

## FIDH Comments on the Proposed Changes to Legal Aid

September 2012

When adopting the Rome Statute, States Parties were “[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”<sup>1</sup>. States introduced, for the first time in international criminal justice, the possibility for victims to actively and independently participate in the proceedings so as to present their views and concerns<sup>2</sup>.

The Statute<sup>3</sup> and the Rules of Procedure and Evidence<sup>4</sup> grant victims an independent role in the proceedings. Victims contribute with their views to a case, the sentence of which is likely to have significance to their lives, families and communities<sup>5</sup>. As long as a sentence serves to acknowledge the victims and their suffering, it will be a form of reparation and, within the Rome Statute system, this has been sought by enhancing victims' participation<sup>6</sup>.

Independent legal representation is essential to ensure an effective participation of victims. FIDH believes that this can only be achieved with an efficient and comprehensive legal aid system that takes into consideration the needs of victims' legal representatives. Over the years, FIDH has consistently supported the efforts to establish an adequate and efficient legal aid scheme to ensure a meaningful participation of victims<sup>7</sup>.

In 2004, the legal aid system of the Court was set to lie on the following principles: equality of arms, objectivity, transparency, continuity and economy<sup>8</sup>. The scheme was reviewed in 2007<sup>9</sup>, basically introducing more flexibility. At that stage, FIDH endorsed a CBF recommendation of furthering a dialogue amongst all relevant stakeholders on the victims' legal aid scheme.

On 7<sup>th</sup> December 2011, the Registrar produced a discussion paper on legal aid for the Defence and victims. During its 10<sup>th</sup> Session, the Assembly of States Parties<sup>10</sup> requested

1 Rome Statute, Preamble para. 2.

2 Rome Statute, Art. 68.3

3 Rome Statute, Art. 68.3. See also, for instance, Art. 15.3, Art. 19.3, Art. 82.4.

4 Rules of Procedure and Evidence, Rules 89-93.

5 ICC-01/04-01/06, The Prosecutor v. Thomas Lubanga Dyilo, *Decision establishing the principles and procedures to be applied to reparations*, 7 August 2012, par. 237

6 Cfr, ICC-01/04-01/06, ICTJ, Submission on reparations issues, 10 May 2012.

7 FIDH, Recommendations to the Seventh Assembly of States Parties to the Rome Statute, The Hague, 14-22 November 2008, Position Paper No. 13. In 2009, FIDH also issued a report on Legal and financial aspects for funding victims' legal representation before the Court. FIDH has also actively participated in the Victims' Rights Working Group and in the Legal Representation Team of the Coalition for the International Criminal Court.

8 ICC-ASP /3/16, Assembly of States Parties, Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons, 17 August 2004, par. 16.

9 ICC-ASP/6/4, Assembly of States Parties, Report on the operation of the Court's legal aid system and proposals for its amendment, 31 May 2007.

10 ICC-ASP/10/Res.4, Programme budget for 2012, the Working Capital Fund for 2012, scale of assessments for the apportionment of expenses of the International Criminal Court, financing

the Registrar to further consult with different stakeholders. The Assembly highlighted that “there was general agreement among delegations to underscore the fundamental role of the Court’s legal aid system both for defendants and victims (...)”<sup>11</sup>. The Registrar proposed, during the year, several changes to legal aid, which have been extensively commented by civil society groups who have consistently called for a comprehensive review of the system.

On 17 August 2012, taking into account the different comments, the Registry proposed a “Supplementary Response of the Registry on four aspects of the Court’s legal aid system”. FIDH welcomes the efforts of the Registry to reflect the views and recommendations of civil society and practitioners consulted in its latest proposal. However, we remain concerned that the discussion continues to be driven, mainly, by budgetary considerations and focuses on four issues instead of addressing the adequacy of the system as whole.

We neither question the States commitment to fairness in the proceedings nor deny the financial situation of the Court. However efficiency measures should not hinder the real needs of victims’ representatives in the short and long term.

We are worried that there may be an unbalance between the burden the requested measures will put on victims’ representation and the real impact the expected financial savings could have on the overall financial situation of the ICC. Victims should not bare a disproportionate weight on the financial difficulties of the Court.

FIDH notes that the Registry recognizes the need for a continuous and comprehensive review of the legal aid system. In fact there are more discussions on victims participation taking place amongst States Parties in the context of the Study Group on Governance and the Hague Working Group.

FIDH insists on the fact that a proper balance between financial concerns and the need to guarantee the rights and needs of victims participation cannot be reached without a thorough and consistent review of the legal aid system, victims’ participation and the overall efficiency of the Court.

### **Cutting by the weakest link**

The discussion set off after the 10<sup>th</sup> Assembly of State Parties noted that the legal aid system (for the Defence and victims) was one of the main cost drivers with an increase of 180 % in the 2012 proposed budget. In the specific case of the Counsel for Victims, the increase was of around 150%. The proposed budget clearly recognised that this was a consequence of the increase in judicial activities. Nevertheless, the Assembly requested the Registrar to present a proposal with the view of saving 1.5 million Euros.

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appropriations for 2012 and the Contingency Fund, 21 December 2011.

11 Supra n.1 para. 19. The Assembly also decided that: “ Should the implementation of the revised legal aid system as foreseen by the Assembly prove not to be possible, it was understood that the Court could have access to the Contingency Fund, in line with existing financial regulations” Para. 21.

The budget for the Counsel for Victims approved for the year 2012 was almost EUR 4,3 millions, representing 6,6% of the Registry's budget, and 4% of the overall budget of the Court. The proposed budget for 2013 is broadly of EUR 4 millions, representing 6% of the Registry's proposed budget and 3,4% of the overall proposed budget for the Court.

Whilst reduction in the budget for the Counsel for Victims may lead to significant problems to ensure proper representation, it is unclear whether it will have a considerable impact in the overall financial situation of the Court. In other words, cutting substantially on an already slim slice may not reduce much the size of the budgetary pie.

In addition, any cuts in the budget for victims' legal aid should be carefully considered so as to make sure that they would not, in the long run, be translated in more expenses. As Judge President Sang-Hyun Song has alerted short term savings, if they lead to delays in the proceedings, may end up generating more expenses.

FIDH does not ignore the financial concerns of the Court and of States Parties, but a piecemeal approach to legal aid for victims and to the budget, may put a burden on victims' representatives that may not be corresponded with a significant financial gain.

The cost analysis of ensuring rights for victims within the Rome Statute system cannot ignore the importance of their participation for the overall credibility and legitimacy of the ICC, as well as the need to explore other issues with financial implications for the Court.

FIDH calls the members of the CBF and States Parties to be mindful that the increase in the expenses of legal aid was mostly due to the increase in judicial activities, as it would be the case for any other expenses related to the participation of any of the parties involved in the proceedings.

### **Concerns in relation to the Registrar's proposal of 17 August 2012**

The Registry's report of 17 August 2012 focuses, as per request of the Bureau of the Assembly of States Parties, on four issues:

- 1. Remuneration in the case of several mandates for legal team members.* A counsel will not assume more than two mandates. She or he will be remunerated 100% for the first case and 50% for the second one.
- 2. Expenses policy (previously focused on the legal aid travel policy).* The allowance to cover the expenses (miscellaneous and travel) of each legal team will be reduced from EUR 48000 per year (EUR 4000 per month) to a maximum of EUR 36000 per year (EUR 3000 per month). Daily subsistence allowance will no longer be paid for extended stays in The Hague.
- 3. Remuneration during phases in which activities are considerably reduced.* Payment to teams will be automatically stopped, with a 30 days prior notification, for phases of proceedings when activities before the Court are reduced such as a stay of proceedings; between closing statements and the decision of the Trial Chamber; and after an appeal in confirmation of charges. Team members will only be paid

hours effectively worked on necessary tasks, with a ceiling equal to the monthly remuneration of each team member.

4. *The possibility of an enhanced role for the Office of the Public Counsel for Victims.*

The report excludes the possibility of exclusive representation for OPCV. The proposal outlines two “scenarios” or “options” to be used on a case-by-case basis:

- Option 1: A senior legal staff member of OPCV meeting the criteria for counsel, who lead the representation, with a team of external support staff.
- Option 2: An external counsel, who builds his core team from members of OPCV.

Whilst FIDH expresses some concerns about the last two proposals, we remain adamant that a comprehensive review of the system for victims' participation and the budget is needed. Whilst there are indeed measures that should be taken to make the system more efficient, selecting a series of issues, without considering the legal aid system as a whole, and by genuinely involving all actors concerned, including the victims themselves, may not lead to the most efficient and adequate system.

We are worried that a non comprehensive review may result in further expenses as opposed to savings. The establishment of new practices, may also render future reform more limited or difficult.

FIDH calls upon the members of the CBF to engage in a careful consideration of each proposal keeping in mind the rights of victims to a meaningful participation, and to ensure an active and wide consultation with civil society and legal counsels.

***The establishment of mixed teams for the representation of victims***

We welcome that the option of an exclusive representation by OPCV has been ruled out from the proposal. We want to recall the freedom for victims to choose their legal representatives and the added value of external counsels for their independence, their privileged access to victims, and their understanding of local realities which contributes to a relationship of trust between victims and their legal representatives.

We are concerned as to whether the composition of teams proposed is really workable. OPCV staff is internally accountable, but they would face a situation of receiving instruction from an external counsel who must be completely independent. OPCV staff would be placed in a situation where they may have two superiors with different views and issuing contradicting instructions. Division within the teams may affect the furtherance of the best legal strategy for the interests of victims, the coherence of the representation, and may, at the end, result in an inefficient or more costly system.

It is our understanding that the proposed options do not exclude the appointment of a totally external team. Any changes to the designation of counsel should be mindful of the right of victims to be consulted in relation to their choice of counsel, the requirements of cultural ties with victims, and the independence of their legal representative.

### ***Remuneration during phases in which activities are considerably reduced***

The Registry proposes that during the phases of reduced activity of a case, payments to external counsel will cease, and introduces a system of reimbursement for those activities that are considered necessary.

The remuneration system would work under the assumption that when proceedings before the Court are significantly reduced, the work of victims' legal representatives is also reduced. That may not be the case. The workload of victims' legal teams is also dictated by the needs and interests of victims, not only by the activity of the Chambers. For instance, when the Court declares a stay of proceedings, victims' representation teams may be more needed in the field to ensure communication with their clients so that they are duly informed of the consequences of a Court's decision on their interests. This work may be key for the credibility, legitimacy and relevance of the Court as a whole.

Whilst the Registry has suggested that teams will not be disbanded during such periods, we are concerned that stopping their remuneration may, in practice, have that effect. There is a need for further information about how the consultation process, during the 30 days prior to the cease of payment, will take place, and how the Registry will assess the necessity of the work, to ensure that this policy will not affect the efficiency and adequacy of victims' representation.

#### **Recommendations:**

**Any changes to the legal aid scheme should be implemented after a comprehensive analysis of the present system in light of the needs of victims' representatives, with a view to ensure a meaningful participation of victims.**

**The cost analysis of the legal aid system should seek a balance between the impact the cuts would have on an effective and adequate legal representation for victims and the financial benefits for the Court as a whole. Cutting substantially on a 4% slice, may not contribute considerably to ensure financial savings for the ICC, but may have a considerable effect on victims' representation.**

**FIDH calls upon the CBF to engage in a careful consideration of each proposal of the Registry's supplementary report, so as not to hinder the rights of victims, and to bare in mind that any measure that may affect the pace of the proceedings, may be more costly in the long term.**