The Victims' Rights Working Group (VRWG) was established in December 1997 by organizations that have promoted the interests and needs of victims in criminal justice and human rights bodies. Its main objective has been to raise the awareness of governments and others (e.g., the press, other NGOs and the public), in all relevant fora, about victims’ issues, to ensure that the Statute and the Rules of Procedure and Evidence adequately provided for victims' rights to be protected and respected, and their needs and concerns to be met throughout the judicial process of the ICC. Particular attention has been paid to the need to ensure that the Court will render not only retributive, but also restorative justice, that will aim, inter alia, to prevent re-victimization, to break cycles of violence and war, and to provide reparations and rehabilitation for victims.

Member organizations of the Working Group issued numerous position and background papers, participated in all meetings, and proposed texts for [re]drafting the Statute and the Rules. The VRWG will continue to be represented at future meetings of the Assembly of States Parties and will continue to advocate for the rights of victims to be respected by participants in proceedings before the Court.

Establishment of the International Criminal Bar (ICB)

The Victims Rights Working Group welcomes the establishment of the International Criminal Bar (ICB) as an indispensable component of the international justice system that is coming to life with the opening of the ICC. The Victims Rights Working Group is concerned, however, that to date, the voices of potential representatives of victims have been largely missing in the development of the ICB, and we believe such input needs to be taken into account in finalizing the ICB organizational structure if the ICB is to live up to its mandate as the representative of all counsel practicing before the ICC.

The development of the ICB thus far has been an initiative largely of organizations representing defense lawyers, with national bar associations, more recently, also playing a very active role. In contrast, there has been minimal participation by individuals or groups representing the interests of victims representatives, even though the ICB as currently envisaged would represent both counsel for the defense and for victims.

Potential for Conflicts of Interest Between Defense Counsel and Victims’ Representatives

In discussions with various participants and observers, we have found a wide range of thought on the question of what, if any, impact the ICB – an organization of lawyers (both individually and collectively, as national bars and associations of counsel) – will have on the balance of power among the lawyers’ clients, that is, defendants and victims.
Many commentators, particularly (though not exclusively) from civil law jurisdictions, have maintained that concerns of conflicts of interest are exaggerated; that the ICB will be an organization of practitioners, defending the independence, professionalism and dignity of lawyers qua lawyers vis-à-vis the potentially overwhelming powers of the Judiciary, the Registry and the Prosecutor. In this view, the professional interests of practitioners transcend the specifics of who their clients are and what those clients’ interests might be. All lawyers practicing before the Court will have logistical needs, such as library, office, translation, communications and computer services. Lawyers will also benefit from the availability of high-quality legal training in international criminal, humanitarian and human rights law as well as practical orientation in the particularities of practice in the unique and developing forum of the ICC. The ICB will likely also provide to lawyers valuable assistance in mediating disputes or facilitating communication among lawyers, or with clients, Judges, the Registrar, the Prosecutor, the Assembly of States Parties, or lawyers’ own national bar associations. The ICB will be able to provide needed lawyer participation in developing procedures for the assignment of counsel and administration of legal aid; and it will be able to provide needed guidance for lawyers seeking to comply with unclear or apparently conflicting ethical and/or professional obligations.

In support of this view also, the experience of civil law jurisdictions is cited, where lawyers’ professional identities are not rigidly defined, and an individual may find him- or herself working as defense counsel in one case, and representing a partie civile the next. Similarly, it is argued, the sum of perspectives of lawyers practicing at the ICC and participating in the ICB will represent a natural balance of differing standpoints, both individually and collectively, and so no bias toward one type of client (defendant, victim) should be expected. The substantial role anticipated for national bar associations and law societies, as “collective members” of the ICB, should, on this logic, even further enhance the evenhanded balanced perspective of the ICB as a whole toward issues of particular sensitivity for victims or defendants.

The common law experience, by contrast, suggests a different line of development. While private barristers in criminal practice do serve as ad hoc prosecutors in some of the British Commonwealth countries, the general pattern is much more of a fixed specialization, particularly in North America. Common law jurisdictions have no participatory role for victims comparable to that of the partie civile in civil law systems, so private criminal attorneys will generally specialize in criminal defense. Though it is not unusual in some common law jurisdictions, at least, for defense attorneys to have had some experience working as prosecutors, movements in the reverse direction are rare. Thus, the routine experience of everyday practice serving defendants naturally tends to reinforce a distinct perspective in criminal defense lawyers as to the appropriate parameters for criminal prosecutions. It is true that a large national bar association, such as the American Bar Association, does not require special sections to represent defense and prosecution (or victim) interests: all attorneys practicing (or otherwise concerned with) criminal law are eligible for membership in the Criminal Justice Section of the ABA, for example. But it is precisely because of the heterogeneity of its participants that when the ABA Criminal Justice Section or a committee issues a report, or files a brief as amicus curiae, or sends representatives to testify in the US Congress, or puts forward proposals for legal or institutional reform, it is seen as the unified voice of all attorneys involved with the criminal justice system, and not just one subgroup. Unlike the ICB, whose individual members will generally be limited to representatives of defendants or victims, “the Criminal Justice Section of the American Bar Association has over 9,000 members including prosecutors, private defense counsel, appellate and trial judges, law professors, correctional and law enforcement personnel, law students, public defenders, and other criminal justice
professionals. With its diverse, multi-disciplinary membership, the Criminal Justice Section is uniquely situated to address the pressing issues facing today's criminal justice system.\(^1\)

In the view of the *Victims Rights Working Group*, it is too early confidently to predict what the constellation of viewpoints in the ICB will actually be. It is not clear whether there will develop a truly fused bar, as civil law lawyers seem to suggest, where most practitioners will have at least some experience representing “both sides of the fence” in criminal proceedings, or whether specialization will be the dominant style. Even if the bar turns out to be “fused” in this fashion, the role of representing victims before the ICC will in any case almost certainly be rather different from that of representing *parties civiles*, and so, in this regard, the civil law experience could at most provide an imperfect predictor of developments. Moreover, we do not know whether other sub-specialties, or niche practice areas, will crystallize, such as representation of human rights, humanitarian or other NGOs as *amici curiae*, or managing “complementarity” hearings for States defending their own ability to handle an investigation or prosecution; or whether these functions will all be together on the menu of expertise offered by ICB members and others practicing before the ICC. If such a unified bar does in fact develop, it would tend to assure the kind of balance that victim advocates now fear will be lacking.

What we do know, however, is that there has not to date been much of a need for specialized victims’ counsel in international criminal tribunals, and most lawyers with any experience practicing in such courts are inevitably defense attorneys. Certainly the overwhelming majority of individual lawyers animating the initiative to set up the ICB have been defense lawyers, and in at least some of the earlier discussions, the ICB concept was characterized by some expressly as a “defense bar.”

We recognize that there has been experience of litigation under international criminal law in national civil law jurisdictions, in Rwanda and Belgium, for example, where victims’ representatives have played a substantial or even dominant role in the proceedings. Moreover, commentators have noted that in particular proceedings, depending on the nature of the political “situation” underlying the case(s), conflicts among victims (and their counsel) or among defendants (and their counsel) may turn out to be the major fault lines, thus further blurring the polarization between the perspectives of victims’ and defense counsel, and resulting in a greater mix of viewpoints and experiences within the ICB.

Another complicating unknown is how the possible domination of the ICB by national bar associations will affect the balance: on the one hand, national bars may in effect represent a broad mix of experiences, somewhat akin to the variety of experiences included in the ABA Criminal Justice Section On the other hand, the ICB will not be a comprehensive bar association; officials representing “collective members” will likely, themselves, also have to be individual practitioners with personal experience in the ICC or other international tribunal(s); and it may be that, in the nature of things, those members of national bar associations who are most naturally drawn to participate in the ICB on behalf of their associations will be a self-selected group whose interests and concerns are most close to what may turn out to be the dominant group of individual practitioners: defense lawyers.

*Specific Areas of Possible Concern for Victims and/or Their Advocates*

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\(^1\) See website of the American Bar Association, [http://www.abanet.org/crimjust/about.html](http://www.abanet.org/crimjust/about.html) (accessed August 26, 2002).
The **Victims Rights Working Group** envisages that conflicts may be particularly likely in relation to the ICB’s proposed role as advocate on behalf of counsel in the “development and amendment process of the Elements of Crimes, Rules of Procedure and Evidence and other relevant instruments of the ICC”. Proposed amendments to the rules of evidence that would expand or reduce the scope of discovery, weaken or strengthen restrictions on admissible testimony, or widen or limit permissible inquiry into past sexual activities of rape victims are but three areas where defense and victims representatives are likely to hold radically differing views. Attached as Annex A to this Memorandum is a list of some of the provisions in the Rules of Procedure and Evidence where we feel reform or amendment initiatives undertaken by the ICB could be particularly troubling for victims’ advocates. A similar list could be made with regard to other instruments, such as the Elements of Crimes.

Dispute resolution (among lawyers, between lawyers and clients, or between lawyers and the Registrar, the Prosecutor or the Court) may in many cases be a natural and relatively uncontroversial function for the ICB. But some kinds of disputes may present situations where the actual or perceived neutrality of the ICB (as between victims’ and defense interests) may be at stake: for example when a lawyer is sanctioned by the Court for badgering a victim-witness; or where defense counsel has engaged in ethically questionable contacts with a victim-witness, or possibly even with a non-victim witness. Similar considerations could arise in disciplinary matters (to the extent they will be within the ICB’s remit), both in individual disciplinary adjudications as well as, more generally, in regard to proposals to establish or modify particular rules in the contemplated Code of Ethics.

**Comments Submitted by the Victims Rights Working Group respecting the ICB Constitution**

While the future professional coloration of the ICB cannot be predicted at this time, the **Victims Rights Working Group** remains concerned that at least in the short term, the ICB may run the risk of destabilizing the balance between defense interests and victims’ interests in a manner disproportionately to the detriment of victims.² At the same time, however, we are mindful of the sage warning of *Avocats sans Frontières* against the paradoxical danger that in seeking to preempt a kind of professional factionalization within the ICB through organizational engineering, we may crystallize healthy tensions into permanent rifts.

In light of the foregoing, we believe a flexible structural accommodation should be made that would provide a measured degree of comfort for those with a victim-oriented perspective – who may, at least in the short term, largely be non-voting associate members (from victims’ advocacy NGOs) within the ICB – while encouraging the proliferation of as broad a spectrum of professional perspectives and experiences within the ICB as possible. Because of the uncertainties, members of the Victims Rights Working Group will continue to reflect on the issues of concern here, and further comments at a later date may then become in order.

In this spirit, at this time, we suggest:

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² To be sure, the ICB’s ability, for example, to influence policy changes at the ICC, or to weigh in in situations of individual conflicts between or among various participants in the ICC proceedings, will be more than matched by the formidable institutional and persuasive power of the Prosecutor’s office. But the ultimate intended beneficiaries of the ICC are the victims. And much of the wisdom of the Rome Statute is precisely its recognition of the fact that victims’ interests do not simply fall in line with those of the Prosecutor. It cannot be enough to argue that victims should be content with looking to the Prosecutor to fully protect their distinct interests.
• The ICB should make all efforts to be as broadly representative of legal professionals practicing before the Court as possible. The Constitution should include language in its Preamble encompassing the medium-term goal of including among its member constituencies legal staff within the Office of the Prosecutor.

• The ICB should formally include within its constitutional structure provision for establishment of ad hoc or standing Subcommittees, at the initiative of interested members, the Assembly or the Council. Such Subcommittees should be open to all interested individual (voting) and associate (non-voting) members. The Subcommittees might include such groupings as victims’ representatives, defense counsel, forensic investigators, accounting analysts, and representatives of States Parties’ interests, or Subcommittees might be established for such purposes as professional education or policy development. Some mechanism (perhaps a minimum number of individual and/or associate members) could be fixed to assure that each of the Subcommittees would represent a genuine constituency.

• Depending on interests, members would not be restricted to only one Subcommittee. The Subcommittees would establish their own procedures regarding membership and operation. Each Subcommittee should be entitled to elect one representative to the Council who would sit on the Council as a non-voting associate member, and who would participate in Council meetings on an equal footing with voting members.

• The ICB will express in its constitutional Preamble the aspiration to function on the basis of consensus. In the event consensus is not possible, Subcommittees might articulate particular views.

• The ICB Constitution should expressly provide that membership is open to non-legal professionals of closely relevant expertises (medical, forensic, accounting, investigation). Such members should be eligible for participation in arbitration and disciplinary panels, and policy development Subcommittees established by the Assembly or the Council.

• A “review conference” should be scheduled for a date some time in late 2004 for the purpose of taking stock of the operating experience of the ICB as of that time, with a mind to re-appraisal of Constitutional and other structural issues that may not or may no longer be adequately responsive to the needs of all ICB constituents and stakeholders.
ANNEX A

Examples of Potential Conflicts between Victim's Representatives and Defense Counsel

Rule 69    Agreements as to Evidence

The Prosecution and Defense can agree as to an alleged fact, and the chamber may treat the fact as proven. It may be in the interests of the victims or witnesses and consequently victims’ representatives to have a more thorough showing in regard to the alleged fact.

Rule 70    Principles of evidence in cases of sexual violence

Defense counsel might view the limitations on the defence of consent as encumbering rights of the accused; victims’ legal representatives may view such rules as necessary to ensuring the proper and appropriate prosecution of rape and other sexual violence.

Rule 71    Evidence of other sexual conduct

Defense counsel in certain parts of the world still tend to want to bring in evidence of a victim’s sexual conduct to discredit her/him as a witness and to suggest that s/he somehow consented to the crime. Victims’ legal representatives would want to ensure the rule prohibiting the admission of such evidence is maintained and adhered to.

Rule 72    In Camera Procedure to consider the relevance or admissibility of evidence

Defense may disagree with victims or witnesses as to whether the evidence has a 'sufficient degree of probative value.'

Rule 73    Privileged Communications and Information

(2); (3) Victims or Witnesses may have different points of view with the Defense as to whether a communication with a non-counsel professional or other confidential relationship should be privileged.

(6) Whether the ICRC should be persuaded to release information.

Rule 74(5)    Self-incrimination by a witness

Defense counsel and legal representatives for victims may disagree on whether a person should be compelled to testify.

Rule 76; 81(4); 87(1) Pre-trial disclosure relating to prosecution witnesses

Legal representatives for victims may not want the identities of certain witnesses/ victims made known
to defense counsel whereas defense might wish for the identities of them to be known for purposes such as gathering opposing evidence or testimony.

**Rule 88(5); 140(2)  Special Measures**

Defense counsel and victims’ legal representatives may have different ideas of what 'avoiding harassment or intimidation' means.

**Rule 91(2); (3)  Participation of legal representatives**

Defense counsel and victims’ legal representatives may disagree on whether the representative's participation should be limited to 'written observations or submissions,' or how otherwise they might participate.

**Rule 94(2); 143  Procedure upon request**

Defense counsel and victims’ legal representatives may have different views on the instances when notification should not be provided to the persons named in the request.

**Rule 95  Procedure on the motion of the Court**

Defense counsel and victims’ legal representatives may have different views on the decision of the Court to proceed on its own motion in providing reparations to victims.

**Article 75; Rule 97  Assessment of reparations**

Defense counsel and victims’ legal representatives may have differing views on how reparations are to be assessed.

**Rule 99  Cooperation and protective measures for the purpose of forfeiture under articles 57, paragraph 3 (e), and 75, paragraph 4**

Defense counsel and victims’ legal representatives may have differing views on when notification would jeopardize the effectiveness of protective measures, and when notice should ultimately be provided.

**Rule 119  Conditional release**

Defense counsel and victims’ legal representatives could disagree at to which, if any, conditions restricting liberty should be allowed.

**Rule 221  Decision on disposition or allocation of property or assets**

Defense counsel and victims’ legal representatives may have different opinions.
Rule 224  Procedure for review concerning reduction of sentence

Defense counsel and victims’ legal representatives may have different opinions.