

ICCBA Input for ICC Victims' Strategy Update

27 September 2024

I. Overview

This document sets out the position and recommendations of the ICC Bar Association (“ICCBA”) regarding the Court’s proposed updated Revised Strategy in Relation to Victims (“Victims’ Strategy”). We include our views concerning both essential elements of the contents of the Victims’ Strategy, and the appropriate process by which the Victims’ Strategy should be created.

We recognise that the Registry has designed a lengthy survey – launched in mid-August 2024 – to obtain input on the Victims’ Strategy. However, completing this survey would involve considerable time, and would not allow the ICCBA to present our views succinctly or in a clear structure. Accordingly, we have prepared our submissions in narrative form, but taking into account those survey questions which appeared most important. We trust that the Registry will equally accept these submissions in lieu of a survey submission, which, in the ICCBA’s view, will facilitate a more genuine and useful consultation process.

This document is in three parts:

- (i) **Preliminary comments:** *What should the Victims’ Strategy aim to achieve?*
- (ii) **Substantive matters:** *What are the priority objectives, concrete steps to achieve them, and means to assess them? (We have organised these around the areas identified in the Registry’s survey.)*
- (iii) **Procedural questions:** *By what process should the Victims’ Strategy be produced?*

II. What should the Victims’ Strategy aim to achieve?

The Assembly of States Parties (“ASP”) requested the Court to initiate consultations for an updated Victims’ Strategy, providing little further detail of what this Strategy should achieve.¹ The Registry’s concept note advises that the purpose of the Victims’ Strategy update is to “address the evolving needs and challenges faced by victims within the Rome Statute System, considering that the last revised strategy was published over 10 years ago, in 2012.”²

The Registry’s framing presents this process as a mere update to an effectively functioning framework. It implies that victim participation is working well, and that the Court’s existing strategy simply has to be updated in light of developments. This is emphatically not the case. While some aspects of victim participation are now routine, and function at a minimally acceptable level, particularly during trial proceedings, other aspects fall far short:

- Outreach outside the confines of an active case is almost non-existent, even in situations where the Court has physical access to victim populations (for example: the Registry has not conducted an outreach or victim information mission to Bangladesh since 2019).

¹ ASP, Resolution ICC-ASP/22/Res.3, [Strengthening the International Criminal Court and the Assembly of States Parties, Annex I](#), para. 12(e).

² ICC Registry, Revised Victims Strategy Process: CONCEPT NOTE, p. 2.

- At the early stages of proceedings, phases which are vital for victims’ interests, the Registry – thus far – has not granted legal aid resources and refuses basic services to victims’ lawyers; Chambers have also, at times, barred victims from filing or being notified of litigation.
- Resources for legal representation have been significantly cut and made discretionary under the new Legal Aid Policy’s (“LAP”) reparations implementation stage. This risks leaving victims without a voice during this essential stage, as well as negatively impacting the Trust Fund for Victims (“TFV”) and Victims Participation and Reparations Sections’ (“VPRS”) capacities to effectively and expeditiously develop draft and final implementation plans, and successfully execute the reparations process.
- No policy or system is in place to ensure that victims’ legal representation is effective, and no uniform practice exists regarding the method by which victims’ legal representation is organised.
- The TFV’s assistance mandate is operational in fewer than half the situations where the Court operates.
- Aside from the tiny fraction of victims who appear as witnesses, or provide *viva voce* views and concerns in an active case, participating victims – unless specifically referred to the Victims and Witnesses Section within the confines of its limited mandate – receive no services or assistance from the Court to safeguard their physical safety or psychological well-being.

Addressing these issues requires more than simply an update. That is particularly so because the Court’s two previous strategies in this area were not fit for purpose.

The Court’s first victims’ “strategy”, created in 2009,³ was criticized as vague and impractical.⁴ It set out “broad principles” and a list of “objectives”, but included no detail as to how these would be achieved. At the 2010 Review Conference, the ASP indicated that the Court should look again “with a sense of urgency” at the strategy on victims, and that it should “include measurable and time-bound objectives”.⁵ However, the revised document produced in 2012 replicated and even increased the vagueness of the original strategy.⁶ The existing “strategy” is a list of ideals. It contains no indication of how they will be achieved, or when. Without those, it is no surprise that the ambitious objectives contained in the 2009 and 2012 documents have overwhelmingly failed to be met. In reality, neither of those documents amounted to a “strategy” in the proper sense of the word. The ASP has since called *again* for the next iteration of this document to have “measurable and time-bound objectives”.⁷

The ICCBA urges the Registry to correct past mistakes in this area and comply with the ASP’s request for a document which sets out measurable and concrete goals. Instead of listing

³ [Report of the Court on the strategy in relation to victims](#), ICC-ASP/8/45, 10 November 2009.

⁴ See G. Carayon and J. O’Donohue, “The International Criminal Court’s Strategies in Relation to Victims”, *Journal of International Criminal Justice*, Vol. 15, 2017, p. 569; Victims’ Rights Working Group, [Victims and Affected Communities: Incorporating the Review Conference ‘stocktaking’ Recommendations into the ICC’s Strategies](#), 14 October 2010, p. 2.

⁵ ASP, [Report of the Bureau on the impact of the Rome Statute system on victims and affected communities](#), ICC-ASP/9/25, 22 November 2010, paras 45-46.

⁶ [Court’s Revised strategy in relation to victims](#), ICC-ASP/11/38, 5 November 2012. For an explanation and critique of the changes, see G. Carayon and J. O’Donohue, “The International Criminal Court’s Strategies in Relation to Victims”, *Journal of International Criminal Justice*, Vol. 15, 2017, p. 570.

⁷ ASP, Resolution ICC-ASP/17/Res.5: [Strengthening the International Criminal Court and the Assembly of States Parties](#), 12 December 2018, para. 12(e).

aspirations which will never be met (or even genuinely attempted), the Victims' Strategy should be a practical roadmap. It should:

- (i) *identify priority objectives to be addressed within a defined timeframe (rather than purporting to address everything);*
- (ii) *state the concrete steps that the Court will take, within specified timeframes, to achieve those objectives;*
- (iii) *explain when and how outcomes will be assessed.*

Finally, the ICCBA considers that one of the significant challenges in this area is to consider the extent to which the Victims' Strategy can serve as strategy document for the Court as a whole (as opposed to merely emanating from and applicable to the Registry), to avoid a disjointed or conflicting approach by different Organs of the Court. That difficult question remains unaddressed in the information distributed to date by the Registry.

III. Preliminary input on substance: priority objectives and possible concrete actions

This section sets out preliminary input from the ICCBA on substantive matters which should be included in the Victims' Strategy. Given that this process is in its early stages, and that limited time has been provided for stakeholder input, these are preliminary proposals only. We have sought to keep them brief to make this document accessible. Once the Registry has a clear framework for how it intends to tackle the Strategy and which topics will be included, the ICCBA will be happy to provide more detailed input at that stage.

To ensure that the Victims' Strategy is a realistic and practical document able to serve as a basis for real improvements, it must focus on *priority* issues which are to be addressed during the period of the Strategy's implementation (for example, in a 5-year period). For each priority area, the Registry should identify an objective or goal that can realistically be achieved within the period of the Strategy. Steps which will be taken to bring about this goal should be identified, as well as means of evaluation.

The following is a preliminary ICCBA proposal for the basics of such an approach. These are based on the ICCBA's assessment of the most important and urgent challenges currently facing victims who seek justice through the ICC.

(1) Outreach: Communication and information to victims

Why this is a priority area

Human rights law guarantees victims of a crime a right to information about the justice process which is responding to that crime.⁸ Without basic information victims cannot access any of their other rights at the Court. Experience also shows that in the absence of information victims become disillusioned and the Court loses legitimacy.

Registry outreach activities are currently so drastically under-resourced that there is effectively no outreach other than on concrete developments in active cases. Victims in situations under

⁸ See eg [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](#), UN GA Resolution 60/147, 16 December 2005, paras 11(c),12(a), 24.

investigation do not receive information from the Registry. This is regardless of specific orders from Pre-Trial Chambers in some situations confirming that outreach is essential at this stage.⁹

Suggested objective

From the time that a preliminary examination or investigation is opened, basic information is made reasonably accessible to victims and affected communities regarding the Court's mandate and procedures, and victims' rights.

Possible steps to be taken

i. Investigate the use of technology in outreach

Given the likely continued lack of sufficient human resources for outreach, the Registry should investigate options for more cost-effective outreach using new technologies. These would include improved use of social media, and the development of online artificial intelligence tools to disseminate information and answer questions in multiple languages. A defined timeframe (eg 1 year) could be set for obtaining a feasibility report with recommendations on issues such as quality control measures and estimates as to cost and implementation times.

ii. Increase transparency in outreach planning and implementation

Current deficits in outreach are not transparently made known by the Registry. The consequences of this are that the ASP and Chambers are unable to effectively maintain oversight; and civil society partners are not well-placed to identify areas where they can/should supplement the Court's work.

The Registry should undertake to publish information for each situation, including outreach strategy, measurable outreach goals, and implementation. Information on implementation should include the resources assigned to outreach in each situation, and key activities such as materials produced and shared, trips taken to meet victim communities, etc. Timeframes should be fixed within which these reports should be updated.

(2) Clarifying and ensuring victims' standing and other core rights

Why this is a priority area

The essence of victim participation is victims' standing (their ability to be heard before ICC Judges) on matters that affect their personal interests. Being able to take a matter to the Judges for resolution enables the safeguarding of all of victims' other rights, such as those related to information, protection and reparations.

However, ICC practice and jurisprudence in this area is inconsistent and sometimes unduly restricts victims' standing – especially at early stages of the proceedings – without explanation or reference to the Court's earlier jurisprudence.¹⁰ As proposed below, efforts should be made to

⁹ Eg *Situation in the State of Palestine, Decision on Information and Outreach for the Victims of the Situation*, ICC-01/18-2, 13 July 2018; *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Order on Information and Outreach for the Victims of the Situation*, 20 January 2020.

¹⁰ Foundational principles established in early decisions which have sometimes later been overlooked, include the following, among many others: *Prosecutor v Lubanga, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, 11 July 2008, ICC-01/04-01/06-1432, para. 97 (regarding the possibility for victims to tender evidence concerning the guilt or innocence of the accused); *Prosecutor v Katanga and Ngudjolo, Order on the Organisation of Common Legal Representation of Victims*, 22 July 2009, ICC-01/04- 01/07-1328, para.

identify, consolidate and harmonise the ICC’s practice and jurisprudence on these issues, including the Court’s early seminal jurisprudence.

Where standing is improperly restricted, victims lose their right to be heard and feel alienated from the Court. Failing to hear from victims also leaves the Judges less equipped to take decisions that are “victim-centred” and to achieve its truth-seeking goals. Inconsistent practice in this area makes it impossible for victims’ lawyers and the Registry to properly inform victims of their rights. The lack of clarity in this area also creates inefficiencies, with lawyers unable to reasonably predict which filings will be received, the Registry unable to establish systems, and Chambers facing difficulties to identify the correct frameworks for decisions.

Suggested objective

Clear parameters are established as to the minimum issues on which victims are entitled to be heard as affecting their personal interests, as well as on other core issues such as when victims should be notified of filings through their lawyers.

A possible step to be taken

Undertake a project to codify and develop the law

The Court – with involvement from the Registry and Chambers, support as needed from the ICCBA, OPCV and/or civil society partners, and input from the Prosecution and OPCD – should initiate the development of guidelines on victims’ standing and core rights which would supplement the ICC legal texts.¹¹ This document would:

- Comprehensively identify existing practice and principles from ICC caselaw and the caselaw of other international tribunals;
- Where inconsistencies exist, propose appropriate agreed principles to be used in the future.

If agreement cannot be reached on some issues, these could be left out. However, at least a central area of agreement could be established and cemented.

This exercise would provide an opportunity to identify the current picture, and fine-tune it. It would create consistency and therefore predictability for victims, as well as Court staff and victims’ lawyers who inform and advise them. It would increase efficiencies in this area, for the work of Judges, the Registry and victims’ lawyers. The document could be adopted either as a part of the Chambers Practice Manual, or by the ASP.

(3) Quality legal representation

Why this is a priority area

Most victims will not have a chance to speak directly to the ICC’s Judges. Instead, their lawyers are their link to the Court. The effectiveness of victim participation is therefore entirely dependent on the quality of victims’ legal representation.

10(a) (regarding the importance of a steady and reliable flow of information about the proceedings to the victims, enabling them to instruct their lawyers); *Situation in Uganda*, [Decision on Victims’ Participation in Proceedings Related to the Situation in Uganda](#), ICC-02/04-191, 9 March 2012, paras 13 and 17-18 (explaining that persons are “victims” under the Court’s Statute even before they have applied and been recognised as such by the Court; and recognising the scenarios in which victims can engage in judicial proceedings at the situation stage, including by initiating such proceedings themselves).

¹¹ See Independent Expert Review of the International Criminal Court and the Rome Statute System, [Final Report](#), 30 September 2020, para. 863 (noting that “the right to victim participation has yet to crystallise into a consolidated and clear practice” before the Court).

Victims will often not know any lawyers, be without a clear picture of what to expect from a good lawyer, and be unable to pay for legal representation. This leaves them with no real choice: most agree to representation from the first lawyer who offers it to them without cost.

Victims are entitled to choose their own lawyers (Rule 90(1)). However, where multiple lawyers become involved in a proceeding, a Chamber may order “common legal representation”. In practice, this usually means the Registry or a Chamber selecting a lawyer – or in some ICC cases a single full-time mandate ‘split’ between multiple lawyers – for victims. This could provide an opportunity for ensuring quality legal representation, but to date, the Court has not established consistent practice on the initiation of common legal representation or how lawyers are chosen in this process.

Once lawyers are in place to represent victims, they usually have insufficient resources to effectively do so. Many victims’ counsel are being denied legal aid altogether on the basis that they have been appointed by victims rather than judges, although this approach is not supported by the legal texts or the Registry’s prior practice. Where victims can access legal aid, resource allocations have not been appropriately adapted to the role of victims’ counsel (as opposed to defence counsel). Some steps taken to improve this situation require further fine tuning to be effective.

Where concerns arise about ineffective legal representation – from victims or others – no systems exist to address them. The Registry and counsel have long discussed how oversight can be established regarding ethical obligations (such as maintaining communication with victims) while at the same time respecting counsel’s independence. However, no solution has yet been put in place.

This series of difficulties has led to a scenario where victims sometimes do not receive quality legal representation. This can contribute to other problems: Chambers are without the assistance of clear and relevant submissions on behalf of victims’; Prosecution and defence resist victims’ positions because of distrust of their counsel; victims’ themselves can fail to be heard; and the efficiency of proceedings can be undermined by unstrategic and unnecessary interventions from counsel (even while important points are not raised).

Suggested objective

The Court implements procedures to maximise the prospects of high quality lawyers being appointed to represent victims, and to deal with concerns about effective representation when they arise.

The Court ensures that all victims of crimes before the ICC are able to access legal aid for their representation, and that legal aid resources and other Registry services are appropriately designed for the work of victims’ counsel.

Some possible steps to be taken

i. Establish a (public) policy regarding Registry procedures for victims’ legal representation

The Court should establish and implement a clear, written, and public procedure to regulate the Registry’s role in victims’ legal representation, similar to the documents created at other international tribunals for this purpose.¹² This would ensure that the Registry exercises its role in this area proactively, consistently, and in victims’ interests.

¹² See for example: Special Tribunal for Lebanon, [Directive on Victims’ Legal Representation](#), 4 May 2012 (amended 28 October 2013).

The document should cover: (i) how the Registry will support victims to choose counsel; (ii) under what circumstances and at what point in proceedings the Registry will recommend to a Chamber that common legal representation be organised; (iii) what process the Registry will use to recommend a lawyer to serve as common legal representative for victims.

In fact, significant work has already been done in this area, with the Registry having proposed approaches on such a policy in earlier cases.¹³ Those proposals suggested an approach similar to that recently used for the selection of counsel for *in absentia* proceedings in Kony.¹⁴

Those earlier documents should be reviewed for currency and updated with assistance from the ICCBA. Broader consultations should be undertaken based on a clear draft. A final document could be adopted as a Registry policy or regulation and made public. A clear deadline should be set for finalising and implementation of such a policy.

ii. Support the ICCBA to establish framework for oversight of effective victims' representation

The Registry should support the ICCBA to establish itself as the professional organisation responsible for effective representation. The Registry and ICCBA should produce regulations for receiving and handling complaints or concerns about effective representation. The Court should endorse and support the implementation of these procedures, and ensure that they interact effectively with the Court's own procedures, for example regarding disciplinary proceedings and the maintenance of the List of Counsel before the ICC.

iii. Review victims' legal aid to ensure it meets the specific nature of this work

Since the beginning of the ICC's operation, victims' legal aid has suffered from the fact that it was designed based on defence legal aid concepts, and minimally adapted. Although the new LAP tweaks and improves victims' legal aid entitlements in some areas, there remain some important gaps.

Now that the overarching LAP has been updated, the Registry could turn its energies to assessing whether the resourcing approaches in places are appropriate for victims' legal representation at all stages. Of particular importance: what are victims' representation needs in practice at the reparations implementation stage? How should legal aid be allocated at the early stage of proceedings and before common legal representation has been arranged?

A review which presents concrete recommendations should be outsourced. Registry staff who oversee legal aid are already overwhelmed and lack direct experience of victims' representation. The review should build on the recommendations made in 2017 by Richard

¹³ For example: *Prosecutor v Banda and Jerbo*, [Proposal for the common legal representation of victims](#), ICC-02/05-03/09-203, 25 August 2011, paras 3, 10 and [Annex 1](#); *Prosecutor v Ruto, Kosgey and Sang*, [Proposal for the common legal representation of victims](#), ICC-01/09-01/11-243, 1 August 2011, paras 3, 16 and [Annex 3](#); *Prosecutor v Muthaura and Kenyatta*, [Proposal for the common legal representation of victims](#), ICC-01/09-02/11-214, 5 August 2011, paras 3, 16 and [Annex 3](#); *Prosecutor v Gbagbo*, [Proposal for the common legal representation of victims](#), ICC-02/11-01/11-120, 16 May 2012, paras 2-3 and [Annex 1](#).

¹⁴ See *Prosecutor v Kony*, [Registry's Report on the implementation of "Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence" dated 4 March 2024 \(ICC-02/04-01/05-481\)](#), ICC-02/04-01/05-488, 25 March 2024, paras 18-19. This approach was approved by the Pre-Trial Chamber: *Prosecutor v Kony*, [Decision on the Procedure for Appointing Counsel](#), ICC-02/04-01/05-499, 2 May 2024.

Rogers,¹⁵ but seek further input based on current practice. Reforms based on the review should then be addressed via the Joint Committee established to oversee implementation and amendment of the current LAP (in effective since 1 January 2024).

iv. *Re-organise and clarify the division of responsibilities among Registry sections to improve efficiency and quality of work*

The Registry's work on victims' participation and reparations was left "unrevised" during previous restructuring. The Registry contains one section (VPRS) which is tasked with providing information to victims, overseeing their application processes and receipt of powers of attorney, and reporting to chambers on matters of participation and reparation. A second section (the Counsel Support Section ("CSS")) administers legal aid and serves as the link between counsel and other Registry services. Because of their contact with victims, it is VPRS which holds the Registry's expertise in victim participation, maintains an awareness of victims' concerns, and develops familiarity with their lawyers from an early stage in the proceedings. CSS does not currently even gather or maintain information about which lawyers represent victims unless and until they receive legal aid (which many currently do not: in particular, as discussed below, to date no legal aid has been granted for lawyers working at the early stages of proceedings).

The consequences of this division are notable inefficiencies in the operation of the Registry on legal representation issues. Counsel are required to deal with CSS, however, the relevant situation and case expertise in respect of victims' issues is held by the VPRS.

The Registry should review this situation and reorganise the division of work on victims' participation and reparation in a way that creates efficiencies and makes use of the expertise held by the VPRS. Consideration should be given to reverting to the pre-2010 model (similar to that used at other international tribunals) under which victims' legal aid and Registry services for victims' counsel were managed by VPRS. At a minimum, the Court's legal aid framework should mandate VPRS involvement in the operation of the Court's LAP for victims.

(4) *Meaningful participation and representation during the early stages of proceedings*

Why this is a priority area

The early stages of proceedings are vital to victims' interests. It is at this stage that victims' will first have the opportunity to learn about the Court; and the Prosecutor will engage with victims' populations, and make decisions on which cases and alleged crimes to pursue. Victims are frequently exposed to misinformation, security risks and other challenges during these phases, and invariably want to ensure that the Prosecutor is performing his role well and with victims' interests in mind. Victims' participation at this early stage is a means of ensuring that all of these things operate effectively.

However, to date, the Court's approach to early stage victim participation is underdeveloped and ineffective, and perhaps viewed by some actors as simply "too difficult" to address in a comprehensive and structured manner. No procedures exist for supporting or arranging victims' legal representation at this stage. No legal aid has yet been granted at this stage. Victims' counsel do not receive basic Registry services such as provision of letters attesting privileges and immunities, access to court information management tools, and security advice.

¹⁵ Richard J. Rogers, [Assessment of the ICC's Legal Aid System](#), 5 January 2017.

A seminar organised by the ICCBA and civil society organisations in May this year highlighted these challenges and produced a document summarising the problems and possible solutions.¹⁶ The Registry has so far taken no action on these recommendations.

Suggested objective

Victims' views and concerns are heard and considered by the Court during the early stages of proceedings (preliminary examination, investigation, and prior to the initial appearance of a suspect in a case), including through legal representatives who are appropriately supported with essential Registry services and legal aid.

Some possible steps to be taken

- i. Ensure that the early stages of proceedings are included in the codification of victims' standing set out above*

Our recommendation that victims' standing rights be codified are set out above. This process should include the question of victims' standing at the preliminary examination and investigation stages, and in cases where a suspect has yet to appear before the Court.

- ii. Adopt a (public) protocol for the provision of (non-legal aid) services to victims' counsel at the early stages*

In September 2023, the ICCBA provided a proposal to the Registrar of a document on the circumstances in which the Registry would provide essential non-legal aid services to victims' counsel during the early stages of proceedings. The proposal dealt with services such as support in travel planning (including visas), security advice, cooperation requests (including for access to clients residing within states parties), access to ICC premises, court information technology resources, the ability to securely submit documents and e-file, notification of relevant Court filings, etc.

The ICCBA took into account discussion with relevant sections of the Registry to ensure feasibility. No substantive response has yet been received. The Registry should take steps to finalise, adopt and implement such a protocol as soon as possible.

- iii. Implement the legal aid policy's provisions regarding legal aid at the investigation stage, while concurrently developing a proposal to elaborate on and improve these provisions*

The ICCBA was heartened that the Registry accepted the ICCBA's recommendations during the legal aid review process to include provision for legal aid for victims at the situation stage. Unfortunately, these provisions are not yet implemented, and the Registry appears to have recognised that the wording included in the policy on these matters is insufficient for purposes of immediate implementation of the provision. The ICCBA has made prior submissions to the Registry on these problems, during the process of the legal aid review.

Using the mechanism of the Joint Committee, the Registry should develop a more detailed and workable framework for the payment of victims' legal aid at the early stages within a fixed and limited timeframe. However, in the meanwhile, the Registry should urgently ensure that budget allocated for this use is not lost but is made use of, even if on the basis of an interim approach.

¹⁶ [17 July: Ensuring Justice for Victims at the ICC on International Criminal Justice Day](#).

(5) Effective reparations and assistance

Why this is a priority area

Reparations and assistance for victims are an essential part of the Rome Statute's commitment to victims' rights. Significant advancements have been made in this area, but practice to date has also revealed major shortcomings. Some of these are simply due to resource shortages in the TFV, and the ICCBA appreciates the renewed focus of the TFV on fundraising to address that issue. However, some other major problems in this area are not related to the sufficiency of TFV funds.

Recent decisions have suggested an emerging view that victims need not be legally represented during the implementation phases of reparations (i.e. after a Reparations Order has been issued). If implemented in practice, this would leave victims without a voice at a stage of the proceedings which affects them directly, and undercuts the efficacy of the essential collaboration between the TFV, VPRS and legal representatives in efficiently and effectively developing an implementation plan in line with the Reparations Order, and successfully commencing and course correcting as needed the actual reparations process.

Meanwhile, the TFV's second mandate, for assistance and support to victims outside the confines of a reparations award, is used inconsistently and with little transparency. In theory, the TFV mandate has the potential to be among the Court's most valuable means of assisting victims. Because it can reach all victims, it could assist those who are excluded from cases brought by the Prosecutor, enabling the Court to overcome the risk of creating divisions among victim communities. By clearly demonstrating a fair approach among victims, the second mandate could support the Court's legitimacy, and victims' trust for it. However, to date, funding shortfalls have limited the use of the second mandate. And just as importantly, it is not made clear to victims how decisions are made regarding which situations will benefit from the second mandate.

Suggested objective

Victims are able to be heard through their legal representatives at all stages of reparations proceedings, including implementation, and any issues which arise subsequently. Decisions of the TFV concerning the operation of its second mandate are taken transparently and in a way that enables victims to be heard on this issue.

Some possible steps to be taken

i. Undertake a review of victims' legal representation during reparations implementation

The Registry should commission an independent review of victims' legal representation during the implementation of reparations. The review should assess the experience in cases to date, draw conclusions regarding what the real needs are for victims' representation at this stage (including the advice, support, and facilitation provided by legal representatives and their teams at the Seat of the Court and in the field, to the TFV and VPRS in the conduct of their respective mandates), and make recommendations to the Chambers and Registry on their implementation. This review should be undertaken independently to avoid the appearance and any reality that interests in reducing legal aid costs for this stage of the proceedings influence the conduct and outcome of the review process.

ii. Establishing a (public) strategy document on use of the TFV's two mandates

Based on the experience that it has now developed, the TFV should undertake a realistic assessment of its fundraising potential and how this money can and should be distributed between the TFV's two mandates. Based on this assessment, the TFV should publish a strategy document which sets out its understanding of how the two mandates will be prioritised as between each other, and as between various cases and situations. The strategy should make clear the process and criteria used when the TFV decides to initiate its second mandate and/or to allocate funds to an article 75 Reparations Order. The policy should also incorporate methods for ensuring that victims are heard in these processes – whether through legal representatives or in other ways.

IV. Process for creating the Victims' Strategy

The above matters are complex, but not insurmountable. Many of them are issues which counsel and civil society organisations have lobbied the Registry on for many years without seeing significant progress. The ICCBA is concerned that the approach currently being taken by the Registry to produce the revised draft Victims' Strategy is ill-adapted to change this pattern and to grapple with the difficult issues in question.

Consultation is important. However, it must be appropriately tailored. It should not be done for the sake of being seen to consult, but rather as a genuine means of gathering input. The survey produced by the Registry to date is, while well-intentioned, not a constructive means by which to consult. Survey questions are often unfocused, inviting open-ended comment on broad topics, and there is no indication of how inputs will be used. It seems doubtful that within the timeframe available the Registry will be able to constructively make use of responses to so many open-ended questions. It is also unclear whether there is any plan to consult victims, and if so how that will be done.

The ICCBA suggests that rather than starting with an unbounded set of survey questions, consultations should be undertaken based on a concrete proposal. In this respect, the Registry might be guided by the recent practice of the Office of the Prosecutor, which has been to produce a draft policy document that is then distributed for consultation.

The ICCBA also feels strongly that a first draft of the strategy would be best produced by an expert who is independent from the Court. Lack of progress over the past many years on the relevant issues demonstrate that conducting such a process 'in-house' is not efficient and effective. Difficulties include the availability of Registry staff with the comprehensive and relevant expertise to spearhead these processes alongside their regular responsibilities. The end result has been strategy documents that do not gain the confidence of the ASP, victims, counsel, and civil society. A better approach would be to identify an external expert who understands victims' rights, has the confidence of actors in this area, and is familiar with the ICC as well as other systems.¹⁷ This is similar to the approach currently used by the Prosecution, in relying on Special Advisors for the creation of policies, and by the Registry previously when it sought the assistance of an expert in recommending legal aid reforms.¹⁸ Of course, to produce a document which is realistic and practical the expert would need to have proper access to Registry staff and internal Registry materials.

¹⁷ The ICCBA has in mind several respected experts who are currently unconnected with ICC proceedings and would be happy to share suggestions with the Registry.

¹⁸ Richard J. Rogers, [Assessment of the ICC's Legal Aid System](#), 5 January 2017.

Due consideration should also be had in this process to the wealth of existing recommendations concerning victims' participation at the Court – for example those made in the Review Conference, IER process and other internal reform processes; public reports from civil society organisations; and academic writing. The first step in producing a revised Strategy should be to collate and review these sources.

The process should be done efficiently, but should not be rushed. The Registry's delayed commencement of this process, followed by a rushed call for survey responses, demonstrates the risk that without independent external input, the process will be both too slow, and then at times too rushed. The ICCBA believes that it should be possible to produce an updated Victims' Strategy by the end of 2025, if an external expert is identified and tasked with this work by the end of 2024 or early 2025.

There is otherwise a danger that by late 2025, the Registry will rush to produce a further document which simply tweaks the previous "strategies", which lacked concrete meaning and the objectives of which remain unmet. The ICCBA urges the Registry, Court and concerned States Parties not to follow a failed path.