

# 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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## ABOUT THE WAR CRIMES RESEARCH OFFICE

The core mandate of the WCRO is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the ICTY and ICTR, established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or "hybrid" war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, Argentina's Assistance Unit for Cases of Human Rights Violations Committed under State Terrorism, the Office of War Crimes Issues at the U.S. Department of State, and the Court of Bosnia and Herzegovina.

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at this stage of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO has taken on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

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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 about the appropriate functioning of the Court's victim participation scheme remain outstanding, several of which relate to the representation of victims before the Court. Specifically, questions have arisen relating to the respective roles of the Court's Victims Participation and Reparations Section (VPRS) and Office of Public Counsel for Victims (OPCV); 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 legal representatives, or whether OPCV should engage in direct representation of victims. The aim of this report is to examine the way in which these questions have been dealt 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: The Roles of the Victims Participation and Reparations Section and the Office Of Public Counsel For Victims**

The ICC has two distinct bodies, both located within the Registry, devoted to providing support to victims who interact with the Court: the Victims Participation and Reparations Section and the Office of Public Counsel for Victims. Notably, while each office has a distinct mandate, there has been at least one prominent call for the merging of the two bodies. Specifically, in a 2010 speech to the ICC's Assembly of States Parties, Judge Adrian Fulford expressed his opinion that VPRS and OPCV should be combined, explaining that he finds it costly and inefficient to operate the two units separately.

The mandates of VPRS and OPCV, and the work each has performed on behalf of victims to date, are described at length in Section III below. Briefly, VPRS is the unit of the Registry that effectuates the obligations of the Registrar under the Court's Rules of Procedure and Evidence relating to the participation of victims. These obligations include: administering applications from individuals seeking to participate in proceedings before the Court, organizing legal

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 victims' role in ICC proceedings as widely as possible. OPCV, by 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 OPCV is to provide support and assistance to the legal representatives for victims and to victims, including, where appropriate: legal research and advice, and appearing before a Chamber in respect of specific issues. 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. Finally, although not expressly a part of its mandate, OPCV has reported that it engages in outreach activities in countries where the ICC is active, as well as in other countries.

### **Specific Issues Relating to the Legal Representation of Victims Before the ICC**

#### *Legal Representation of Individuals Who Have Applied for Victim Status in Proceedings before the Court During the Time that Such Applications Are Pending*

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 OPCV's role in relation to such victim applicants, as well as the scope of that role, has evolved over time. For instance, in the *Kony, et al.* case, Pre-Trial Chamber II refused to appoint OPCV as the legal representative of victim applicants, but held that the Office could otherwise provide support and assistance to the applicants. By contrast, in the *Lubanga* case, Trial Chamber I was willing to appoint OPCV as the legal representative for victim applicants, granting the Office the right to access certain documents in the case where relevant to its role as the applicants' counsel, and to intervene on behalf of its clients by filing submissions with the Court on topics related to the

interests of the applicants. More recently, the *Bemba* Trial Chamber took an even more expansive view of OPCV's role as legal representative of victim applicants, appointing OPCV to represent the applicants' views and concerns at the opening of the trial, including by making opening statements on their behalf. Finally, in the *Abu Garda* case, Single Judge Cuno Tarfusser declined to assign OPCV any role with respect to victim applicants, holding that VPRS was the appropriate body to interact with victim applicants and that the approach of the other Chambers inappropriately blurred the distinction between OPCV and VPRS. 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.

### *Organization of Common Legal Representatives*

Rule 90 of the ICC's Rules of Procedure and Evidence governs the legal representation of victims before the Court. Subparagraph 1 of the rule states that a victim shall be free to choose a legal representative, but this provision is modified by Rule 90(2), which provides that, where there are a number of victims, the Chamber may request that victims or groups of victims choose a common legal representative. In addition, Rule 90(3) states that, if victims are unable to choose a common legal representative within a period of time established by the Chamber, the Chamber may request the Registry to appoint one or more such representatives.

As explained in detail below, the Pre-Trial Chambers and Trial Chambers presiding over the cases that have come before the ICC thus far have taken various approaches to the legal representation of victims. For instance, in the *Lubanga* case, victims were largely represented by counsel of their own choosing throughout the proceedings, meaning that eight different legal teams represented just over 120 victims during the *Lubanga* trial. In the *Katanga & Ngudjolo* and *Banda & Jerbo* cases, several legal teams were permitted to participate at the confirmation of charges stage of proceedings, but the Trial Chambers tasked VPRS with grouping victims and organizing their common legal representation prior to the start of trial. Finally, in the two cases arising out of the Kenya situation to date, the Pre-Trial Chamber instructed the Registry to take steps towards organizing common legal representation for victims within weeks of the

Chamber's decisions issuing summonses to appear for the suspects, and a common legal representative was appointed in each case before the confirmation of charges hearing.

### *Representation of Victims by the Office of Public Counsel for Victims*

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. Early in the Court's operations, Pre-Trial Chamber II appointed OPCV as the legal representative of a number of victims participating in the *Kony, et al.* case, noting that it was acting upon the recommendation of VPRS. The next Chamber to address the question of whether OPCV should engage in direct representation of victims was the *Lubanga* Trial Chamber, which initially barred OPCV from representing victims participating in the proceedings, saying that the Office should concentrate its limited resources on providing support and assistance to external legal representatives and to victim applicants. Notably, however, OPCV was later appointed to represent a limited number of dual status victim/witnesses in the *Lubanga* trial. Unfortunately, the *Lubanga* Trial Chamber's decision appointing OPCV as the legal representative of these victims does not appear to be publicly available, and thus it is not clear why the Chamber reversed its earlier position that OPCV should not represent individual victims. OPCV also sought to engage in direct representation of victims in the *Bemba* case, but the Trial Chamber, citing the initial position taken by the *Lubanga* Trial Chamber, held that instead, the Office should focus on its primary role, which was to assist the external legal representatives of victims. 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 one of the external legal representatives was removed due to an apparent conflict of interest.

### **Recommendations**

#### *VPRS and OPCV Should Remain Distinct Entities, But Overlap in Their Functions Should Be Avoided*

As stated above, there has been at least one prominent call for the merging of VPRS and OPCV. This proposal has obvious appeal in that it would eliminate any confusion on the part of victims as to the

roles of VPRS and OPCV and minimize inefficiencies that may be caused by overlapping aspects of the two entities' mandates. 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 outreach activities. While the scope of OPCV's outreach activities 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 Their "Views and Concerns" on Issues Related to the Case*

As reviewed in detail below, 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. 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 it is true that Regulation 86 of the Court's Regulations entrusts the Registrar with the task of requesting further information from those applying for victim status whose applications are incomplete, the Registrar is *not* charged with assisting applicants in responding to 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

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 rights to victim applicants, and thus OPCV's role should be limited to 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 before the Chamber "in respect of specific issues." Indeed, as discussed below, OPCV has demonstrated an impressive ability to efficiently canvass the views of multiple victims and victims' 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* 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 conflicts of interest arise or as necessary to protect the interests of particular groups of victims.

As discussed below, several benefits will flow from the early organization of common legal representation, such as promoting the expeditiousness of proceedings; avoiding the need to impose a change of counsel on victims midway through proceedings; and allowing counsel more time to consult with their clients to determine victims' needs and interests in advance of key stages of the case, such as the confirmation of charges hearing. 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 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, which are detailed below.

Finally, while consultation with victims will provide important information to VPRS concerning the views of victims with regard to legal representation, 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 permitted to assess the views of victims by generally canvassing victim applicants, their lawyers, and community groups on issues relating to representation. 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 to "Legal Representation" would have the added benefit of alerting victims to the possibility that they will not be represented by counsel of their choosing if granted participation rights. At present, the application form asks if the victim has a lawyer and requests the contact information for the lawyer, without suggesting in any way that the lawyer may not be able to represent the victim before the Court.

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

Although Regulation 80(2) of the Court's Regulations permits a 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 victims' 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 learned for future victims' counsel. Thus, 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 yet been assigned counsel. Ideally, in line with our recommendation above that common legal representatives be appointed before any decisions are made on applicants' victim status, these instances will be 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. 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 victims' interests.

## I. INTRODUCTION

The International Criminal Court (ICC) is frequently lauded for being the first international criminal body to allow victims to participate in proceedings, not just as witnesses for one of the parties, but in their own right.<sup>1</sup> Nevertheless, nearly a decade after the entry into force of the Rome Statute, many questions about the appropriate functioning of the Court's victim participation scheme remain outstanding, several of which relate to the representation of victims before the Court. Specifically, questions have arisen relating to the respective roles of the Court's Victims Participation and Reparations Section (VPRS) and Office of Public Counsel for Victims (OPCV); 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 legal representatives, or whether OPCV should engage in direct representation of victims. To varying degrees, these questions have been addressed by different Chambers of the Court in various cases, but have yet to be answered in a definitive manner, thereby leading to the inconsistent treatment of victims across cases. The aim of this report is to examine the way in which these questions have been dealt

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<sup>1</sup> See, e.g., Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES*, 315 (Dominic McGoldrick, et al. eds., 2004) (noting that the Rome Statute marked a "major departure from a hitherto limited theory of international criminal justice, which is centered on punishment and international order," towards a "more expansive model of international criminal law that encompasses social welfare and restorative justice"); Gilbert Bitti & Håkan Friman, *Participation of Victims in the Proceedings*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 456, 457 (Roy S. Lee ed., 2001) ("The model for victims' participation thus developed in the [Rome] Statute... was seen as an important achievement because the Court's role should not purely be punitive but also restorative."); Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1388 (Cassese, et al. eds., 2002) (criticizing the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda for ignoring the fact that "the concerns of the Prosecutor do not necessarily coincide with those of the victims" and describing the Rome Statute's provisions allowing for victims to participate in proceedings and receive reparations as "decisive advances").

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

## **II. INSTITUTIONAL SUPPORT FOR VICTIMS AT THE ICC: THE ROLES OF THE VICTIMS PARTICIPATION AND REPARATIONS SECTION AND THE OFFICE OF PUBLIC COUNSEL FOR VICTIMS**

The ICC has two distinct bodies, both located within the Registry, devoted to providing support to victims who interact with the Court: the Victims Participation and Reparations Section and the Office of Public Counsel for Victims. Notably, while each office has a distinct mandate, there has been at least one prominent call for the merging of the two bodies. Specifically, in a 2010 speech to the ICC's Assembly of States Parties, Judge Adrian Fulford expressed his opinion that VPRS and OPCV should be combined, explaining:

Although there are historical reasons that explain why we have a Victims Participation and Reparations Section (VPRS) and an Office of Public Counsel for Victims (OPCV), I find it difficult to see why they continue to function separately. They each have a broad mandate to assist victims at different stages of the proceedings, and I consider it is unnecessarily costly and inefficient to keep them operating independently. Arguably, there should be a single, integrated service for victims.”<sup>2</sup>

The following section is intended to explain the mandates of VPRS and OPCV and illustrate the work each has performed on behalf of victims to date. Judge Fulford's recommendation will be taken up in Section IV.A below.

### **A. Victims Participation and Reparations Section**

The Victims Participation and Reparations Section is the unit of the Registry that, *inter alia*, effectuates the obligations of the Registrar under the Court's Rules of Procedure and Evidence relating to the participation of victims.<sup>3</sup> These obligations include: (i) receiving

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<sup>2</sup> Judge Sir Adrian Fulford, *The Reflections Of A Trial Judge*, reprinted in 22 Crim. L. Forum 215, 221-22 (2011).

<sup>3</sup> See International Criminal Court, Regulations of the Court, ICC-BD/01-01-04,

applications for participation from victims and transmitting them to the relevant Chamber and, subject to the provisions of the Rome Statute requiring the Court to protect the “the safety, physical and psychological well-being, dignity and privacy of victims,”<sup>4</sup> to the Prosecution and Defense;<sup>5</sup> (ii) “assisting [victims] in obtaining legal advice and organizing their legal representation,”<sup>6</sup> including, where necessary, organizing common legal representation;<sup>7</sup> and (iii) “[p]roviding notice or notification to victims or their legal representatives.”<sup>8</sup> Thus, the main tasks of VPRS in relation to victim participation are administering applications from individuals seeking to participate in proceedings before the Court, organizing legal 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<sup>9</sup> and has worked to develop relationships with victims’ groups, civil society groups, and non-governmental, governmental, and international institutions for the purpose of disseminating information about the Court and victims’ role in its proceedings as widely as possible.<sup>10</sup>

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Reg. 86(9), *adopted* 26 May 2004 (“There shall be a specialised unit dealing with victims’ participation and reparations under the authority of the Registrar. This unit shall be responsible for assisting victims and groups of victims.”).

<sup>4</sup> Rome Statute of the International Criminal Court, *adopted* on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, U.N. Doc. A/CONF.183/9, Art. 68(1) (1998).

<sup>5</sup> International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, R. 89(1) (2000).

<sup>6</sup> *Id.* R. 16(1)(b).

<sup>7</sup> *Id.* R. 90(2) – (4). For more on the assignment of common legal representation for victims, *see infra* n. 94 *et seq.* and accompanying text.

<sup>8</sup> ICC Rules, *supra* n. 5, R. 16(1)(a).

<sup>9</sup> International Criminal Court, *Registry and Trust Fund for Victims Fact Sheet*, at 2 (March 2011), [http://www.iccnw.org/documents/Victims\\_Factsheet\\_March\\_2011.18apr1832.pdf](http://www.iccnw.org/documents/Victims_Factsheet_March_2011.18apr1832.pdf).

<sup>10</sup> International Criminal Court Newsletter #6, *VPRS: Frequently asked Questions*, at 7 (November 2006); International Criminal Court, *Victims Before the Court*, ICC-PIDS-FS-02-001/09\_Eng, at 1 (2009).

I. *Administering Applications from Individuals Seeking to Participate in Proceedings before the Court*

VPRS serves a number of functions in the administration of applications for participation from victims. First, VPRS prepared the Court's standard form by which individuals may apply to participate in proceedings before the ICC,<sup>11</sup> as well as a manual entitled *Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*, which outlines the application process for victims and the role of VPRS in this process.<sup>12</sup> VPRS receives and reviews all applications for participation, and is authorized to request additional information from applicants, States, the Prosecutor, and intergovernmental or non-governmental organizations to ensure that the application is complete before it is transferred to the relevant Chamber.<sup>13</sup> Indeed, according to the Pre-

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<sup>11</sup> International Criminal Court Newsletter #2, *Victims Before the ICC*, at 7 (October 2004). Note that individuals wishing to participate before the ICC as victims need not use the standard form to apply, so long as the applicant provides the Court with all necessary information. See, e.g., *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, ¶ 102 (Pre-Trial Chamber I, 17 January 2006).

<sup>12</sup> International Criminal Court, *Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*, at 20, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Participation/Booklet.htm>.

<sup>13</sup> Regulations of the Court, *supra* n. 3, Reg. 86(4). See also Fiona McKay, *Victim Participation in Proceedings Before the International Criminal Court*, 15 No. 3 Hum. Rts. Brief 2, at 5 (2008) (in which the Chief of the VPRS explains that one of her office's tasks is to "follow[] up on" applications from victims); *Situation in Uganda*, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, at 61 (Pre-Trial Chamber II, 10 August 2007) (in which the Chamber requests that VPRS "contact all the applicants for whom decision has been deferred due to deficiencies affecting proof of their identity, in order to inform them of the need to submit proper proof of identity"). Note that a Chamber may also request additional information before deciding on an application to participate in proceedings. See Regulations of the Court, *supra* n. 3, Reg. 86(7) ("Before deciding on an application, the Chamber may request, if necessary with the assistance of the Registrar, additional information from, *inter alia*, States, the Prosecutor, the victims or those acting on their behalf or with their consent. If information is received from States or the Prosecutor, the Chamber shall provide the relevant victim or victims with an opportunity to respond.").

Trial Chamber presiding over the confirmation proceedings in the first two cases arising out of the Kenya situation,<sup>14</sup> VPRS is not only authorized to request additional information for purposes of ensuring the completeness of applications, but, “for efficiency purposes,” bears the *responsibility* of requesting any additional information necessary within two weeks after receipt of an application.<sup>15</sup> For this purpose, Pre-Trial Chamber II directed VPRS to have a representative available in the field in Kenya to assist with ensuring that all applications were complete by the Chamber’s deadline for submissions for participation in the confirmation proceedings in the Kenya cases.<sup>16</sup>

With respect to complete applications, VPRS groups them based on common links among applicants, prepares a report summarizing the applications, and provides the Chamber with assistance in the assessment of the applications by, *inter alia*, “directing the attention of the... Chamber in a neutral way to particular issues or facts that it is considered are likely to be relevant to the Chamber’s decision.”<sup>17</sup> However, VPRS does not express any views on the merits of any

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<sup>14</sup> In the context of the ICC, the Court’s operations are divided into two broad categories: “situations” and “cases.” According to Pre-Trial Chamber I, “[s]ituations... [are] generally defined in terms of temporal, territorial and in some cases personal parameters” and “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.” *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, ¶ 65 (Pre-Trial Chamber I, 17 January 2006). In other words, the “situation” refers to the operations of the ICC designed to determine whether crimes have been committed within a given country that should be investigated by the Prosecutor. By contrast, “cases” are defined as “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects” and “entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.” *Id.*

<sup>15</sup> *The Prosecutor v. William Samoei Ruto, et al.*, First Decision on Victims’ Participation in the Case, ICC-01/09-01/11-17, ¶ 18 (Pre-Trial Chamber II, 30 March 2011).

<sup>16</sup> *Id.* ¶ 25.

<sup>17</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Implementation of the Reporting System Between the Registrar and Trial Chamber in Accordance with Rule 89 and Regulation of the Court 86(5), 01/04-01/06-1022, ¶ 20 (Trial Chamber I, 9 November 2007).

application.<sup>18</sup> In addition, during its review of the applications it receives, VPRS assesses whether disclosure of information contained in the applications to the parties and participants “may jeopardize the safety or security of the victims concerned,”<sup>19</sup> an assessment that includes communicating with the Court’s Victims and Witnesses Unit (VWU) to find out whether any victims are part of the ICC protection program.<sup>20</sup> Where information exists that could endanger victims, VPRS, in collaboration with VWU, will suggest the necessary redactions to the applications prior to transmitting the applications to the Prosecution, Defense, and victims already granted participation rights in the case.<sup>21</sup>

As of March 2011, VPRS had received 4,773 victims’ applications for participation and submitted 332 reports and filings to Chambers.<sup>22</sup> Unfortunately, as both the number of cases being tried by the Court and the number of individuals applying to participate as victims in

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<sup>18</sup> *Id.* ¶ 19. See also *Situation in the Republic of Kenya*, Order to the Victims’ Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, ICC-01/09-4, ¶ 9 (Pre-Trial Chamber II, 10 December 2009); *Situation in the Republic of Kenya*, Public Redacted Version of Report Concerning Victims’ Representations, ICC-01/09-6-Red , ¶ 9 (Pre-Trial Chamber II, 29 March 2010); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Treatment of Applications for Participation, ICC-01/04-01/07-933-tENG , ¶¶ 20-21, 24 (Trial Chamber II, 26 February 2009); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Response to the Questions Raised by Trial Chamber II on 13 November 2008 and Additional Observations, ICC-01/04-01/07-765, ¶ 5 (Trial Chamber II, 24 November 2008).

<sup>19</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Request of the OPCV and on the Prosecution’s Filing which Concern the Trial Chamber’s Decision Inviting the Parties’ Observations on Applications for Participation of Victims Issues on 6 May 2008, ICC-01/04-01/06-1333, ¶ 9 (Trial Chamber I, 16 May 2008).

<sup>20</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Certain Practicalities Regarding Individuals who have the Dual Status of Witness and Victim, ICC-01/04-01/06-1379, ¶¶ 73-76 (Trial Chamber I, 5 June 2008).

<sup>21</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Victim Participation, ICC-01/05-01/08-103-tENG-Corr, at 5-6 (Trial Chamber III, 12 September 2008); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Treatment of Applications for Participation, ICC-01/04-01/07-933-tENG, ¶¶ 48-49 (Trial Chamber II, 26 February 2009); *Situation in Kenya*, Decision on Victim’s Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-24, ¶ 18 (Pre-Trial Chamber II, 3 November 2010).

<sup>22</sup> ICC, *Registry and Trust Fund for Victims Fact Sheet*, *supra* n. 9, at 2.

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.<sup>23</sup> 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*] further approximately one month. The Registry estimates that by 30 June it would be able to transmit no more than 250 or 300 applications. Accomplishing even this partial transmission and reporting would significantly increase the strain on the resources of the Registry and may interfere with the Registry's ability to comply fully with orders already issued by other Chambers.<sup>24</sup>

In the end, only 130 victims participated in the confirmation of charges hearing in the *Mbarushimana* case.<sup>25</sup> Similar problems arose prior to the confirmation of charges hearings in the two cases arising out of the Kenya situation to date,<sup>26</sup> with the result that just 327 victims

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<sup>23</sup> *The Prosecutor v. Callixte Mbarushimana*, Proposal on Victim Participation in the Confirmation Hearing, ICC-01/04-01/10-213 ¶ 5 (Pre-Trial Chamber I, 6 June 2011).

<sup>24</sup> *Id.*

<sup>25</sup> *The Prosecutor v. Callixte Mbarushimana*, Decision on the 138 Applications for Victims' Participation in the Proceedings, ICC-01/04-01/10-351, at 18-20 (Pre-Trial Chamber I, 11 August 2011).

<sup>26</sup> *See, The Prosecutor v. William Samoei Ruto, et al.*, Decision on the Registrar's "Request for Instructions on the Processing of Victims' Applications," ICC-01/09-

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

## 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,<sup>31</sup> and to date, all participating victims have been represented by a lawyer.<sup>32</sup> As of March 2011, VPRS had “facilitated the appointment of a legal representative (including OPCV) by the Court for 2,647 victims.”<sup>33</sup> The details of VPRS’s approach to organizing legal representation for victims, and how it has evolved over time, is discussed in detail in Section III.B below.

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01/11-147, ¶ 3 (Pre-Trial Chamber II, 28 June 2011) (referring to the fact that the Registry had informed the Pre-Trial Chamber that it would only be in position to redact and provide reports on 400 of approximately 1,800 victims’ applications by the Chamber’s deadline of 8 July 2011); *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Decision on the Registrar’s “Request for Instructions on the Processing of Victims’ Applications,” ICC-01/09-02/11-137, ¶ 3 (Pre-Trial Chamber II, 28 June 2011) (referring to the fact that the Registry had informed the Pre-Trial Chamber that it would only be in position to redact and provide reports on 400 of approximately 550 victims’ applications by the Chamber’s deadline of 8 July 2011).

<sup>27</sup> *The Prosecutor v. William Samoei Ruto, et al.*, Transcript of Hearing, ICC-01/09-01/11-T-5-ENG, at 3 (Pre-Trial Chamber II, 1 September 2011).

<sup>28</sup> See *Ruto, et al.*, Decision on the Registrar’s “Request for Instructions on the Processing of Victims’ Applications,” *supra* n. 26, ¶ 3.

<sup>29</sup> *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Transcript of Hearing, ICC-01/09-02/11-T-4-ENG, at 3 (Pre-Trial Chamber II, 21 September 2011).

<sup>30</sup> See *Muthaura, et al.*, Decision on the Registrar’s “Request for Instructions on the Processing of Victims’ Applications,” *supra* n. 26, ¶ 3.

<sup>31</sup> ICC Rules, *supra* n. 5, R. 90(1).

<sup>32</sup> ICC, *Registry and Trust Fund for Victims Fact Sheet*, *supra* n. 9, at 2.

<sup>33</sup> *Id.*

### 3. *Field Missions and Outreach*

In a 2004 report to the Assembly of States Parties, the ICC described VPRS as the organ “responsible for the content and implementation of the victims’ outreach campaigns,” noting that VPRS “also advises the Public Information and Documentation Section of the Registry on the preparation of victim-related materials as part of the ICC’s general programme of outreach and communications.”<sup>34</sup> 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.<sup>35</sup> As of March 2011, VPRS had undertaken 135 missions in the field and organized 518 meetings and seminars.<sup>36</sup> In addition, VPRS disseminates information regarding victims’ role before the ICC through a range of other tools, such as “public announcements; conferences and workshops; web sites; posters; brochures; print advertisements; radio and TV spots, and fact sheets.”<sup>37</sup>

### 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 been asked to play a role in communicating victims’ representations to 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 such instance occurred in relation to the Prosecutor’s request to investigate crimes occurring during the 2007-2008 post-election violence in Kenya.<sup>38</sup> Specifically, because Article 15(3) of the Rome Statute states that “[v]ictims may make representations to the Pre-Trial Chamber” in the event that the Prosecutor makes a

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

<sup>35</sup> 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.

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

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

<sup>38</sup> See generally *Situation in the Republic of Kenya*, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant 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,<sup>39</sup> the Pre-Trial Chamber directed VPRS to receive victims' representations on the subject and summarize the representations into one consolidated report.<sup>40</sup> Pursuant to the Chamber's direction, VPRS received representations from 396 victims and presented a report reflecting the views communicated in these representations to the Chamber.<sup>41</sup> VPRS was charged with filling a similar role in relation to the Prosecutor's request to open an investigation *proprio motu* into alleged crimes committed in Côte d'Ivoire.<sup>42</sup>

## **B. Office of Public Counsel for Victims**

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,<sup>43</sup> was established in September 2005 pursuant to Regulation 81 of the Regulations of the Court.<sup>44</sup> 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:

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<sup>39</sup> Rome Statute, *supra* n. 4, Art. 15(3).

<sup>40</sup> *Situation in the Republic of Kenya*, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, *supra* n. 38, ¶ 9.

<sup>41</sup> *Situation in the Republic of Kenya*, Public Redacted Version of Report Concerning Victims' Representations, ICC-01/09-17-Corr-Red (Registry, 29 March 2010).

<sup>42</sup> *Situation in the Republic of Côte d'Ivoire*, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, ICC-02/11-6 (Pre-Trial Chamber III, 6 July 2011).

<sup>43</sup> Regulations of the Court, *supra* n. 3, Reg. 81(2) ("The Office of Public Counsel for victims shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office. Counsel and assistants within the Office shall act independently."). *See also* Regulations of the Registry, ICC-BD/01-01-06-Rev.1, Regulation 115(1) ("[M]embers of the Office shall not receive any instructions from the Registrar in relation to the conduct of the discharge of their tasks as referred to in regulations 80 and 81 of the Regulations of the Court.").

<sup>44</sup> Office of Public Counsel for Victims, *Helping Victims Make Their Voices Heard*, ICC-OPCV-B-001/10\_Eng, at 3 (September 2010).

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

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.<sup>46</sup>

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 a case to “determine the precise nature of the role of [OPCV] in a particular case,”<sup>47</sup> 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 close to six hundred “legal advices and researches” to those representatives.<sup>48</sup> 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.<sup>49</sup> The Office has also compiled a manual for

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

<sup>46</sup> *Id.* Reg. 80(2) (“The Chamber may appoint counsel from the Office of Public Counsel for victims”).

<sup>47</sup> *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.*, Decision on the OPCV’s Observations of Victims’ Applications and on the Prosecution’s Objections Thereto, ICC-02/04-01/05-243, at 5-6 (Pre-Trial Chamber II, 16 April 2007).

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

<sup>49</sup> International Criminal Court, *Report of the Court on Legal Aid: Legal and Financial Aspects of Funding Victims’ Legal Representation Before the Court*, 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).

victims' legal representatives that contains a general introduction to the ICC and to the role of victims participating before the Court, extracts of decisions relating to victim participation handed down by the Court, and an "explanation of practical issues relevant for the representation of victims in the proceedings before the Court."<sup>50</sup> OPCV plans to update this manual regularly to ensure the most relevant jurisprudence is included.<sup>51</sup>

Notably, as the Court recognized in a report to the Assembly of States Parties, both legal representatives and the Chambers of the Court have acknowledged the importance of this support, as OPCV is able to provide the victims' legal teams with "research capacity, specialist knowledge of relevant areas of international law and of the law and practice of the Court, the ability to follow Court proceedings on an ongoing basis and technical knowledge of the Court's systems for managing information."<sup>52</sup> Indeed, a 2009 study conducted by the Court determined that OPCV's assistance to external legal representatives means that victims' legal teams require fewer personnel, thereby reducing the amount of money paid to victims' counsel through the Court's legal aid budget.<sup>53</sup>

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<sup>50</sup> Office of Public Council for Victims, *Representing Victims before the International Criminal Court: A Manual for Legal Representatives* (October 2010), <http://www.icc-cpi.int/iccdocs/PIDS/tmp/Representing%20Victims%20before%20ICC.PDF>.

<sup>51</sup> *Id.*

<sup>52</sup> *Report of the Court on Legal Aid: Legal and Financial Aspects of Funding Victims' Legal Representation Before the Court*, *supra* n. 49, ¶ 42. See also OPCV, *Helping Victims Make Their Voices Heard*, *supra* n. 44, at 7 (quoting a Belgian lawyer who acted as one of the legal representatives for victims in the Katanga & Ngudjolo case as stating that the "quality of [OPCV's] support has contributed to the development of a genuine dynamic collaboration with the victims as well as with their legal representatives, making the Office an inevitable actor in the process allowing the optimization of the legal representation and the defense of victims' interests").

<sup>53</sup> *Report of the Court on Legal Aid: Legal and Financial Aspects of Funding Victims' Legal Representation Before the Court*, *supra* n. 49, ¶ 43. See also Victims' Rights Working Group, *September 2009 Legal Update*, at 3 (8 September 2009) (noting that, in the context of the *Katanga & Ngudjolo* case, "[t]he Registry... found that limiting the legal aid budget to one counsel per team and a case manager remained appropriate *given that the team also benefits from the assistance of OPCV*") (emphasis added).

## 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.<sup>54</sup> The Chambers of the Court have stressed that OPCV is neither a party to nor a participant in the proceedings.<sup>55</sup> As a result, OPCV can only appear before the Chamber when initiated by: the Chamber; a victim or legal representative of a victim; OPCV, if it has been appointed as a legal representative of victims; or an application by OPCV, acting outside of its role as a legal representative, to address the Chamber.<sup>56</sup>

In practice, OPCV has appeared before the Chambers on specific issues on a number of occasions. For instance, in the *Lubanga* trial, Trial Chamber I directed OPCV to “present general submissions in accordance with Regulation 81(4)(b) of the Regulations of the Court on the issue of the [*sic*] participation by indirect victims.”<sup>57</sup> In this case, OPCV was not acting in the capacity of legal representative for any victims and was asked only for its observations as to whether certain applicants fell within the category of indirect victims.<sup>58</sup> On a separate occasion in the *Lubanga* case, Trial Chamber I requested that OPCV provide an analysis of the use of the terms “victims” and “victims who appear before the Court” in the Rome Statute.<sup>59</sup> OPCV has also appeared before Chambers after successfully submitting a request to address the Chamber. For example, in the *Lubanga* case, Trial Chamber I granted a request from the Principal Counsel of OPCV to be heard on the issues of protection of applicants and the

<sup>54</sup> Regulations of the Court, *supra* n. 3, Reg. 81(4)(b).

<sup>55</sup> *See, e.g., Lubanga*, Decision on the Role of the Office of Public Counsel for Victims and its Request for Access to Documents, *supra* n. 47, ¶ 35.

<sup>56</sup> *Id.* ¶ 35. *See The Prosecutor v. Joseph Kony, et al.*, Decision on Victims’ Applications for Participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07, ICC-02/04-01/05-282, ¶ 286 (Pre-Trial Chamber II, 21 November 2008) (“[T]he proper way for the OPCV to fulfill its mandate is to refrain from taking any initiative *vis-à-vis* the Chamber without prior seeking authorization to do so.”).

<sup>57</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Version of “Decision on ‘Indirect Victims,’” ICC-01/04-01/06-1813, ¶ 5 (Trial Chamber I, 8 April 2009).

<sup>58</sup> *Id.* ¶ 37.

<sup>59</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, OPCV’s Analysis of the Notions of “Victims” and of “Victims Who Appear before the Court” with Annexes, ICC-01/04-01/06-1063, ¶ 5 (Office of Public Counsel for Victims, 7 December 2007).

dual status of victims potentially appearing also as witnesses (dual status victim/witnesses), reasoning “at this stage of the case, the Chamber may be assisted by the views of the Office of Public Counsel for Victims on these issues of principle.”<sup>60</sup> In *Mbarushimana*, OPCV filed a submission on the specific issue of whether the Chamber should accept the Registry’s proposal that, for purposes of the confirmation of charges hearing in that case, the Chamber should depart from the usual system of victim participation under which only those individuals granted victim status could participate in proceedings, in favor of a system by which the Chamber could “seek the views” of applicants who had not yet been granted victim status.<sup>61</sup>

### 3. *Legal Representation*

As explored in detail in Sections III.A. and III.C below, OPCV has engaged in the direct legal representation of individuals in nearly every case that has come before the ICC to date, either as a representative of victim applicants in the period of time before the Chamber makes a ruling on their status and/or as counsel to victims granted participatory rights in a case.

### 4. *Submissions on Behalf of “Victims Who Have Communicated with the Court”*

Yet another function that OPCV has filled has been making submissions to the Court on behalf of “victims who have communicated with the Court.” The ICC Rules of Procedure and Evidence refer to “victims who have communicated with the Court” in

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<sup>60</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Submissions of the OPCV on its Role in the Proceedings, ICC-01/04-01/06-1108, ¶ 25 (Office of Public Counsel for Victims, 1 January 2008).

<sup>61</sup> *The Prosecutor v. Callixte Mbarushimana*, Request to Appear before the Chamber Pursuant to Regulation 81(4)(b) of the Regulations of the Court on the Specific Issue of Victims’ Participation in the Confirmation Hearing, ICC-01/04-01/10-226 (Office of Public Counsel for Victims, 9 June 2011). Although OPCV made its observations in the context of a “request to appear” before the Chamber on the issue, the Chamber nevertheless referenced OPCV’s arguments in its decision on the Registry’s proposal without ruling on the issue of “whether there was a valid basis for its intervention before the Chamber on this issue.” *The Prosecutor v. Callixte Mbarushimana*, Decision on the “Proposal on victim participation in the confirmation hearing,” ICC-01/04-01/10-229, at 5 (Pre-Trial Chamber I, 10 June 2011).

two specific contexts. First, Rule 59, which relates to participation in proceedings on motions challenging the jurisdiction of the Court or the admissibility of a case under Article 19 of the Rome Statute, provides in subparagraph (1) that the Registrar shall inform, *inter alia*, “victims who have already communicated with the Court in relation to that case or their legal representatives” of any challenge to jurisdiction or admissibility.<sup>62</sup> Second, Rule 119, which relates to the conditional release of an accused, provides in subparagraph (3) that, “[b]efore imposing or amending any conditions restricting liberty, the Pre-Trial Chamber shall seek the views of the Prosecutor, the person concerned, any relevant State and victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed.”<sup>63</sup> The Chambers have repeatedly interpreted the term “victims who have communicated with the Court” to include: “a) those victims who have been admitted to participate in the Case or their legal representatives; and b) those applicants who have submitted applications to be admitted to participate with respect to the Case or their legal representatives,”<sup>64</sup> and have on multiple occasions appointed OPCV to represent the interests of the latter in proceedings related to Article 19 challenges or provisional release.<sup>65</sup>

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<sup>62</sup> ICC Rules, *supra* n. 5, R. 59(1) (emphasis added).

<sup>63</sup> *Id.* R. 119(3) (emphasis added).

<sup>64</sup> *The Prosecutor v. Joseph Kony, et al.*, Decision Initiating Proceedings under Article 19, Requesting Observations and Appointing Counsel for the Defence, ICC-02/04-01/05-320, at 7 (Pre-Trial Chamber II, 21 October 2008); *See also The Prosecutor v. Callixte Mbarushimana*, Decision Requesting Observations on the “Defense Challenge to the Jurisdiction of the Court,” ICC-01/04-01/10-377, at 3 (Pre-Trial Chamber I, 16 August 2011).

<sup>65</sup> *See, e.g. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Treatment of Applications for Participation, ICC-01/04-01/07-933-tENG at 24 (Trial Chamber II, 26 February 2009); *The Prosecutor v. William Samoei Ruto, et al.*, Decision on the Conduct of Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, ICC-01/09-01/11-31, ¶¶ 12-13 (Pre-Trial Chamber II, 4 April 2011); *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Decision on the Conduct of Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, ICC-01/09-02/11-40, ¶¶ 12-13 (Pre-Trial Chamber II, 4 April 2011); *The Prosecutor v. Callixte Mbarushimana*, Decision Requesting Observations on the “Defense Challenge to the Jurisdiction of the Court,” ICC-01/04-01/10-377, at 4 (Pre-Trial Chamber I, 16 August 2011); *The Prosecutor v. Callixte Mbarushimana*, Decision on “Defense Request for an Extension of the Time-Limit to Submit Observations on

### 5. Outreach

Finally, although not expressly a part of its mandate under Regulation 80, OPCV has reported that it engages in outreach activities for “members of the judiciary, the legal profession, and the [*sic*] civil society in countries [where] investigations and/or cases are ongoing, as well as in other countries.”<sup>66</sup>

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Interim Release” and Request for OPCV Observations, 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).

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

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### III. SPECIFIC ISSUES RELATING TO THE LEGAL REPRESENTATION OF VICTIMS BEFORE THE ICC

As explained above, the key questions that have arisen in the Court's 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 legal representatives, or whether the Court's Office of Public Counsel 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. Legal Representation of Individuals Who Have Applied for Victim Status in Proceedings before the Court During the Time that Such Applications Are Pending

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 OPCV's role in relation to such victim applicants, as well as the scope of that role, has evolved over time.

Judge Mauro Politi, acting as Single Judge of Pre-Trial Chamber II in the context of the *Kony, et al.* case, was the first judge to contemplate whether individuals who had applied for victim status were entitled to legal representation – whether by OPCV or an external legal representative – during the period of time between the filing of an application and a decision by the Court on its merits.<sup>67</sup> In his February 2007 decision, Judge Politi reasoned that, because “the role of the

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<sup>67</sup> *The Prosecutor v. Joseph Kony, et al.*, Decision on legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134, ¶¶ 2-13 (Pre-Trial Chamber II, 1 February 2007).

legal representative is optional even after a decision allowing a victim to participate in the proceedings has been rendered, it appears *a fortiori* that applicant victims cannot claim to have an absolute and unconditional right to be provided with the assistance of a legal representative in respect of the phase preceding the Chamber's decision on the merits of the application."<sup>68</sup> Nevertheless, Judge Politi did not rule out the possibility that a Chamber *could* appoint such counsel, citing Regulation 80(1) of the Regulations of the Court, which permits a Chamber to appoint a legal representative of victims where the "interests of justice so require."<sup>69</sup> In the context of the request by forty-nine applicants for legal representation before him at the time of the ruling, Judge Politi determined that the interests of justice did not require appointment of a legal representative because no other victim applicants were represented by counsel in the case, meaning that "no issue of unequal treatment of the Applicants arises at this stage in terms of their opportunity of being considered a victim under the relevant provisions of the Statute and the Rules."<sup>70</sup> At the same time, Judge Politi noted that Regulation 81(4) of the Regulations of the Court requires that OPCV "provide support and assistance to the legal representative for victims *and to victims*,"<sup>71</sup> and thus he instructed the Registrar to transmit the forty-nine pending applications to OPCV "with a view to allowing it to provide the Applicants with any support and assistance which may be necessary or appropriate at this stage of the proceedings."<sup>72</sup> While Judge Politi did not expand on the type of support or assistance he envisioned OPCV providing to the applicants, OPCV later submitted that, based on its reading of the 1 February 2007 decision, its responsibilities towards victim applicants included: "provid[ing] the applicants with any legal advice related to their applications, as well as with advice to supplement, if need be, their request;" and "explain[ing] to the applicants the procedure before a decision on the application is taken by the relevant Chamber," as well as "their general rights as potential victims in a proceeding before the Court."<sup>73</sup> Judge Politi seemed to adopt this interpretation in a later

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<sup>68</sup> *Id.* ¶ 11.

<sup>69</sup> *Id.* ¶ 12.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* ¶ 13 (emphasis added).

<sup>72</sup> *Id.*

<sup>73</sup> *The Prosecutor v. Joseph Kony, et al.*, Decision on the OPCV's "Request to

decision, saying that the tasks described by OPCV's Principal Counsel "appear in full compliance with the statutory tasks of the Office as set forth under [Regulation 81(4)] since they consist in activities to be performed *vis-à-vis* the applicant victims themselves..."<sup>74</sup> However, Judge Politi refused to accept observations submitted to the Chamber from OPCV on behalf of the victim applicants that contained "legal arguments on the admissibility of the applications" and "any assessment and/or information that could be useful in the process of the examination of the applications,"<sup>75</sup> reasoning that such observations appeared to be an "activity performed *vis-à-vis* the Chamber on behalf of the applicant victims," and noting that the 1 February 2007 decision "explicitly excluded that the Office would be entrusted with the role and responsibility of legal representative of the applicant victims."<sup>76</sup>

The Pre-Trial Chamber presiding over proceedings arising out of the situation in the Democratic Republic of Congo similarly reached the conclusion that, while victim applicants were not entitled to legal representation,<sup>77</sup> OPCV could provide "support and assistance" to such applicants.<sup>78</sup> Specifically, Pre-Trial Chamber I noted in a 17 August 2007 decision that, "considering that under regulation 86(4) of the Regulations,[<sup>79</sup>] the Registry will automatically request additional

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Access Documents and Material," ICC-02/04-01/05-222, at 4 (Pre-Trial Chamber II, 16 March 2007) (quoting statements made by the Principal Counsel of OPCV at a confidential hearing) (internal quotations omitted).

<sup>74</sup> See, e.g., *The Prosecutor v. Joseph Kony, et al.*, Decision on OPCV's Observations on Victims' Applications and on the Prosecution's Objections Thereto, ICC-02/04-01/05-243, at 4 (Pre-Trial Chamber II, 16 April 2007).

<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.* at 5.

<sup>77</sup> *Situation in the Democratic Republic of Congo*, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims' Participation and Legal Representation, ICC-01/04-374, ¶ 42 (Pre-Trial Chamber I, 17 August 2007) (explaining that the rules and regulations pertaining to legal representation of victims "refer to persons who have been accorded the procedural status of victims to participate...").

<sup>78</sup> *Id.* ¶ 43.

<sup>79</sup> Regulation 86(4) states: "The Registrar may request further information from victims or those presenting an application in accordance with rule 89, sub-rule 3, in order to ensure that such application contains, to the extent possible, the information

information for all incomplete Applications, the Chamber deems it appropriate to appoint the OPCV to provide support and assistance to the unrepresented applicants.<sup>80</sup> Thus, Pre-Trial Chamber I seemed to envision OPCV's role in relation to victim applicants as assisting them 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-Trial Chamber's 17 August 2007 decision and noting that the "reason 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 applications pursuant to Regulation 86(4)."<sup>81</sup> Nevertheless, Trial Chamber I referred to OPCV's role in this context as acting as "the legal representative for victim applicants," and it went on to hold that, upon request, OPCV would be permitted to access certain documents "in its capacity as legal representative of particular victim applicants."<sup>82</sup> While OPCV's role as representative of applicants remained restricted,<sup>83</sup> it was, unlike in the *Kony, et al.*

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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 organizations." Regulations of the Court, *supra* n. 3, Reg. 86(4).

<sup>80</sup> *Situation in the Democratic Republic of Congo*, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims' Participation and Legal Representation, *supra* n. 77, ¶ 43.

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

<sup>82</sup> *Id.* ¶¶ 36-38.

<sup>83</sup> For instance, Trial Chamber I rejected a request by OPCV that the Office be consulted on the subject of redactions to its clients' applications before the applications are transmitted to the parties, holding that VPRS is charged with redacting confidential information from applications under the Regulations of the Court and that it is "well-equipped to undertake this task," meaning consultation with OPCV would be "duplicative and unnecessary." *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Request of the OPCV and on the Prosecution's Filing which Concern the Trial Chamber's Decision Inviting the Parties' Observations on 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 rejected OPCV's request to participate in an interlocutory appeal of a Trial Chamber decision on victim participation, holding that OPCV's clients did not "hold the status of victims in the case" and therefore did not "meet the prerequisite for participation in the appeals." *The Prosecutor v. Thomas Lubanga Dyilo*, Decision, *in limine*, on Victim Participation in the Appeals of the Prosecutor and the Defence against Trial

case,<sup>84</sup> permitted to file observations in support of its clients' applications to participate on occasion.<sup>85</sup> In addition, OPCV was permitted to file observations on behalf of a limited number of applicants, namely, those who would also be appearing as Prosecution witnesses in the *Lubanga* case, after the Defense filed a request seeking to obtain unredacted versions of those individuals' applications to participate.<sup>86</sup>

More recently, other Chambers have seemed to take an even more expansive view of OPCV's role as legal representative of victim applicants. For instance, in the *Bemba* case, OPCV was appointed to represent the applicants to express their "views and concerns at the opening of the trial," including by making opening statements on their behalf.<sup>87</sup> The legal basis for this decision is unclear; the Chamber

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Chamber I's Decision entitled "Decision on Victims' Participation," ICC-01/04-01/06-1335, ¶ 39 (Appeals Chamber, 16 May 2008).

<sup>84</sup> *Kony, et al.*, Decision on OPCV's Observations on Victims' Applications and on the Prosecution's Objections Thereto, *supra* n. 74, at 3.

<sup>85</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing, ICC-01/04-01/06-T-98-ENG, at 6 (Trial Chamber I, 18 November 2008) (setting a date by which the parties must submit observations on the victims' applications to participate and a date by which the applicants must "respond to these filings"); *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Applications by Victims to Participate in the Proceedings, ICC-01/04-01/06-1556, ¶ 6 (Trial Chamber I, 15 December 2008) (referring to a document submitted by OPCV entitled "Filing of two memoranda concerning the application for participation of victim a/0078/06 with two annexes ex parte, only available to the OPCV and the Applicant"). See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Observations on Legal Representation of Unrepresented Applicants, ICC-01/05-01/08-547, ¶ 10 (Office of Public Counsel for Victims, 9 October 2009) (in which OPCV states that, in the context of the *Lubanga* case, it was permitted to file submissions on behalf of applicants "in response to the observations by the parties" on the applications).

<sup>86</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing, ICC-01/04-01/06-T-98-ENG, at 7 (Trial Chamber I, 18 November 2008). Note that while OPCV was also permitted to make submissions on the issue of dual status victim/witnesses in the *Lubanga* case, OPCV relied on Regulation 81(4), which allows the Office to "appear[] before a Chamber in respect of specific issues," as the legal basis for this intervention, not its role as legal representative of unrepresented applicants. See *The Prosecutor v. Thomas Lubanga Dyilo*, OPCV's Request to Submit Observations or Otherwise Be Heard on Point E of the Order of 14 November 2007 and on the Issue of the Dual Status of Witnesses/Victims, ICC-01/04-01/06-1038, ¶ 44 (Office of Public Counsel for Victims, 21 November 2007).

<sup>87</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Legal

merely stated the approach would avoid “prejudice to these applicants,” some of whom “may later be granted participating status.”<sup>88</sup> Additionally, in each of the two cases arising to date out of the Kenya situation, OPCV was permitted to file observations on behalf of victim applicants regarding whether the confirmation of charges hearing should be held *in situ*.<sup>89</sup> In the Kenya context, however, it is notable that, at the time of the Chamber’s request for observations, no victims had yet been granted participatory status in either case, meaning that victim applicants were the only individuals to whom the Chamber had access in terms of assessing whether, from the victims’ point of view, *in situ* proceedings would be in the interests of justice.

Finally, in contrast to the various approaches taken by the Chambers in the *Lubanga*, *Bemba*, and Kenya cases, in the *Abu Garda* case, Single Judge Cuno Tarfusser declined to assign OPCV *any* role with respect to victim applicants, noting that Regulation 86 of the Court’s Regulations entrusts “*the Registrar* with a number of responsibilities relating to the participation of victims in the proceedings,” including the task of requesting further information from those applying for victim status.<sup>90</sup> Hence, although VPRS requested that the Chamber authorize it to transmit incomplete applications to OPCV with a view to allowing OPCV to meet with the applicants and assist them in completing their applications, Judge Tarfusser determined that such tasks fell “squarely within the mandate of the Registry, in particular of VPRS.”<sup>91</sup> At the same time, Judge Tarfusser stressed that the tasks vested in OPCV are, as a whole, “meant to be exercised once an

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Representation of Victim Applicants at Trial, ICC-01/05-01/08-1020, ¶¶ 25-27 (Trial Chamber III, 19 November 2010).

<sup>88</sup> *See id.* ¶ 22.

<sup>89</sup> *See The Prosecutor v. William Samoei Ruto, et al.*, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, ICC-01/09-01/11-106, at 4 (Pre-Trial Chamber II, 3 June 2011); *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, ICC-01/09-02/11-102, at 4 (Pre-Trial Chamber II, 3 June 2011).

<sup>90</sup> *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on Issues Relating to Victims’ Applications in the Case, ICC-02/05-02/09-20, at 4 (Pre-Trial Chamber I, 12 June 2009) (emphasis added).

<sup>91</sup> *Id.*

applicant's status as victim has been recognised by the Chamber."<sup>92</sup> Given that it was "necessary and appropriate to respect the difference in nature and scope of the functions respectively vested in the Registrar and in the OPCV," and that "entrusting the OPCV with the task of contacting the applicants with a view to the finalisation of the Applications... would be tantamount to unduly blurring the difference" between the Registry and OPCV, Judge Tarfusser rejected VPRS's request.<sup>93</sup> 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. Organization of Common Legal Representatives**

Rule 90 of the ICC's Rules of Procedure and Evidence governs the 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 or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.
3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.

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<sup>92</sup> *Id.* at 5.

<sup>93</sup> *Id.* at 5-6.

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,<sup>94</sup> are represented and that any conflict of interest is avoided.<sup>95</sup>

Thus, while the default rule is that victims are free to choose their legal representative, this default is supplemented by the Chamber's authority to require that victims or, where necessary, the Registry, choose a common legal representative for a group of victims. As explained above, VPRS is the section responsible for acting on behalf of the Registry in matters relating to the organization of legal representation for victims.<sup>96</sup>

Over time, the Pre-Trial Chambers and Trial Chambers presiding over the cases that have come before the ICC thus far have taken various approaches to the legal representation of victims. The following summary is intended to provide a brief overview of these different approaches.

*1. The Lubanga and Katanga & Ngudjolo Cases*

In the early stages of the Court's operations, the number of victims participating in proceedings was relatively small, and thus the Chambers did not require the appointment of common legal representatives, although the majority of legal representatives acted on behalf of more than one victim. Thus, for example, in the *Lubanga* case, just four victims participated in the confirmation of charges proceedings, three of whom were represented by one lawyer and one

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<sup>94</sup> Article 68(1) of the Rome Statute states: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." Rome Statute, *supra* n. 4, Art. 68(1).

<sup>95</sup> ICC Rules, *supra* n. 5, R. 90.

<sup>96</sup> See *supra* n. 6 *et seq.* and accompanying text.

of whom was individually represented.<sup>97</sup> In the *Katanga & Ngudjolo* case, fifty-seven victims participated at the confirmation stage of proceedings<sup>98</sup> and were represented by four separate teams of lawyers.<sup>99</sup>

At the trial stage of the *Lubanga* case, the number of victims authorized to participate in proceedings grew to over 120, and these victims were represented by eight legal representatives.<sup>100</sup> While this situation proved manageable for the most part, there were instances in which a single witness would be questioned not only by the Prosecution and the Defense, but also by up to four victims' representatives, leading to lengthy proceedings.<sup>101</sup> Hence, in the *Katanga & Ngudjolo* case, the Trial Chamber asked the legal representatives already participating in the proceedings, with the assistance of the Registry, to submit a proposal for the common legal representation of present and future participating victims.<sup>102</sup> In response, the legal representatives proposed grouping the victims into three "teams" according to the harm suffered and in a manner that would avoid conflicts of interest, with one team consisting of "victims

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<sup>97</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Observations Made during the Confirmation Hearing on Behalf of Victims a/0001/06, a/0002/06 and a/0003/06, ICC-01/04-01/06-750 (Legal Representative of Victims, 4 December 2006); *The Prosecutor v. Thomas Lubanga Dyilo*, Written Submissions of the Legal Representative of Victim a/0105/06, ICC-01/04-01/06-745 (Legal Representative of Victims, 1 December 2006).

<sup>98</sup> See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Treatment of Applications for Participation, ICC-01/04-01/07-933, ¶ 7 (Trial Chamber II, 27 February 2009).

<sup>99</sup> See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of Hearing, ICC-01/04-01/07-T-53-ENG, at 41 (Trial Chamber II, 28 November 2008).

<sup>100</sup> See Brianne McGonigle Leyh, PROCEDURAL JUSTICE? VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL PROCEEDINGS 327 (2011).

<sup>101</sup> See, e.g., *id.* ("The relatively low number of victims participating allowed victims to have the lawyer of their choice. However, the high number of legal representatives in the proceedings has, on occasion, meant that some victims are questioned first by the prosecution and then by at least four separate legal representatives before the defense even begins its examination.").

<sup>102</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the Organisation of Common Legal Representation of Victims, ICC-01/04-01/07-1328, ¶¶ 2-4 (Trial Chamber II, 22 July 2009).

of the enlistment of child soldiers, who took an active part in the attack and may therefore also be seen as perpetrators.”<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> Since that time, more than three hundred additional victims have been authorized to participate in the *Katanga & Ngudjolo* case.<sup>106</sup>

## 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 “a presentation of their views and concerns by a single common legal representative” would be appropriate “in order to ensure [the] effectiveness of pre-trial proceedings.”<sup>107</sup> Recognizing that Rule 90(4) requires that the “distinct interests of the victims participating in the proceedings must be taken into consideration and that any conflict of interest should be avoided,” the Chamber observed that, in appointing a common legal representative, “criteria adapted to the circumstances of the case in question may be envisaged, such as (i) the language spoken by victims, (ii) links between them provided by time, place and circumstances, (iii) the specific crimes of which they allege to be

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<sup>103</sup> *Id.* ¶ 5.

<sup>104</sup> *Id.* ¶ 6.

<sup>105</sup> *Id.* ¶¶ 12-13.

<sup>106</sup> *See, e.g.*, Victims’ Rights Working Group, *ICC Victims’ Rights Legal Update 1st February – 4 March 2011*, at 2, [http://www.vrwg.org/Legal\\_Update/Legal\\_Update\\_Feb\\_2011.pdf](http://www.vrwg.org/Legal_Update/Legal_Update_Feb_2011.pdf) (noting that a decision dated 9 February 2011 granting victim status to two additional victims brought the total number of victims participating in the case to 365).

<sup>107</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Fifth Decision on Victims’ Issues Concerning Common Legal Representation of Victims, ICC-01/05-01/08-322, ¶ 7 (Pre-Trial Chamber III, 16 December 2008).

victims, (iv) the views of victims, and (v) respect of local traditions.”<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup>

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.<sup>113</sup> 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.<sup>114</sup> It further determined that victims would be assigned to one of the two common

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<sup>108</sup> *Id.* ¶¶ 8-9.

<sup>109</sup> *Id.* ¶ 10.

<sup>110</sup> *Id.* ¶ 11; *id.* at 7.

<sup>111</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Observations on Legal Representation of Unrepresented Applicants, ICC-01/05-01/08-651, ¶ 11 (Trial Chamber III, 9 December 2009). For more on OPCV’s role as legal representative in proceedings, including in the *Bemba* case, see *infra* n. 148 *et seq.* and accompanying text.

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

<sup>113</sup> 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).

<sup>114</sup> *Id.* ¶¶ 6-7.

legal representatives based on geographical considerations, thereby allowing “victims from the same family or community to be represented by the same legal representative” and facilitating “individual contacts between the victims and their legal representatives.”<sup>115</sup> The Chamber also set forth a number of guidelines to be followed by the Registry in choosing the common legal representatives, including:

- the importance of ensuring that the “participation of victims, through their legal representatives, is as meaningful as possible, as opposed to ‘purely symbolic;’”
- the Chamber’s “duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity,” as well as its “obligation under Article 68(3) of the Statute to ensure that the manner in which victims participate is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;” and
- the ability of the legal representatives to “give reasonable assurance that they will be available and present at the seat of the Court for the entirety of the trial proceedings as well as at the reparation phase.”<sup>116</sup>

In addition, noting that Regulation 79(2) of the Court’s Regulations provides that, “[w]hen choosing a common legal representative for victims,” the Chamber is to consider “the need to respect local traditions and to assist specific groups of victims,”<sup>117</sup> the Chamber opined that it would be advisable that “the common legal representatives speak the victims’ language, share their culture and know their realities.”<sup>118</sup> Finally, the Chamber addressed the fact that

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<sup>115</sup> *Id.* ¶¶ 18-20.

<sup>116</sup> *Id.* ¶¶ 9-10.

<sup>117</sup> Regulations of the Court, *supra* n. 3, Reg. 79(2).

<sup>118</sup> *Bemba*, Decision on Common Legal Representation of Victims for the Purpose of

Regulation 79(2) also provides that the Chamber is to take into consideration “the views of the victims” in selecting a common legal representative, holding that, in light of the “important number of victims’ applications pending before the Chamber and the proximity of the commencement of trial,” the views of “each victim on such issue can only be taken into account to the extent possible.”<sup>119</sup>

Shortly after the Trial Chamber issued its decision on common legal representation, the Registrar designated Ms. Douzima and a second lawyer from the CAR to represent the two groups of victims.<sup>120</sup> Since that time, the Chamber has granted more than 1600 additional victims the right to participate in the case,<sup>121</sup> and a large number of applications remained pending.<sup>122</sup> To date, all participating victims have been assigned to one of the two groups of victims created by the Trial Chamber’s November 2010 decision.<sup>123</sup>

### 3. *The Banda & Jerbo Case*

Despite the *Bemba* Pre-Trial Chamber’s proactive approach to organizing common legal representation early in the case, the Pre-Trial

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Trial, *supra* n. 113, ¶ 11.

<sup>119</sup> *Id.* ¶ 14.

<sup>120</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Notification of Designation of Common Legal Representatives, ICC-01/05-01/08-1012 (Registry, 16 November 2010). Specifically, Ms. Douzima was appointed as the legal representative of victims who had suffered crimes committed in or around the following locations: Damara, Sibut, Boali, Bossembele, Boassangoa, Bozoum, and Mongoumba. *Id.* at 6-7. Mr. Assingambi Zarambaud was appointed as the legal representative of victims who had suffered crimes committed in or around Bangui and PK12, as well as dual status victims/witnesses. *Id.* at 6.

<sup>121</sup> *See The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on 270 Applications by Victims to Participate in the Proceedings, 01/05-01-08-25-1862 (Trial Chamber III, 2 October 2011) (accepting 264 victims, for a total of over 1800).

<sup>122</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Setting a Timeline for the Filing of Observations on Pending Victims’ Applications, ICC-01/05-01/08-1726, ¶ 3 (Trial Chamber III, 9 September 2011 ) (by which VPRS informed the Chamber that it expected 2830 additional applications over the coming months).

<sup>123</sup> *See, e.g., Bemba*, Decision on 270 Applications by Victims to Participate in the Proceedings, *supra* n. 121, ¶ 34 (dividing the newly accepted victims into the groups created by the Trial Chamber in its November 2010 decision, which will in turn determine their legal representation).

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.<sup>124</sup> 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 representatives “at the earliest opportunity.”<sup>125</sup> The Registry also recommended that, in line with proper case management, no more than two legal teams should represent victims in the case.<sup>126</sup> Following the submission of the Registry’s report, two of the legal representatives that had participated in the confirmation proceedings made submissions to the Chamber requesting that they be appointed the common legal representative,<sup>127</sup> while two of the other legal representatives submitted to the Chamber that it should “turn down the recommendations of the Registrar and refuse the requests sought in its entirety.”<sup>128</sup> Responding to the Registry’s report, the Trial Chamber agreed that “the timely organisation of common representation of victims [was] necessary in order to safeguard the expeditiousness of the proceedings and the effectiveness of victim participation in the case,” and ordered the victims, with the assistance of the Registry, to agree to common legal representation within two months.<sup>129</sup> The Chamber further stipulated that, if the victims were unable to agree by the Chamber’s deadline, the Registrar would have a further five days to appoint common legal representation.<sup>130</sup>

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<sup>124</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Report Recommending a Decision concerning the Common Legal Representation of Victims Participating in the Case, ICC-02/05-03/09-134, ¶¶ 5-6 (Registry, 15 April 2011).

<sup>125</sup> *Id.* ¶ 8.

<sup>126</sup> *Id.* ¶ 9.

<sup>127</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Order Instructing the Registry to Start Consultations on the Organization of Common Legal Representatives, ICC-02/05-03/09-138, ¶ 2 (Pre-Trial Chamber I, 21 April 2011).

<sup>128</sup> *Id.* ¶ 3.

<sup>129</sup> *Id.* ¶¶ 4-5.

<sup>130</sup> *Id.* ¶ 6.

Two days before the Chamber's deadline by which the victims were to 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.<sup>131</sup> While the Registry had consulted with the victims' five legal representatives, it had been unable to conduct meaningful consultations with the victims themselves, as such consultations would require "face-to-face meetings with the victims, assisted by interpretation, and allowing adequate time for explanation and discussion," a process that would require "approximately four to five weeks of travel, involving two Registry staff of at least P-2 level," something that was not feasible within the Chamber's time frame and given the limitations on the resources of the Registry.<sup>132</sup> Thus, while recognizing that Regulation 79(2) of the Court's Regulations require that consideration be given to the views of victims in the selection of common legal representatives, the Registry argued that a "practical approach must be taken."<sup>133</sup> 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 and on "objective criteria aimed at achieving quality legal representation in the best interests of victims."<sup>134</sup> 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.<sup>135</sup> The Trial Chamber agreed with the Registry's

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<sup>131</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Report on the Implementation of the Chamber's Order Instructing the Registry to Start Consultations on the Organisation of Common Legal Representatives, ICC-02/05-03/09-164-Red, ¶¶ 10-11 (Registry, 21 June 2011).

<sup>132</sup> *Id.* ¶¶ 7-9.

<sup>133</sup> *Id.* ¶ 11.

<sup>134</sup> *Id.* ¶¶ 13-14.

<sup>135</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Annex to the Report on the Implementation of the Chamber's Order instructing the Registry to Start Consultations on the Organisation of Common Legal Representatives, ICC-02/05-03/09-164-ANX (Registry, 21 June 2011).

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

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 groups; (ii) establishing “selection criteria and the respective weight accorded to them,” taking into account information provided by victims and the prior experience of the Registry; (iii) distributing an invitation through the Registry’s list of counsel to seek interest in the position; and (iv) taking into account the work performed to date by the five legal representatives who participated in the confirmation proceedings.<sup>137</sup> 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.<sup>138</sup> The Trial Chamber subsequently endorsed the Registry’s recommendation.<sup>139</sup>

#### 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 legal representation in its first decision on victims’ applications to

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<sup>136</sup> *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 Chamber granting the Registry’s request and extending the deadline for organization of common legal representation of victims).

<sup>137</sup> *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).

<sup>138</sup> *Id.* ¶ 32.

<sup>139</sup> *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).

participate in proceedings.<sup>140</sup> The Chamber began by noting that forty-eight of the 130 victims granted participation rights were represented by one of three separate teams of lawyers, but that the remaining victims were unrepresented.<sup>141</sup> It also recognized that, “[i]n view of the large number of victims granted authorisation to participate” and “mindful of the need to ensure the fairness and expeditiousness of the proceedings, while also providing for the meaningful participation of victims,” it would be necessary to provide common legal representation for the participating victims.<sup>142</sup> However, due to security concerns and the impending commencement of the confirmation hearing, the Pre-Trial Chamber did not instruct the Registry to consult with the 130 victims for the purpose of choosing a common legal representative, but rather permitted the three lawyers already representing victims to participate in the proceedings and divided the unrepresented victims among them.<sup>143</sup>

In the two cases arising out of the Kenya situation, the Pre-Trial Chamber instructed the Registry to “take appropriate steps with a view to organizing common legal representation” within weeks of the Chamber’s decisions issuing summonses to appear for the suspects.<sup>144</sup> Notably, even before the Chamber issued this direction, the Registry had been meeting with victims and community leaders to discuss, *inter alia*, “the work of the Court and victim participation, including issues of legal representation.”<sup>145</sup> Following the approach outlined by the Registry in the *Banda & Jerbo* case,<sup>146</sup> the Registry spent the next

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<sup>140</sup> See *The Prosecutor v. Callixte Mbarushimana*, Decision on the 138 Applications for Victims’ Participation in the Proceedings, ICC-01/04-01/10-351 (Pre-Trial Chamber I, 11 August 2011).

<sup>141</sup> *Id.* ¶ 45.

<sup>142</sup> *Id.* ¶ 46.

<sup>143</sup> *Id.* ¶¶ 47-48.

<sup>144</sup> See *The Prosecutor v. William Samoei Ruto, et al.*, First Decision on Victims’ Participation in the Case, ICC-01/09-01/11-17, ¶ 24 (Pre-Trial Chamber II, 30 March 2011); *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Decision on Victims’ Participation in the Case, ICC-01/09-02/11-23, ¶ 24 (Pre-Trial Chamber II, 30 March 2011).

<sup>145</sup> See, e.g., *The Prosecutor v. William Samoei Ruto, et al.*, Proposal for the Common Legal Representation of Victims, ICC-01/09-01/11-243, at 4 (Registry, 1 August 2011).

<sup>146</sup> See *supra* n. 134 *et seq.* and accompanying text.

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.<sup>147</sup>

### **C. Representation of Victims by the Office of Public Counsel for Victims**

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.<sup>148</sup> Specifically, OPCV was appointed after VPRS informed the Chamber that, “in light of the choice expressed by the victims, the limitations of the legal aid budget for 2008, and the current status of the proceedings,” it recommended the appointment of OPCV “until such time as either the victims or the Court decide to appoint an external common legal representative.”<sup>149</sup> The Chamber followed VPRS’s recommendation, while noting that the appointment of OPCV was “made without prejudice to any future determination by the Chamber regarding the common legal representatives of victims in light of the requirements of rule 90(4) of the Rules.”<sup>150</sup>

The next Chamber to address the question of whether OPCV should engage in direct representation of victims was the *Lubanga* Trial Chamber. Although OPCV had not represented victims at the confirmation stage of proceedings in the *Lubanga* case, it argued to the Trial Chamber that, since Rule 90(1) of the ICC Rules of Procedure and Evidence “provides for the right of victims to choose their legal representative, victims can indicate in their respective application

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<sup>147</sup> *Ruto, et al.*, Proposal for the Common Legal Representation of Victims, *supra* n. 145, ¶ 45; *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Proposal for the Common Legal Representation of Victims, ICC-01/09-02/11-214, ¶ 45 (Registry, 1 August 2011).

<sup>148</sup> See *The Prosecutor v. Joseph Kony, et al.*, Decision on Legal Representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06, ICC-02/04-01/05-267, at 4 (Pre-Trial Chamber II, 15 February 2008).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 5.

forms their wish to be represented by the Office.”<sup>151</sup> In response, the Trial Chamber noted that, because Regulation 80(2) states that “[t]he Chamber may appoint counsel from the Office of Public Counsel for [V]ictims” as legal representative,<sup>152</sup> it is up to the Chamber to determine whether OPCV should be appointed as counsel in any given case.<sup>153</sup> The *Lubanga* Trial Chamber went on to state that, “during this early stage in the Court’s existence[,] it is critical that the Office concentrate[] its limited resources on the core functions given to it under the Rome Statute framework[,] which... [are] to provide support and assistance to the legal representatives of victims and to victims who have applied to participate (rather than representing individual victims).”<sup>154</sup> Notably, however, OPCV was later appointed to represent a limited number of dual status victim/witnesses in the *Lubanga* trial.<sup>155</sup> Unfortunately, the *Lubanga* Trial Chamber’s decision appointing OPCV as the legal representative of these victims does not appear to be publicly available, and thus it is not clear why the Chamber reversed its earlier position that OPCV should not represent individual victims. OPCV had expressly requested permission from the Chamber to represent these victims, stressing the fact that the Office had represented the individuals during the application stage and that each had expressed a desire to continue to be represented by OPCV.<sup>156</sup>

OPCV’s role in the direct representation of victims also arose in the *Bemba* case. There, OPCV was first appointed by the Pre-Trial Chamber to serve as the legal representative of individuals who were

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<sup>151</sup> *Lubanga*, Submissions of the OPCV on its Role in the Proceedings, *supra* n. 60, ¶ 34.

<sup>152</sup> Regulations of the Court, *supra* n. 3, Reg. 80(2) (emphasis added).

<sup>153</sup> *Lubanga*, Decision on the Role of the Office of Public Counsel for Victims and its Request for Access to Documents, *supra* n. 47, ¶ 30.

<sup>154</sup> *Id.* ¶ 32.

<sup>155</sup> See *Bemba*, Decision on Common Legal Representation of Victims for the Purpose of Trial, *supra* n. 113, ¶ 28 (referring to the fact that OPCV was appointed as legal representative of a limited number of dual status victims/witnesses in the context of the *Lubanga* trial).

<sup>156</sup> See, e.g., *Lubanga*, Issues Concerning the Legal Representation of Victims a/0047/06 to a/0052/06, a/0078/06 and a/0149/08, ICC-01/04-01/06-1565 (Trial Chamber I, 19 December 2008).

not otherwise represented “from the time they submit their applications for participation, until a legal representative has been appointed.”<sup>157</sup> The Chamber later clarified that, with respect to individuals that had been granted victim status, “OPCV had been appointed by the Chamber only in case and for the time where victims could not organise their timely legal representation,” and the Chamber stressed that victims should “be represented by a counsel from their country, unless those victims object to such legal representation.”<sup>158</sup> While two counsel from the Central African Republic were available to represent victims during the confirmation of charges proceedings, several victims expressed their wish to continue be represented by OPCV, and therefore OPCV acted as legal representative of twenty individual victims during the confirmation proceedings.<sup>159</sup> Later, however, the *Bemba* Trial Chamber ordered that the “totality of the victims allowed to participate” in the trial be represented by one of two common legal representatives from the Central African Republic.<sup>160</sup> With respect to OPCV, the *Bemba* Trial Chamber followed the initial approach of the *Lubanga* Trial Chamber, determining that the Office’s role was “primarily to assist the legal representatives of victims rather than representing individual victims in court.”<sup>161</sup> The Chamber also reiterated that Regulation 80 permits *a Chamber* to appoint OPCV as the legal representative of victims,<sup>162</sup> meaning that although Rule 90(1) of the Rules of Procedure and Evidence states that victims “shall be free to choose a legal representative,”<sup>163</sup> the Regulations of the

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<sup>157</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Victim Participation, ICC-01/05-01/08-103-tENG-Corr, ¶ 10 (Pre-Trial Chamber III, 12 September 2008).

<sup>158</sup> *Bemba*, Fifth Decision on Victims’ Issues Concerning Common Legal Representation of Victims, *supra* n. 107, ¶ 14.

<sup>159</sup> *See Bemba*, Observations on Legal Representation of Unrepresented Applicants, *supra* n. 85, ¶ 6; *Bemba*, Decision on the Observations on Legal Representation of Unrepresented Applicants, *supra* n. 111, ¶¶ 11, 13.

<sup>160</sup> *Bemba*, Decision on Common Legal Representation of Victims for the Purpose of Trial, *supra* n. 113, ¶ 34.

<sup>161</sup> *Id.* ¶ 29.

<sup>162</sup> Regulations of the Court, *supra* n. 3, Reg. 80(2) (“The Chamber may appoint counsel from the Office of Public Counsel for victims.”).

<sup>163</sup> ICC Rules, *supra* n. 5, R. 90(1).

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

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-Christostome Mulamba Nsokoloni, that caused the Chamber to remove him as legal representative.<sup>165</sup> OPCV did not continue to represent victims at the trial stage in the *Katanga & Ngudjolo* case.

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<sup>164</sup> *Bemba*, Decision on Common Legal Representation of Victims for the Purpose of Trial, *supra* n. 113, ¶ 29.

<sup>165</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Provisional Separation of Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08, ICC-01/04-01/07-660, at 9 (Pre-Trial Chamber I, 3 July 2008).

#### IV. RECOMMENDATIONS

##### A. VPRS and OPCV Should Remain Distinct Entities, But Overlap in Their Functions Should Be Avoided

As stated above, there has been at least one prominent call for the merging of VPRS and OPCV.<sup>166</sup> This proposal has obvious appeal in that it would eliminate any confusion on the part of victims as to the roles of VPRS and OPCV and minimize inefficiencies that may be caused by overlapping aspects of the two entities' mandates. 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. Indeed, as the Principal Counsel of OPCV has explained, the independence of the Office "is a prerequisite for carrying out its mandate of assisting and representing legal representatives of victims and representing victims," as such independence "allows the Office to work without being subjected to pressure of any kind and preserves the privileged relationship between victims and their legal representatives."<sup>167</sup>

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 outreach activities. As explained above, the ICC has described VPRS as the organ "responsible for the content and implementation of the victims' outreach campaigns," noting that VPRS "also advises the Public Information and Documentation Section of the Registry on the preparation of victim-related materials as part of the ICC's general programme of outreach and communications."<sup>168</sup> However, OPCV

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<sup>166</sup> See *supra* n. 2 and accompanying text.

<sup>167</sup> Paolina Massidda & Sarah Pellet, *Role and Practice of the Office of Public Counsel for Victims*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 691, 694 (Carsten Stahn & Göran Sluiter, eds. 2009).

<sup>168</sup> ICC, *Report on Participation of and Reparations to Victims*, *supra* n. 34, ¶ 3.

has reported that it engages in outreach activities for “members of the judiciary, the legal profession, and the [*sic*] civil society in countries [where] investigations and/or cases are ongoing, as well as in other countries.”<sup>169</sup> While the scope of OPCV’s outreach activities 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<sup>170</sup> and has worked to develop relationships with victims’ groups, civil society groups, and non-governmental, governmental, and international institutions for the purpose of disseminating information about the Court and victims’ role in its proceedings as widely as possible.<sup>171</sup> This approach will allow OPCV to focus on providing legal support and assistance to victims and their legal representatives.

**B. OPCV Should Serve as Counsel to Unrepresented Victim Applicants to Protect Their Interests as Applicants, But Not to Generally Present Their “Views and Concerns” on Issues Related to the Case**

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.<sup>172</sup> 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 correct that Regulation 86 of the Court’s Regulations entrusts *the Registrar* with the task of *requesting* further information from those applying for victim status whose applications are incomplete,<sup>173</sup> the Registrar is *not* charged with assisting applicants in responding to

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<sup>169</sup> OPCV, *Helping Victims Make Their Voices Heard*, *supra* n. 44, at 11.

<sup>170</sup> ICC, *Registry and Trust Fund for Victims Fact Sheet*, *supra* n. 9, at 1-2.

<sup>171</sup> ICC Newsletter #6, *VPRS: Frequently asked Questions*, *supra* n. 10, at 7; ICC, *Victims Before the Court*, *supra* n. 10, at 1.

<sup>172</sup> *See supra* n. 67 *et seq.* and accompanying text.

<sup>173</sup> *See supra* n. 90 and accompanying text.

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,<sup>174</sup> 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 may need “assistance concerning issues such as protection, redactions of application forms, issues linked to the dual status of victim/witness, and the possibility for applicants to file submissions in response to the observations by the parties under rule 89 of the Rules of Procedure and Evidence.”<sup>175</sup> 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,<sup>176</sup> provide participatory rights to victim applicants. Indeed, Rule 89(1) of the ICC Rules of Procedure and Evidence expressly states that, “[i]n order to present their views and concerns, victims shall make written application to the Registrar” and, after providing the Prosecution and Defense a right to

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<sup>174</sup> See *supra* n. 23 *et seq.* and accompanying text.

<sup>175</sup> *Bemba*, Observations on Legal Representation of Unrepresented Applicants, *supra* n. 85, ¶ 10. Rule 89 provides, in part, as follows: “In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber...” ICC Rules, *supra* n. 5, R. 89(1).

<sup>176</sup> The exceptions to this general principle are those provisions in the Rules of Procedure and Evidence that permit the Court to hear the views of “victims who have communicated with the Court” and the provision under Article 15 of the Rome Statute permitting victims to make representations to the Court in the context of a request from the Prosecutor to open investigations *proprio motu*. These instances are addressed directly below. See *infra* n. 179 *et seq.* and accompanying text.

reply to the application, the Chamber “shall *then* specify the proceedings and manner in which participation is considered appropriate.”<sup>177</sup> Thus, OPCV’s role should be limited to 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. As Pre-Trial Chamber I held in *Mbarushimana* case, affording victim applicants general participation rights in proceedings “circumvent[s] the system of victim participation.”<sup>178</sup> 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.

Of course, in the event that circumstances arise such as those seen in the Kenya cases, when the Pre-Trial Chamber sought the views of victims on the subject of whether the confirmation hearings should be held *in situ*, the Chamber may request observations from OPCV on that particular issue pursuant to Regulation 81(4)(b), which expressly authorizes OPCV to appear before the Chamber “in respect of specific issues.”<sup>179</sup> Furthermore, the Chambers should continue to make use of Regulation 81(4)(b) where it seeks the views of victims who have communicated with the Court or otherwise have standing to provide their views to the Court on a specific matter, such as in the case of a request from the Prosecutor to open investigations *proprio motu*.<sup>180</sup> Indeed, OPCV has demonstrated an impressive ability to efficiently canvass the views of multiple victims and victims’ organizations and present those views cogently to the Court. For instance, after being appointed by the Pre-Trial Chamber to represent the views of “victims who have communicated with the Court” in relation to the Government of Kenya’s admissibility challenge in the *Ruto, et al.*

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<sup>177</sup> ICC Rules, *supra* n. 5, R. 89(1) (emphasis added).

<sup>178</sup> *The Prosecutor v. Callixte Mbarushimana*, Decision on the “Proposal on Victim Participation in the Confirmation Hearing,” ICC-01/04-01/10-229, at 5 (Pre-Trial Chamber I, 10 June 2011).

<sup>179</sup> Regulations of the Court, *supra* n. 3, Reg. 81(4)(b).

<sup>180</sup> See *supra* n. 62 *et seq.* and accompanying text.

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) processing “unsolicited contribution from victims’ organisations in Kenya” received by the Office; and (iv) reviewing the views of victims submitted to the Court in support of the Prosecutor’s request to open investigations *proprio motu* in Kenya.<sup>181</sup> 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. 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* 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 &*

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<sup>181</sup> *The Prosecutor v. William Samoei Ruto, et al.*, Observations on Behalf of Victims on the Government of Kenya’s Application under Article 19 of the Rome Statute With Public Annexes 1 and 2, ICC-01/09-01/11-70, ¶¶ 47-54 (Office of Public Counsel for Victims, 28 April 2011).

*Jerbo* case, “the timely organisation of common representation of victims [is] necessary in order to safeguard the expeditiousness of the proceedings.”<sup>182</sup> Notably, expeditious proceedings are as much in the interests of victims as they are in the interests of the other actors involved in the proceedings.<sup>183</sup> Second, the early organization of common legal representation avoids the risk, recognized by the Registry in the *Banda & Jerbo* case, that a change in victims’ legal representation midway through proceedings will “undermine victims’ trust or confidence in the proceedings.”<sup>184</sup> Furthermore, if VPRS does not begin the process of organizing common legal representation until some point after individual legal representatives have been permitted to participate in proceedings, “there is a real risk of conflict between the interests of victims and those of their current counsel” when common legal representation is finally arranged.<sup>185</sup> Lastly, the early assignment of counsel will provide the legal representatives more time to consult with their clients to determine victims’ needs and interests in advance of key stages of the case, such as the confirmation of charges hearing.

One drawback of selecting common legal representatives at the earliest stages of the case is that this approach will necessarily limit the number of victims with whom the Registry can consult in order to assist them in selecting a common legal representative or, in the event that victims cannot agree among themselves, for purposes of the Registry’s selection of a common representative. However, the reality is that, in most cases, the common legal representatives have been

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<sup>182</sup> *Id.* ¶¶ 4-5.

<sup>183</sup> See, e.g., International Federation for Human Rights, *Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, Press Release, 23 April 2007, [http://www.fidh.org/article.php3?id\\_article=4208](http://www.fidh.org/article.php3?id_article=4208) (“In order for the victims to participate in the trial and to obtain reparations, it is necessary that those responsible for the crimes they have suffered are effectively prosecuted.”); Human Rights Watch, *Commentary to the Second Preparatory Commission Meeting on the International Criminal Court*, at 26 (July 1999) (recognizing that the “overriding interest of victims is likely to be the interest in seeing that crimes are effectively investigated and that justice is done”).

<sup>184</sup> *Banda & Jerbo*, Report on the Implementation of the Chamber’s Order Instructing the Registry to Start Consultations on the Organisation of Common Legal Representatives, *supra* n. 131, ¶ 12.

<sup>185</sup> *Ruto, et al.*, Proposal for the Common Legal Representation of Victims, *supra* n. 145, ¶ 7.

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.<sup>186</sup> 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.<sup>187</sup>

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 situation, VPRS has determined thus far that all victims may be organized into a single group.<sup>188</sup> By contrast, in *Katanga & Ngudjolo*, the victims were divided into two groups, with one group consisting of child soldiers who could have also been perpetrators of crimes.<sup>189</sup> While this division of victims into two groups was not effectuated until the trial stage of proceedings, the groups could have been created at the beginning of the case based on the fact that the accused are charged with crimes relating to the use of child soldiers, in addition to other crimes. VPRS may also want to create separate groups of victims based on the criteria set forth in Article 68(1) of the Rome Statute, which provides that, in ensuring the protection of the “safety, physical and psychological well-being, dignity and privacy of victims,” the Court shall “have regard to all relevant factors, including age, gender . . . , and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence

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<sup>186</sup> See *supra* n. 102 *et seq.* and accompanying text.

<sup>187</sup> See *supra* n. 114 *et seq.* and accompanying text.

<sup>188</sup> See *supra* n. 138 and accompanying text; *supra* n. 147 and accompanying text.

<sup>189</sup> See *supra* n. 103 and accompanying text.

or violence against children.”<sup>190</sup> Indeed, as stated above, Rule 90(4) expressly states that “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, are represented.”<sup>191</sup> 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.<sup>192</sup>

Finally, while consultation with victims will provide important information to VPRS concerning the “views of victims” with regard to legal representation,<sup>193</sup> 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 to “Legal Representation” would have the added benefit of alerting victims to the possibility that they will not be represented by counsel of their choosing if granted participation rights. At present, the application form asks if the victim has a lawyer and requests the contact information for the lawyer, without suggesting in any way that the lawyer may not be able to represent the victim before the Court.<sup>194</sup>

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<sup>190</sup> Rome Statute, *supra* n. 4, Art. 68(1).

<sup>191</sup> ICC Rules, *supra* n. 5, R. 90(4).

<sup>192</sup> *See supra* n. 135 and accompanying text.

<sup>193</sup> As stated above, Regulation 79(2) of the Regulations of the Court requires that the Chamber consider, *inter alia*, the “views of victims” in making a decision on legal representation. Regulations of the Court, *supra* n. 3, Reg. 79(2).

<sup>194</sup> *See* Standard Application Form for Individuals, Part F, [http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAF\\_IndividualEng.pdf](http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAF_IndividualEng.pdf).

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

Although Regulation 80(2) permits a Chamber to appoint OPCV as the legal representative for victims,<sup>195</sup> 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,<sup>196</sup> and the Office is composed of just four jurists and three counsel,<sup>197</sup> 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. As both the *Lubanga* and the *Bemba* Trial Chambers have stressed, this is the primary function of OPCV.<sup>198</sup> Indeed, in its *Strategy In Relation to Victims*, the Court pledged to “maintain an adequately resourced OPCV to provide legal support and assistance to legal representatives of victims and to victims,” thereby enabling the Office “to build up an expertise in the law and practice of the Court and provide specialist legal research and other support.”<sup>199</sup> In this way, OPCV is able to serve a function similar to that undertaken by its counterpart, the Office of Public Counsel for the Defence, which has described itself as seeking to “constitute an institutional memory for the Defence.”<sup>200</sup> Providing such an institutional memory to victims’ counsel is critical in the context of the ICC, which operates in several jurisdictions

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<sup>195</sup> Regulations of the Court, *supra* n. 3, Reg. 80(2).

<sup>196</sup> See *Bemba*, Observations on Legal Representation of Unrepresented Applicants, *supra* n. 85, ¶ 15; *Bemba*, Decision on the Observations on Legal Representation of Unrepresented Applicants, *supra* n. 111, ¶ 6; *Lubanga*, Submissions of the OPCV on its Role in the Proceedings, *supra* n. 60, ¶ 37.

<sup>197</sup> OPCV, *Helping Victims Make Their Voices Heard*, *supra* n. 44, at 9.

<sup>198</sup> *Lubanga*, Decision on the Role of the Office of Public Counsel for Victims and its Request for Access to Documents, *supra* n. 47, ¶ 31; *Bemba*, Decision on Common Legal Representation of Victims for the Purpose of Trial, *supra* n. 113, ¶ 29.

<sup>199</sup> International Criminal Court, *Report of the Court on the Strategy in relation to Victims*, ICC-ASP/8/45, ¶ 58 (10 November 2009).

<sup>200</sup> International Criminal Court Website, *Office of Public Counsel for the Defence*, <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/defence/office%20of%20public%20counsel%20for%20the%20defence/the%20office%20of%20public%20counsel%20for%20the%20defence?lan=en-GB>.

simultaneously, making it difficult for individual teams of victims' 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 learned for future victims' counsel. Yet, OPCV will have fewer 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* case, where OPCV's representation of just a handful of victims required that the Principal Counsel of the Office and "other senior legal officers" from OPCV be in court "daily."<sup>201</sup> 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.<sup>202</sup> 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 OPCV "due to its limited resources and the constraints relating to the support and assistance it is able to provide to the victims of the legal representatives in other cases."<sup>203</sup> 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 appointing OPCV as legal representative, noting that this "tasks the already limited resources of this office and is not sustainable."<sup>204</sup> One

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

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

<sup>203</sup> *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.

<sup>204</sup> 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 argued to Trial Chamber I that "the OPCV's role should be limited as regards representation in the proceedings"); *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 representative as “a difficult step – if not dangerous – for the [OPCV] since the workload requires an unquestionable adaptation involving a reassessment of its resources.”<sup>205</sup>

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. Indeed, Trial Chamber I initially prevented OPCV from representing victims in the *Lubanga* case, in part, because “[s]ignificant problems could emerge if the Chamber is not able to prevent conflicts of interests or other events that may result in a damaging diminution of the Office’s core role.”<sup>206</sup> In particular, the Chamber expressed concern that “conflicts of interest... may emerge between victims represented by the Office, on the one hand, and those to whom the Office should be providing support and assistance, on the other.”<sup>207</sup> To date, OPCV has avoided potential conflicts by creating separate legal teams within its Office to represent victims in different cases arising out of the same situation.<sup>208</sup> However, it is impossible for OPCV to know at any given time what future cases may be opened before the Court, making it difficult for the Office to ensure that one or more members of its staff will be free

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24 (noting that the lawyer for one of the victims participating in the *Lubanga* case argued that “the appointment of the Office as the representative of victim applicants could affect the efficiency of the Office in its work in assisting legal representatives”).

<sup>205</sup> OPCV, *Helping Victims Make Their Voices Heard*, *supra* n. 44, at 7.

<sup>206</sup> *Lubanga*, Decision on the Role of the Office of Public Counsel for Victims and its Request for Access to Documents, *supra* n. 47, ¶ 31.

<sup>207</sup> *Id.*

<sup>208</sup> See, e.g., *The Prosecutor v. William Samoei Ruto, et al.*, Submission on Appointment for Representation of Victims in the Ruto et al. Case, ICC-01/09-01/11-45, ¶ 7 (Office of Public Counsel for Victims, 7 April 2011) (explaining that, for purposes of representing victims who had communicated with the Court in proceedings relating to the Government of Kenya’s admissibility challenge, OPCV “constituted two separate and autonomous legal teams, one for each case,” with each filing its own submission in each case). See also *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Submission on Appointment for Representation of Victims in the Muthaura et al. Case, ICC-01/09-02/11-49, ¶ 7 (Office of Public Counsel for Victims, 7 April 2011) (same).

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.<sup>209</sup> As the *Bemba* Trial Chamber explained, “it is advisable that the common legal representatives speak the victims’ language, share their culture and know their realities in order for the victims’ representation to be more meaningful.”<sup>210</sup> Similarly, the Court recognized in its *Strategy In Relation to Victims* that lawyers coming from a victims’ own country will have “knowledge of the context in which crimes were committed and the conditions in which they live.”<sup>211</sup> Furthermore, selecting representatives from the country in which victims are located is more efficient. As OPCV has acknowledged, it is a challenge for the Office to “maintain contact with its clients, who often live in remote, non-urban areas without access to telephone lines.”<sup>212</sup> When representing victims, members of OPCV have to “undertake missions in the field in order to meet with its clients, to collect their views and concerns, to collect evidence and material to be used in the proceedings, and to keep them updated on the proceedings before the Court.”<sup>213</sup> Again, such activities detract from OPCV’s core role of providing support to victims and their legal representatives across cases.

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<sup>209</sup> See *Bemba*, Decision on Common Legal Representation of Victims for the Purpose of Trial, *supra* n. 113, ¶ 11; *Katanga & Ngudjolo*, Order on the Organisation of Common Legal Representation of Victims, *supra* n. 102, ¶ 15; *Situation of the Republic of Kenya*, Decision on Victims’ Participation in the Situation in Proceedings related to the Situation of the Republic of Kenya, ICC-01/09-24, ¶ 22 (Pre-Trial Chamber II, 3 November 2010).

<sup>210</sup> *Bemba*, Decision on Common Legal Representation of Victims for the Purpose of Trial, *supra* n. 113, ¶ 11.

<sup>211</sup> See ICC, *Report of the Court on the Strategy in Relation to Victims*, *supra* n. 199, ¶ 56. The Court’s *Strategy In Relation to Victims* also notes that appointing lawyers from situation countries to represent victims before the ICC will contribute to “promoting the Rome Statute at [the] national level and thus the principle of complementarity.” *Id.*

<sup>212</sup> OPCV, *Helping Victims Make Their Voices Heard*, *supra* n. 44, at 10.

<sup>213</sup> *Id.* at 9.

Importantly, while the members of OPCV's legal staff are extremely well qualified lawyers, the Court's Rules of Procedure and Evidence 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,<sup>214</sup> which establishes the qualifications required for counsel for an accused, including "established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings."<sup>215</sup> Regulation 67 of the Regulations of the Court clarifies that "[t]he necessary relevant experience for counsel as described in rule 22 shall be at least ten years."<sup>216</sup> In addition, to be appointed, counsel must "have an excellent knowledge of and be fluent in at least one of the working languages of the Court."<sup>217</sup> 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 decisions are made on applicants' victim status, these instances will be 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.<sup>218</sup> 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

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<sup>214</sup> ICC Rules, *supra* n. 5, R. 90(6).

<sup>215</sup> *Id.* R. 22(1).

<sup>216</sup> Regulations of the Court, *supra* n. 3, Reg. 67.

<sup>217</sup> ICC Rules, *supra* n. 5, R. 22(1).

<sup>218</sup> *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 Chambers when questions arise that are likely to affect victims' interests.

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

The International Criminal Court is frequently lauded for being the first international criminal body to allow victims to participate in proceedings, not just as witnesses for one of the parties, but in their own right. Nevertheless, nearly a decade after the entry into force of the Rome Statute, many questions about the appropriate functioning of the Court's victim participation scheme remain outstanding, several of which relate to the representation of victims before the Court. Specifically, questions have arisen relating to the respective roles of the Court's Victims Participation and Reparations Section and Office of Public Counsel for Victims; 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 legal representatives, or whether the Office of Public Counsel for Victims should engage in direct representation of victims. To varying degrees, these questions have been addressed by different Chambers of the Court in various cases, but have yet to be answered in a definitive manner, thereby leading to the inconsistent treatment of victims across cases. The aim of this report is to examine the way in which these questions have been dealt with by the Court to date and to recommend responses to the questions that can be applied with consistency across cases.



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