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PRE TRIAL CHAMBER I

Before: Judge Silvia Fernandez de Gurmendi, Single Judge

SITUATION IN THE REPUBLIC OF COTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

**REDRESS TRUST OBSERVATIONS TO PRE-TRIAL CHAMBER I OF THE
INTERNATIONAL CRIMINAL COURT PURSUANT TO RULE 103 OF THE
RULES OF PROCEDURE AND EVIDENCE**

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I. BACKGROUND

1. On 6 February 2012, the Single Judge ordered the Registry to propose a form that could be used to encourage collective applications in accordance with Rule 89(3), by 29 February 2012,¹ and on 29 February the Registry filed its Proposal on a partly collective application form for victims' participation.²
2. On 2 March, the Single Judge invited observations from the parties on the Registry's Proposal.³ Also on 2 March, REDRESS applied for leave to submit observations pursuant to Rule 103 of the Rules of Procedure and Evidence. On 8 March, the Single Judge granted it leave to submit observations on the two issues identified.⁴

REDRESS RESPECTFULLY MAKES THE FOLLOWING OBSERVATIONS:

II. PRELIMINARY OBSERVATIONS

3. These observations address the two issues on which REDRESS has been granted leave to intervene, and will be considered in turn.
4. REDRESS limits its submission to relevant comparative practice and challenges which may be relevant to the Chamber in its consideration of a potentially collective approach to victims' participation. It has refrained from providing observations on whether a collective approach is merited or in line with the ICC's legal texts and does not make direct observations on the Registry's Proposal.

III. PRACTICE AND PROCEDURES OF RELEVANT REGIONAL AND INTERNATIONAL COURTS/BODIES AND DOMESTIC PRACTICE

III.1 Different forms of collective applications

¹ Decision on issues related to the victims' application process, 6 February 2012, ICC-02/11-01/11-33.

² Proposal on a partly collective application form for victims' participation, 29 Feb. 2012, ICC-02/11-01/11-45; Report, Annex A, ICC-02/11-01/11-45-AnxA; Proposed form, ICC-02/11-01/11-45-AnxB.

³ Decision inviting observations from the parties, 2 Mar. 2012, ICC-02/11-01/11-47.

⁴ Decision on the Application by Redress Trust, 8 Mar. 2012, ICC-02/11-01/11-50.

5. Collective applications are understood in mainly three different ways: (i) Group applications relate to instances in which collective rights may have been violated⁵ and the collective brings a claim for the infringement of the rights of the group as a whole, for example indigenous peoples' rights. In such instances, the group has been recognised as having standing to claim in its own right for the violation of its collective/community interests;⁶ (ii) Under certain systems, NGOs or individuals are entitled to file complaints on behalf of a group of victims, without necessarily being linked to the victims themselves,⁷ and without having to list the individual victims who may have suffered;⁸ (iii) There are instances in which individual victims may decide to file their claims jointly or are requested by the Court/Body considering their claims to group themselves in order to facilitate the administrative handling or decision-making of the claims.
6. The Observations focus on the third approach, insofar as the Single Judge appears to consider the possibility of a system which might enable victims who wish to do so, to file their claims jointly, or for individual claims to be considered jointly.

III.2 Applications on behalf of groups of victims whose individual interests are similarly situated to others in the group

7. Diverse courts and bodies have responded to situations characterised by mass crimes and mass numbers of victims by giving the individuals concerned the opportunity to file their claims jointly. Alternatively, a court/body may request individuals to group themselves and pursue claims jointly. The collective pursuit of claims may facilitate case administration and decision-making, and is based on actual or perceived similarities between group members' individual claims. While the general principle of grouping claims is widely recognised, courts/bodies have had to address challenges, particularly the need to identify individual victims at

⁵ See, e.g. *Rochela Massacre v. Colombia*, (Merits, Reparations and Costs), Int-Am Ct HR, 11 May 2007, Series C No.163; *Case of the Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs), Int-Am Ct HR, 28 Nov. 2007, Series C No.172.

⁶ *Case of the Saramaka People*, *ibid.*

⁷ This type of action, also called *actio popularis*, is possible before the African Commission on Human and Peoples' Rights. See, *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea*, ACHPR Comm. 249/2002 (2004).

⁸ Art. 28(e), *Rules of Procedure of the Inter-American Commission on Human Rights*, as mod. 2 Sept. 2011.

various stages of proceedings, the status of the individual vis-à-vis the group and representation. These procedural issues define the relationship between the individual victim, the group and representatives, and should address the divergence of interests, if not conflict, that may arise when pursuing claims collectively.

III.3 Possibility of bringing claims collectively

8. Some treaty bodies, such as the UN Human Rights Committee, and regional courts, such as the European Court of Human Rights, allow for cases to be brought by a representative on behalf of a number of named individuals.⁹ The Inter-American¹⁰ and African human rights systems¹¹ are broader insofar as they provide for *actio popularis* and for a case to be brought on behalf of individual (or collective) victims. Also, once a case has been referred from the Inter-American Commission to the Court, the Court can order the joinder of interrelated cases, “when there is identity of parties, subject-matter and ruling law”.¹²
9. In instances in which a large number of claimants apply to participate or join an action, or are likely to want to do so, courts have developed procedures to facilitate the process. Before the Extraordinary Chambers in the Courts in Cambodia (ECCC), civil party claims are filed individually¹³, however the 2010 revision of the internal rules has sought to streamline victim participation, and requires that during the trial phase, all civil parties’ claims are consolidated into a single group,¹⁴ with Court pleadings coordinated by Lead-Co-Lawyers.

⁹ *E.W. et al. v. The Netherlands*, Comm. No. 429/1990, U.N. Doc. CCPR/C/47/D/429/1990 (1993), para.6.3; *Finogenov et al v Russia*, (ECtHR, Applic. nos. 18299/03 and 27311/03), 20 Dec. 2011, paras.1-4.

¹⁰ ‘Any person or group of persons or nongovernmental entity... may submit petitions to the Commission, on their behalf or on behalf of third persons’ [r. 23, Rules of Procedure of the Int. Am.Com.HR, *supra.*, n.8].

¹¹ Art. 55, African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5; *Article 19 v. Eritrea*, ACHPR, Comm. 275/2003 (2007), para. 65.

¹² Art. 30, *Rules of Procedure of the Inter-American Court of Human Rights*, Approved by the Court during its LXXXV Regular Period of Sessions, 16-28 Nov. 2009.

¹³ Art. 2, *Practice Direction on victim participation, 02/2007/Rev.1*; Application form for victims, App. A.

¹⁴ ECCC Internal Rules (Rev8), rev. 3 Aug. 2011, Rules 23(3)(a) and (5), 12(ter)6 and 23 *ter*.

10. The ECCC also refers to Victims' Associations, which are associations of victims of crimes coming within the jurisdiction of the ECCC.¹⁵ These, however, have only had a subsidiary impact before the ECCC,¹⁶ as they do not have civil party status before it – only their members do. The Associations' role is more to organise members and coordinate joint action.

Class action litigation

11. Class action lawsuits allow for joint claims. These are typically individual claims that are joined procedurally; they are not collective claims as such. In the United States model, a court will first decide on the suitability of a class action application before assigning a definition that describes the members (i.e. the qualities that group them together). Rule 23 of the US Code Annotated Federal Rules of Civil Procedure for the US District Courts lists the following "prerequisites to a Class Action": "(a) ... One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." There is no restriction on who may file a class action - the named plaintiffs must only proffer that their claims are representative of the class.
12. Associations may sue on behalf of individual members if "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."¹⁷

¹⁵ To be so recognised, associations must demonstrate that they are validly registered or established in the country in which they carry out activities, and that they are authorised to act on behalf of members of the association. Art. 5.2 of the *Practice Direction on victim participation*.

¹⁶ There are at least two formally recognised Cambodian victims associations.

¹⁷ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 181 (2000); *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

13. Group claims are also provided for in the Canadian Indian Residential Schools Adjudication which considers claims of sexual abuse, serious physical abuse, and other wrongful acts.¹⁸ Group claims were accepted when the individual applications of group members were submitted together or within a short interval; each of the claimants indicated their desire to proceed as a group; the claims show commonality among group members; and a representative of the group has submitted an application to proceed as a group.¹⁹ It must be demonstrated that the group is well-established with evident viability and decision-making capacity; its members are already providing each other with support in connection with their experiences or have a clear plan and realistic capacity to do so; the issues raised by the individuals within the group are broadly similar; and the group has a clear plan and intention to manage safety resources, where they desire to do so, and to achieve healthy and lasting resolution of their claims.
14. Where a proposal to proceed as a group is not accepted, the individuals will be advised of their right to continue as individuals if their applications otherwise meet the criteria.²⁰

III.4 Criteria/process for groups to apply

15. Subsection 23(c) (5) of the US Federal Rules of Civil Procedure allows judges to divide classes into subclasses, each with its own representative(s) and to separate out particular issues in the class proceeding. In the *Holocaust Victim Assets Litigation*, which resulted in a detailed settlement arrangement that recognised a number of classes of victims as eligible to benefit through dedicated claims programmes, the claims procedures were determined class by class, and depended on issues such as size of the class, the type of benefit that members

¹⁸ Appendix D of Schedule "D" *Independent Assessment Process (IAP) For Continuing Indian Residential School Abuse Claims*, http://www.residentialschoolsettlement.ca/Schedule_D-IAP.PDF.

¹⁹ Para. (vi) of App. II of Sched. "D", *ibid*.

²⁰ Application form of the IAP: http://www.residentialschoolsettlement.ca/IAP_form.pdf.

were eligible to receive, the availability and location of evidence to prove membership in the class.²¹

III.5 Process for victims to apply to join a group – Identification of victims

16. Once a class or victims' group is established, victims who may not have been initially included must be provided with the opportunity to join. In the US class action model, Subsection 23(e)(1) of the Federal Rules of Civil Procedure requires the class to issue a notice approved by the court, which must describe in plain language the claims and the procedure for objecting to and opting out of the class action).²² In the *Holocaust Victim Assets Litigation*, Korman J. authorised the plaintiffs' attorneys to undertake an extensive campaign of international notice, which ultimately included direct mail, press conferences, meetings with victims' groups as well as the creation of an internet site in over 20 languages directed at potential class members in numerous countries. An initial questionnaire was designed to solicit participation from potential class members and to obtain preliminary claim-related information.²³
17. Often, the Court or adjudicating body will recognise the 'class' without requiring, at the time of recognition, the full list of members. This was the case, for example, with the Swiss Banks Holocaust Settlement, referred to above.
18. Similarly, in cases before the Inter-American Court, the Court has directed the Inter-American Commission to identify, by name, individual members of the 'class' within a specified timeframe. In the *Case of the Juvenile Reeducation Institute*, it ordered the Commission to name the "children and adolescents interned at the 'Panchito López' Juvenile Reeducation Institute between August 1996 and July 2001, and thereafter sent to adult prisons in Paraguay," within three months'

²¹ See *Re Holocaust Victim Asset Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000), Exhibit I to Plan of Allocation, Class Action Settlement Agreement.

²² See Subs. 23 (c)(5) of the *Federal Rules of Civil Procedure, With Forms*, 1 Dec. 2010, p. 29

²³ Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, 11 Sept. 2000 ("Distribution Plan"), Vol. I, at 86-87. See also, J. Gribetz and S. Reig, 'The Swiss Banks Holocaust Settlement', in C. Ferstman, M. Goetz and A. Stephens, *Reparations for victims of genocide, war crimes and crimes against humanity: Systems in Place and Systems in the Making*, Martinus Nijhoff, 2010.

time.²⁴ In that order, it indicated to the Commission that if the list was not sent, the case would continue to be processed, but only in regards to the claimants already identified in the application. The Court has taken into consideration at what point during the proceedings new victims have been mentioned, the reason why they were not initially included and the opportunity for the other side to respond. The inclusion of new persons as alleged victims or their next of kin, after the State has answered the application, must be duly justified, to preserve legal certainty and the right of the State to defend the claim.²⁵ Where possible, the Court has requested information from the parties in order to be able to identify victims or has examined the evidence itself in an attempt to do so.²⁶ It has developed a flexible approach in cases where there are difficulties to identify all potential victims.²⁷ When it has not been possible for the Commission to identify one or more potential victims because it concerns massive or collective violations, in its updated Rules of Procedure of 2009, the Court is permitted to decide whether to consider those individuals as victims.²⁸

19. The Court has also dealt with cases where one group of victims requested to join a second group. In *Castillo Petruzzi v. Peru*, petitions were filed by two separate groups, the second requesting that their case be joined with the original.²⁹ The second group was required to obtain a power of attorney or authorisation from the original claimants to become co-claimants in the case, which they did.³⁰
20. The Court has also dealt with instances in which there was a discrepancy between the list of victims in the group application and what the evidence in the case demonstrated. In several cases, the original list of victims provided to the Court

²⁴ *Case of Juvenile Reeducation Institute v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112, para. 110.

²⁵ *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela*, 5 July 2006, Series C No. 150, para. 33. See also, *Case of the Ituango Massacres*, 1 July 2006, Series C No. 148, para.91; *Case of Acevedo Jaramillo et al.*, 7 Feb. 2006, Series C No. 144, para. 227; *Case of Mapiripán Massacre v. Colombia* (Merits, reparations and costs), 15 Sept. 2005, Series C No. 134, para. 183; *Case of the Moiwana Community*, 15 June 2005, Series C No. 124, para. 74; *Case of the "Juvenile Reeducation Institute"*, *ibid*, para. 111 and *Case of the Plan de Sánchez Massacre*, 20 Apr. 2004, Series C No. 105, para. 48; *Case of the Rochela Massacre*, *supra.*, n. 5, paras. 42, 91-92, 94.

²⁶ *Case of Mapiripán Massacre v. Colombia*, *ibid*, para. 183; *Case of the Moiwana Community*, *ibid*, paras. 305-306; *Case of Acevedo Jaramillo et al.*, *ibid*, para. 227; *Case of the Ituango Massacres*, *ibid*, para.94.

²⁷ R. 35(2) of the Rules of Procedure of the Int-Am Ct HR.

²⁸ *Ibid*.

²⁹ *Case of Castillo Petruzzi et al. v. Peru*, 30 May 1999, Series C No.52, paras.3-4.

³⁰ *Ibid.*, paras. 4, 8.

by the Commission did not match exactly the list provided by the representatives, and the representatives also sought to add more victims later.³¹ The Court stressed that it is not possible for representatives to bring new matters of fact other than those set out in the application, thus one of the victims was not included. As the representatives could not justify why certain others of the new alleged victims had not been included previously, they were not added.³²

III.6 Selection and mandate of a group representative

21. Victims that applied as a group or were later asked to group themselves, are typically directed to appoint a representative who will serve as the main interlocutor between the Court and the grouped victims. A group representative or interlocutor has the role of conveying the views and concerns of the group or at times serving as a form of intermediary. In some jurisdictions, such as before the Inter-American Court, the 'intervener' representing victims is also the person entitled to speak on their behalf (in that case, the only person allowed to do so).³³
22. In other jurisdictions, 'representatives' of victims have been put in place, usually on an ad hoc basis, by legal counsel representing numerous victims, in order to facilitate their coordination, consultation and advisory work, in contexts in which it is impossible to individually meet with each and every victim. For example, legal counsel representing civil parties before the ECCC, requested that the victims appoint representatives to acts as the main contact person between counsel and clients. In this case, they have no standing to appear before the Court, and serve a coordinating function to assist the counsel to better advise and communicate with clients.
23. In the US class action system, any member of the class who meets the requirements of typicality and adequacy can serve as the representative of the class. The class representative is self-nominated. While the class representative

³¹ *Case of the Sawhoyamaxa Indigenous Community*, 29 March 2006, Series C No. 146, paras. 61-68; *Case of the Pueblo Bello Massacre*, 31 Jan. 2006, Series C No. 140, para. 54.

³² *Sawhoyamaxa*, *ibid.*, paras. 68-70; *Case of the Rochela Massacre*, *supra*, n. 5, para. 48.

³³ R. 25(2) *Rules of Procedure of the Int-Am Ct HR*.

usually does not play a significant role in the litigation, by proposing to represent the class, they take on fiduciary or quasi fiduciary obligations.

III.7 Instances where no agreement is found on representative of victims

24. In cases where victims are asked to appoint a person to represent them, courts have had to address situations where no agreement could be found amongst victims as to whom that person should be. For example, if a group cannot decide on a common intervener, the Inter-American Court can impose a deadline for the appointment of up to three representatives to act as common interveners, and if still no agreement can be found, the Court can “make the appropriate ruling”.³⁴ In doing so, criteria such as the number of victims represented by one of the proposed interveners or the fact that he/she was him/herself a victim have been considered.³⁵ Likewise, the Court stated that “[i]n the case of the alleged victims who do not or may not have a representative, the Commission should safeguard their interests so as to ensure that they are effectively represented throughout all procedural stages before the Court.”³⁶

IV. CHALLENGES FACED BY VICTIMS OF MASS CRIMES IN APPLYING TO PARTICIPATE IN COURT PROCEEDINGS

25. These observations are drawn from REDRESS’ work in multiple countries, experience of taking up cases on behalf of victims before national and international courts/tribunal and work assisting NGOs working with victims of conflict. They are based on REDRESS and its partners’ direct experience and on interviews conducted with representatives of victims’ organisations in Nepal, South Africa and Cambodia.

IV.1 Inherent diversity of victims’ views

³⁴ See Rule 25(2) and (3) of the *Rules of Procedure of the Int-Am Ct HR*.

³⁵ *Case of Miguel Castro-Castro Prison v. Peru*, 25 Nov. 2006, Series C No.160, para.40; *Case of Acevedo Jaramillo et al. supra* n. 26, para. 142.

³⁶ *Case of Acevedo Jaramillo, ibid*, para. 142

26. Victims rarely speak with one voice. Each will typically have his/her own interests and will have experienced victimisation in a unique way. Experiences of mass violations are gendered with women and girls experiencing disproportionately higher rates of sexual violence and will also invariably experience other forms of violence differently, as individuals and as mothers, spouses, carers or dependents. In Uganda, while victims' groups often undertake joint advocacy, members' views differ on fundamental issues of amnesty, reparation, and criminal trials. Victims of LRA crimes may have different views and objectives if family members were also abducted, and went on to commit crimes. Children may have ended up in militia groups for different reasons – to defend their ethnic group, with the tacit consent of elders and parents, or under the powerful influence of militia leaders; driven to enlist as a result of abject poverty, after suffering terrible losses in conflict; and others will have been abducted and forcibly conscripted.³⁷ The circumstances will impact on the willingness and ability of demobilised children to constitute themselves into groups as they do not perceive their victimisation in the same way. Individuals' recollections of their suffering may also differ, making it difficult for a common factual narrative to be agreed amongst a large group of victims.
27. In rape cases, the views, expectations and fears of victims may differ depending on whether the violation led to pregnancy. Circumstances such as whether the victim was reintegrated in her community, or whether the victim may have relocated away from the conflict zone or outside of the country impact on the desire for, and expectations of justice and reparation. Victims may agree on a general strategy during trial but may want different reparations. Or, they may agree on association in the criminal action (as participant or civil party), but have different views in relation to the aggravating and extenuating circumstances relevant to the guilt of the accused. This can be the case for victims who have suffered harm at the hands of their own tribe, political party, and community.

³⁷ REDRESS, *Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court*, Sept 2006, available at <http://www.redress.org/downloads/publications/childsoldiers.pdf>.

28. Assessing whether within the diversity, there are common positions, and equally, determining fundamental areas of division, requires extensive consultation, not least to ensure that any diversity is not lost through a collective approach.

IV.2 Logistical and related challenges impeding group processes

29. Challenging terrain, poor infrastructure and transportation can impede victims from communicating with each other and organising themselves. Victims of the same group, depending on the criteria on which the group was based may not all speak the same language. During the course of proceedings, victims may relocate to a different region inside or outside of the country, often without leaving contact details. Victims' counsel before the ECCC explained that in the Cambodian political context, groups were forbidden to meet without first seeking permission from the authorities, which was strictly enforced prior to elections.
30. In countries where victims are already organised in formal groups, lack of resources may significantly impede focal points to keep members informed and consulted. In South Africa, awareness-raising and outreach throughout the country was not initially funded, which proved problematic. Outside financial support (no state resources were made available) was necessary to assist victims' groups, their representatives or lawyers to overcome logistical challenges.
31. In order to address logistical hurdles, in Nepal, NGOs carried out a door to door programme of visits to victims and invited them to scheduled meetings where they would interact with other victims. Local NGOs also recognised the need to provide logistical support/reimbursement to victims who attended. A similar approach was taken in South Africa where eight members of the Khulumani Support Group travelled around the country to raise awareness with victims.

IV.3 Challenges for victims to constitute themselves as a group

32. There is a tension between grouping for practical reasons and grouping according to legal categories (similar harm suffered, similar strategy for trial/reparation). Victims may prefer to form a group in relation, for example, to affinities, family

units, geographical location. However, groupings by affinities can lead to some victims' voices and interests not being fully represented inside the 'group'.

33. There is a risk that women and girls will be under-represented in victims' groups. In Nepal, to increase the participation of women in the groups making up the national umbrella organisation representing conflict victims, membership cards were distributed to all members of each group and special information programmes were run that focused on and targeted women.
34. There is a risk that victims of sexual and other forms of gender based violence may be part of a group claim but that the claim does not cover that aspect of the victimisation. Many past truth commissions and ad hoc tribunals struggled to enable such victims to convey what happened to them³⁸, with girls having almost no voice or recognition of harms suffered.³⁹ As a result, commission reports and tribunal jurisprudence rarely adequately captured or reflected the realities of sexual violence during conflict.⁴⁰ Victims who suffered from more than one crime may be reluctant to mention sexual and other forms of gender based violence in addition to the other crimes suffered. Some victims will believe that such practices are so 'normal' that they are not worth mentioning. There may also be a tendency by group leaders or family members to omit references to sexual violence, as potentially bringing shame to the group/family. Yet, in groups where only victims of sexual violence are represented, there is potential to attract further stigma, just by being part of or associated with the group.
35. There can also be challenges for victims to join a pre-established group. In Nepal, grouped victims went on to invite other victims to join the pre-existing group. However, it is not always possible for late-comers to join. In South Africa, victims wishing to join the Khulumani Support Group were required to provide evidence of the harm suffered and other members of the group would be asked to

³⁸ R. Rubio (ed.), *What Happened to the Women? Gender and Reparations for Human Rights Violations*, NY: Social Science Research Council, 2008

³⁹ D. Mazurana and K. Carlson "Reparations as a Means for Recognizing and Addressing Crimes and Grave Rights Violations Committed Against Children during Situations of Armed Conflict and Under Authoritarian Regimes," in R. Rubio (ed.), *The Gender of Reparations: Unsettling Gender Hierarchies while Addressing Human Rights Violations*, Cambridge University Press, 2009

⁴⁰ Ibid.

corroborate, and the Khulumani Support Group also undertook its own research to corroborate. Individuals were never excluded from membership though Khulumani emphasised that reparations could only be available to victims and survivors of gross human rights violations.

36. Tensions may arise when the pre-existing group is not all-embracing of victims' experiences; certain ethnic or other identities may predominate, or the group may emphasise certain forms of victimisation.
37. At the ECCC, this tension became apparent when after all civil parties were regrouped into one consolidated group, the Vietnamese victims were perceived by other groups as not entitled to any reparations, despite the general acknowledgement among civil parties, that they were all victims for the purpose of participation. In Rwanda, victims of genocide typically find it difficult to identify with victims from different ethnic backgrounds who may have suffered crimes against humanity or war crimes; to link these victims within a single grouping would for them be tantamount to equalising the crimes. For victims who fall outside of the predominant classifications, it may be difficult and at times dangerous to seek to join such groups. In most cases there will be a natural plurality of groupings. At times, these may be capable of being coordinated to an extent into umbrella groups that reflect, in their organisational structure, the diversity of victims' experiences.
38. There can be pressure not to join a victim group. In Nepal, political affiliation and influence can make it difficult for victims to claim justice; political party leaders have attempted to discourage victims from attending meetings of victims' groups, or to join victims' groups. Similarly, in South Africa, certain ANC leaders portrayed victimhood as a weakness and encouraged victims to "forget mourning and get on with the struggle." In that context, awareness-raising was crucial for victims to come forward.
39. Challenges can also arise when certain charges are dropped and some victims in the group no longer the reduced charges. This arose at the ECCC where all civil parties were regrouped into a consolidated group; however the case was later

severed with only a few incidents remaining in the criminal case. The Chamber ruled that the consolidated group would remain for the purpose of participation (thus including victims of other incidents no longer mentioned in the case who remained civil parties), despite the fact that the severance meant that only the victims of the few chosen incidents would be eligible to claim reparations. This created confusion for those victims who didn't realise that while they remained civil parties they were no longer able to claim reparation.

IV.4 Challenges with regards to groups' legitimacy and representation

40. Numerous persons may claim to speak "on behalf of a group". Where victims' groups are already constituted, legitimacy concerns have sometimes arisen with regards to who the group purports to represent, and whether the person representing the group is a legitimate representative. In South Africa, the involvement of international NGOs led to a multiplication of actors claiming to speak "on behalf" of victims which led to victims' feeling used, as merely resources in others' research. In one example cited by Khulumani, victims who had been appointed as staff became over time so comfortable with "speaking on behalf of victims" that they started seeing their position as a way to promote themselves, becoming somehow abusive to the very same victims they purported to assist and represent. Victims' groups may be dominated by political figures with certain issues treated as important only when they served political ends. Victims' poverty and illiteracy makes them susceptible to manipulation. In Nepal, manipulation by political parties has been cited as one of the challenges. In certain countries where REDRESS has worked, 'leaders' have made false promises in exchange for assisting victims to take part in legal proceedings.
41. There may be challenges for victims to agree on a common representative. In some groups in Nepal, this was dealt with by democratically electing an executive committee. In rural areas of Nepal, selected committee members tended to fit into a pattern of village governance already in place. In South Africa, victim members of the Khulumani Support Group established committees of people they trusted

to represent them at meetings and required that these persons regularly report back on developments. At the ECCC, one of the lawyers set up a system with one local NGO whereby victims would be gathered by provinces and would select and elect representatives, who would then act as the main contact point for counsel. Grouping was made by region rather than crime suffered due to the difficulties for victims of the same crime to travel long distances to meet. This worked because in most cases, civil parties' perception of victimisation centred on being a victim of the Khmer Rouge, though this differed for victims of genocide, who perceive themselves as a distinct group, in particular the Vietnamese/Khmer Krom and victims of sexual violence who see themselves as a distinct group because of the particular sensitivity of the crime. In relation to more than 1,800 civil parties assisted in that context, 122 representatives were elected. In most cases, those elected were the most educated or respected members in the community. Yet, challenges still arose to ensure adequate representation of women as group representatives. Despite encouragement to ensure at least half of the representatives were women, in one region the group did not select a single woman.

42. A similar process occurred with the Steering Committee of the most affected victims association in the IOM German Forced Labour Compensation Programme. The representatives of victim associations were not chosen by IOM but rather determined through a process of self-selection: in countries where large numbers of IOM claimants resided, the IOM country office invited victim associations to self-select a representative to join the Steering Committee. However, problems sometimes arose: while a similar process was used to select the Board of Trustees of the German Foundation engaged in seeking reparation for former slave and forced labourers, the lack of agreement among the Roma community meant that their seat on the board remained empty.
43. There is sometimes a perception that group leaders may benefit more from the process, creating tensions internally. In cases where only a few testify on a behalf of a group, tensions and jealousies have arisen, often reinforced by a lack of

information. In Cambodia, the elected representatives were perceived to benefit from attending regular meetings where they would be briefed on recent developments and relay victims' views. Consequently, attempts were made to also bring some of the "non representative" members of victims' groups, to spread out the perceived benefits. In South Africa, while applications had to be filed in the name of individual plaintiffs, these individuals understood they represented thousands of others with similar challenges, not only their personal interests. The focus was on winning the issue being contested rather than focusing on the individual plaintiff. For this reason, whenever cases were heard in court, delegations of victims attended. The lawyers in the case would ensure that they met the other victims, who would still attend hearings en masse.

44. Victims may have difficulty to voice their discontent with the group and ask to leave. There might not be a clear procedure to 'leave' a group. This is particularly true for groups that are not constituted as legal entities or who may not have a formal membership procedure. As there will always be some disagreements, one must ensure that victims are given the space to disagree.
45. It may be necessary to make provision for victims in the group to express their dissatisfaction with a leader and review the appointment. This arose with certain 'informal representatives' appointed by ECCC civil parties to liaise with their counsel. If the representatives were not fulfilling their functions adequately, they were 'resigned' from their function and new representatives were appointed with the assistance of the local NGO working with victims.

IV.6 Challenges for victims to stay *informed*

46. In Nepal, the victims' umbrella organisation holds monthly meetings at the district level, during which they collect complaints, discuss problems and seek solutions. Similarly, in the context of the ECCC, with local NGO support, meetings of the elected representatives are held every three months, during which they would be informed of recent developments and at which they would

also be able to pass on victims' views and concerns. The 122 representatives would be split into 2 smaller groups in order to discuss in more detail.

47. Consultation with victims on how they want to be kept informed may help to identify cases where obvious communication channels would be inappropriate.

IV.6 Capacity of group leaders

48. Representatives chosen by victims may not have sufficient legal understanding to convey the outcomes of court processes. At the ECCC, elected representatives were ultimately trained on basic legal matters. In Nepal, NGOs working with victims felt that to address victims' need for psychosocial healing, selected members of victims' groups would be trained in psychosocial counselling. At the ECCC, one legal representative reviewed the type of information which was being shared, simplified the language and will soon begin pre-recording the messages that elected representatives would be tasked to explain and pass on. That way, victims would be able to listen to them later on, when they were back in their communities and accuracy would be preserved.

IV.5 Challenges to ensuring victims' physical and psychological safety

49. Finding secure ways to communicate and store information has also been a challenge for victims' groups. In some countries there is a risk for victims perceived to be associated with specific justice processes, which might require holding meetings outside of the victims' community, or identifying suitable venues to do so which do not attract attention.⁴¹
50. Contacting victims for follow up after initial intake can be a challenge in the absence of a centralised way to safely store contact details in the field. In one Asian country, testimonies of victims were recorded and sent to the National Human Rights Commission. However, there was no central organisation or record of how to contact victims whose testimonies had been recorded. When the political context changed and there were security concerns, there was no way to

⁴¹ Urgent Request by the Victims' Representative, 29 Feb. 2012, ICC-01/09-01/11-392-Red, para 50.

check whether any of the victims had faced reprisals as a result of the testimonies, and to intervene if necessary.

51. In contrast, as found in Cambodia, being part of a group has sometimes made victims feel stronger, more self confident and empowered. While at the beginning victims feared that the Khmer Rouge would come back and were scared of engaging in the proceedings, over time they were reassured by the fact they were 'so many'. A similar experience was reported in Russia, where the confidence of victim applicants in a case improved because they acted together. Thus when anyone targeted one of the victims she/he immediately informed the others and they were able to respond as a group.
52. Victims and those working with them typically have a low awareness of best practices in respect of protection and often lack the resources to store information in a secure way. Certain tools have been prepared to assist.⁴² In Nepal, in response to threats received by victims who had began to organise themselves as groups, a local NGO conducted a 5 day security training with technical assistance from a specialist organisation, with the goal that victims trained would relay the information back to group members in their individual districts.
53. Finally, collective participation implies that victims in a group know and trust each other, and have the possibility to discuss issues together. In case of a falling out between members of the group, there can be challenges to ensure that individual members are not put at risk.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Carla Ferstman
Director

Dated this 16 March 2012

At London, United Kingdom

⁴² *Guidelines for lawyers and intermediaries for protecting victims*, Victims' Rights Working Group, Jan. 2008, at www.vrwg.org/VRWG_DOC/2008_jan_Guidelines_Protection_ENG.pdf