that victims would not be able to choose common legal representation on their own and that, in appointing counsel for the victims, the Registry would base its decision on input the Registry had already received from victims in the process of helping them to complete their applications for participation

representation in the best interests of victim ¹³⁴ The objective criteria identified by the Registry included: an established relationship of trust with the victims or the ability to establish such a relationship, a demonstrated commitment to working with vulnerable persons, familiarity/connection with the situation country, relevant litigation expertise/experience, sufficient availability, and information technology skills.¹³⁵

¹³¹ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*

proposed approach and provided it with additional time to compile a report recommending common legal representation.¹³⁶

When it submitted its final report to the Chamber on the subject of common legal representation, the Registry outlined the steps it had taken in reaching its conclusion, which included: (i) grouping the victims by taking into account the views and information previously provided by victims and the advantages of minimizing the number of

victims and the prior experience of the Registry; (ii) distributing an

position; and (iv) taking into account the work performed to date by the five legal representatives who participated in the confirmation proceedings.¹³⁷ Based on this process, the Registrar concluded that all eighty-nine victims could be represented by a single team of lawyers and recommended the names of a principal and an associate common legal representative.¹³⁸ The Trial Chamber subsequently endorsed the

¹³⁹

4. *The Mbarushimana and Kenya Cases*

In the most recent cases commenced before the Court, the Pre-Trial Chambers have again attempted to minimize the number of legal representatives early in the confirmation proceedings. For instance, in the *Mbarushimana* case, the Chamber addressed the topic of common

¹³⁶ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Report on the Organization of Common Legal Representatives, ICC-02/05-03/09-187, at 4 (Registry, 5 August 2011) (referring to an email from the Trial

of common legal representation of victims).

¹³⁷ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Proposal for the Common Legal Representation of Victims, ICC-02/05-03/09-203, ¶ 4 (Registry, 25 August 2011).

¹³⁸ *Id.* ¶ 32.

¹³⁹ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Order Inviting the Registrar to Appoint a Common Legal Representative, ICC-02/05-03/09-209 (Trial Chamber IV, 6 September 2011).

several months consulting with victims and applying its objective criteria, and ultimately recommended that the Chamber appoint a single common legal representative to act on behalf of all of the victims in each of the two cases.¹⁴⁷

C.

A final question that has arisen in a number of cases is whether OPCV should, in addition to its other roles, engage in direct representation on behalf of victims who have been granted participation rights in a case. OPCV was first appointed to represent individual victims in the *Kony, et al.* case.¹⁴⁸ Specifically, OPCV was appointed after VPRS informed

applications for participation, until a legal representative has been

Court charges *the Chamber* with the sole discretion to appoint OPCV as a legal representative.¹⁶⁴

Finally, OPCV was appointed on a temporary basis to represent a number of victims during the confirmation of charges proceedings in the *Katanga & Ngudjolo* case after the Defense raised an apparent conflict of interest on the part of one of the external legal representatives, Mr. Jean-Christophe Mulamba Nsokoloni, that caused the Chamber to remove him as legal representative.¹⁶⁵ OPCV did not continue to represent victims at the trial stage in the *Katanga & Ngudjolo* case.

RECOMMENDATIONS

A.

judiciary, the legal profession, and the [*sic*] civil society in countries [where] investigations and/or cases are ongoing, as well as in other

¹⁶⁹ Whi is unclear, it seems appropriate to leave the role of conducting general outreach in the hands of VPRS, which regularly undertakes field missions to countries where the Court is active¹⁷⁰ and has worked to develop r non-governmental, governmental, and international institutions for the

role in its proceedings as widely as possible.¹⁷¹ This approach will allow OPCV to focus on providing legal support and assistance to victims and their legal representatives.

B.

eir “Views and Concerns” on

As explained above, different Chambers have taken different approaches in determining whether OPCV should be permitted to represent applicants during the time pending a decision on their victim status and, if so, what the scope of that representation should be.¹⁷² This has resulted in unequal treatment of victim applicants across cases that should be avoided in the future.

As an initial matter, it makes sense to appoint OPCV to represent victim applicants who would otherwise be unrepresented pending a determination on their victim status. While Judge Tarfusser was *the Registrar* with the task of

those requests for further information, nor is it charged with providing applicants with legal advice in relation to their applications. While VPRS could theoretically provide such assistance to victims, recent developments have established that the Section is extremely overworked and is having difficulty processing the applications it receives and reporting to the Chambers on these applications,¹⁷⁴ suggesting it has limited resources available to assist individual victims. Furthermore, the Registrar, as a neutral organ of the Court, lacks standing to make arguments to the Chambers in the interests of individual victim applicants. Victim applicants need representation by a body with such standing because, as OPCV has explained, applicants of application forms, issues linked to the dual status of victim/witness,

then specify the
 proceedings and manner in which participation is considered

¹⁷⁷ The
 before the Court on behalf of applicants on those issues that affect
 their interests *as applicants*, such as issues related to their protection or
 their ability to obtain victim status, as appropriate. At the same time,
 the Chambers should refrain from adopting the approach taken by the
Bemba Trial Chamber in permitting OPCV to make opening
 arguments on behalf of victim applicants. As Pre-Trial Chamber I
 held in *Mbarushimana* case, affording victim applicants general

¹⁷⁸ Such an approach would also interfere with the right
 of the Prosecution and Defense to submit observations on whether an
 individual qualifies as a victim before that individual is allowed to
 express his or her views and concerns to the Court.

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case, OPCV took a number of steps to gather the views and concerns of a wide range of victims, including: (i) preparing a written explanation sheet on the admissibility proceedings and a questionnaire to gather the views of victim applicants represented by OPCV; (ii) communicating with the legal representatives of victim applicants who were already being represented by counsel other than OPCV; (iii)

submitted to the investigations *proprio motu* in Kenya.¹⁸¹ Such an approach facilitated the efficient presentation of the views of a wide range of victims to the Court in a single filing, and thus should be repeated where appropriate in the future.

C.

With the exception of the *Lubanga* case, which was the first case to come to trial before the ICC and involved a relatively limited number of victims, participating victims have been organized into groups and assigned common legal representation at some stage of the proceedings. This approach has been warranted in light of the need to ensure that proceedings be conducted in a fair and expeditious manner, which will be equally important in future cases before the Court. Hence, it is recommended that, going forward, VPRS should begin the process of organizing common legal representation as soon as it begins processing applications for participation, and ideally complete the process before the Chamber has made its first decision on such applications. Of course, additional legal representatives may need to be appointed in the event that unsuspected conflicts of interest arise or as necessary to protect the interests of particular groups of victims.

Several benefits will flow from the early organization of common legal representation. First, as Trial Chamber IV recognized in the *Banda &*

¹⁸¹ *The Prosecutor v. William Samoei Ruto, et al.*, Observations on Behalf of Victims

With Public Annexes 1 and 2, ICC-01/09-01/11-70, ¶¶ 47-54 (Office of Public Counsel for Victims, 28 April 2011).

Jerbo

selected before the majority of victims that are ultimately represented by those lawyers have been granted participation rights in the case. For instance, in the *Katanga & Ngudjolo* case, the Trial Chamber ordered the Registry to organize common legal representation when only fifty-seven victims had been authorized to participate, although more than three hundred additional victims have since been granted participation rights.¹⁸⁶ Similarly, in *Bemba*, only 135 victims had been granted participation status when the Trial Chamber instructed the Registry to organize common legal representation for all present and future victims in the case, although more than 1600 additional victims subsequently joined the case, and further applications for participation remain pending.¹⁸⁷

In terms of its approach to organizing common legal representation, VPRS must first determine whether all victims are likely to be able to be represented by a single lawyer, or whether, based on the charges in the case and preliminary consultations with victims, it is likely that two or more groups of victims will need to be created. For instance, in the *Banda & Jerbo* case and both of the cases arising from the Kenya

¹⁹⁰ Indeed, as stated above, Rule 90(4)

ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68,

¹⁹¹ For purposes of selecting the lawyer(s) who will serve as common legal representative(s) in a case, VPRS should be guided not only by information gleaned from consultations with victims, but also by the objective criteria first set forth by the Registrar in the *Banda & Jerbo* case.¹⁹²

Finally, while consultation with victims will provide important information to V

legal representation,¹⁹³ it should be stressed that nothing in the documents governing the ICC requires face-to-face consultation with each individual victim on the subject of legal representation. Thus, VPRS should be able to fill the requirement of taking the views of victims into consideration by generally canvassing the views of victim applicants, their lawyers, and community groups. One specific step VPRS could take in support of this process is to revise the standard application form to include a question asking victims to identify the criteria they would consider important in the selection of a legal representative. The addition of such a question under the section of the application form dedicated

D.

representatives to connect with one another to share experiences built up over time or enjoy the advantages of economies of scale. As a permanent body of the ICC, OPCV has a unique ability to track legal developments across situations and cases at the Court and incorporate the experiences of various teams of legal representatives into lessons

resources to devote to supporting other legal representatives if the Office is itself engaged in direct representation throughout a case. This was demonstrated in the *Lubanga* representation of just a handful of victims required that the Principal

²⁰¹ Notably, OPCV has itself recognized that it has limited resources available for the representation of victims. For instance, in March 2008, when the number of case and victims was very low, OPCV said it only had capacity to represent one group consisting of up to fifty victims.²⁰² In fact, OPCV has repeatedly requested that the Chambers and sections of the Registry consult OPCV prior to making any decisions involving the assistance of

support and assistance it is able to provide to the victims of the legal ²⁰³ Finally, lawyers from outside of the Office who have been appointed to serve as legal representatives of victims before the ICC have repeatedly warned against the practice of

²⁰⁴ One

²⁰¹ International Bar Association, *First Challenges: An Examination of Recent Landmark Developments at the International Criminal Court*, at 34 (June 2009).

²⁰² *Lubanga*, Submissions of the OPCV on its Role in the Proceedings, *supra* n. 60, ¶¶ 41.

²⁰³ *Bemba*, Decision on the Observations on Legal Representation of Unrepresented Applicants, *supra* n. 111, ¶ 6. See also *Bemba*, Observations on Legal Representation of Unrepresented Applicants, *supra* n. 85, ¶ 15; See *Lubanga*, Submissions of the OPCV on its Role in the Proceedings, *supra* n. 60, ¶ 37.

²⁰⁴ IBA, *First Challenges: An Examination of Recent Landmark Developments at the International Criminal Court*, *supra* n. 201, at 33-34. See also *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing, ICC-01/04-01/06-T-101, at 37-39 (Trial Chamber I, 12 January 2009) (in which a legal representative of victims

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Lubanga, Decision on the Role of the Office of Public Counsel for Victims and its Request for Access to Documents, *supra* n. 47, ¶

lawyer even referred to the practice of appointing OPCV as legal
if not dangerous for the [OPCV]
since the workload requires an unquestionable adaptation involving a
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of conflicts when a new case is opened, the victims of which may have interests that conflict with the interests of victims already assisted by OPCV.

Finally, as the Chambers have stressed in multiple cases, it makes sense to have victims represented by lawyers from their community, or at least their country.²⁰⁹ As the *Bemba*

well qualified

and Regulations contain stringent requirements for attorneys interested in representing victims before the Court, ensuring external legal representatives also will be well qualified for the job. Specifically, Rule 90(6) requires that any attorney appointed to serve as the legal representative of victims meet the qualifications set forth in Rule 22,²¹⁴ which establishes the qualifications required for counsel for an

criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar cap²¹⁵ Regulation 67 of the

experience for counsel as described in rule 22 shall be at least ten²¹⁶

excellent knowledge of and be fluent in at least one of the working²¹⁷ Moreover, external legal representatives will have the assistance of OPCV, which may prove particularly useful in terms of navigating the unique substantive and procedural aspects of the ICC.

Of course, there may be times when it is necessary for OPCV to step in and serve as temporary, *ad hoc* counsel to victims who would otherwise lack legal representation. One such instance will be where an individual has been granted victim status by a Chamber, but has not yet been assigned counsel. Ideally, in line with our recommendation above that common legal representatives be appointed before any

rare. A Chamber may also need to assign OPCV as temporary counsel where an external legal representative is unexpectedly unable to continue in his or her role, as occurred during the confirmation proceedings in the *Katanga & Ngudjolo* case.²¹⁸ At the same time, the Chambers should continue to request submissions from OPCV when issues arise that are not adequately addressed by the parties and

²¹⁴ ICC Rules, *supra* n. 5, R. 90(6).

²¹⁵ *Id.* R. 22(1).

²¹⁶ Regulations of the Court, *supra* n. 3, Reg. 67.

²¹⁷ ICC Rules, *supra* n. 5, R. 22(1).

²¹⁸ *See supra* n. 165 and accompanying text.

participating victims. Given its unique position as a permanent body dedicated to developing legal expertise on issues relating to victims before the ICC, OPCV is able to serve as an invaluable resource to the interests.



W A S H