



LEGAL REPRESENTATION TEAM
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)

COMMENTS AND RECOMMENDATIONS
On the 'Discussion paper on the Review of the ICC Legal Aid System'

31 January 2012

This paper, prepared by the CICC's Legal Representation Team¹, has been produced in response to an invitation of 19 December 2011, from the Registrar of the Court, to submit comments to a 'Discussion paper on the Review of the ICC Legal Aid System'. It should be stated from the outset that the Team supports a review of the existing legal aid system in light of practice to date, including to identify areas where the system can be made more effective and to identify potential cost savings, if any, through increased efficiency. However, the Team is concerned regarding the context in which this discussion document has been presented, in particular the budgetary pressure by some states parties to reduce legal aid costs in response to increases in the Proposed Programme Budget of the International Criminal Court for 2012. It is a significant concern that the present legal aid 'discussion document' gives an impression that the cuts it proposes will have no effect on the level and quality of the services provided. This detracts seriously from the credibility of the discussion document and its proposals. The CICC Legal Representation Team is also troubled at the manner in which the consultation process has been undertaken, with limited time in which to engage in sufficient consultation within its expert networks. Indeed the Coalition received the discussion paper on 10th January 2011, allowing only 21 days in which to respond. Consequently, in providing its response to the discussion document, the Team maintains grave doubts whether the present consultations can be genuine or considered, given the exceptionally short deadlines imposed for necessary consultations on matters of such import. Therefore the Team recommends that following the current six weeks consultation process, a new proposal should be circulated with a second opportunity for input, preferably through the organisation of a meeting with all relevant stakeholders.

Summary of Recommendations

I. Consultations

Reviews of the ICC legal aid system should be considered, holistic, and include genuine consultations with interested stakeholders including victims and legal representatives, drawing on experiences gained following the ICC's first trials.

¹ The Legal Representation Team is comprised of representatives of member organisations of the CICC as well as a number of legal representatives of member bar organisations of the CICC. While the work of the Legal representation Team reflects the positions of Coalition members active on the Team, this paper cannot be construed to represent the views of all organizations/members of the CICC. Since the Rome Diplomatic Conference, Coalition members have organized themselves into teams, one to follow each working group or theme of the intergovernmental process. Coalition teams now follow issues addressed by the Assembly of States Parties or its subsidiary mechanisms and by the International Criminal Court. Teams provide a forum within which interested members discuss issues, follow developments, elaborate relevant research and positions in response to developments, and elaborate and implement advocacy strategies in relation to those positions. All Coalition members are welcome to join any teams and all Coalition members are regularly apprised of the work of the teams.

The discussion document or proposal on which comments are invited, should be sufficiently clear and provide a detailed description of any consequences of proposals made.

II. Legal Aid for Victims

Legal Representatives for Victims (LRV) must receive adequate legal aid and resources in order to give genuine and effective legal representation to victims.

- *Before any reductions are considered, it is necessary for a review to be undertaken into the legal aid system as a whole. Without such a revision, the current cuts will lead to further delays, an increased burden on ICC staff and less meaningful participation of victims.*
- *The current legal aid system for victims' legal representation and existing practices (including the compositions of LRV teams), which have evolved to meet the needs of ever-increasing numbers of victims in distant locations, and following the realisation that effective participation requires meaningful consultation, should not be reduced prior to a review of the entire system. On the contrary, with the current system, at present, there are insufficient resources within the current team structure to conduct meaningful and adequate consultations with victims.*
- *The Registry must not reduce the current travel budget allocated to Legal Representation for Victims Teams.*
- *The number of budgeted Legal Representatives of Victims Teams must be adequate to give genuine and effective legal representation to victims.*

III. Legal Aid for Defence

Legal aid for suspects and accused persons must be sufficient to provide what is reasonable and necessary to guarantee equality of arms and effective representation, thus ensuring fair trials for all persons appearing before the Court.

- *Before any reductions are being considered, it is necessary for a review to be undertaken into the legal aid system as a whole.*
- *Legal aid for defence counsel must be sufficient to guarantee the accused's right to experienced, competent and effective defence counsel; their right to adequate time and facilities to prepare a defence; and equality of arms to present their case.*
- *Legal aid for defence teams must be sufficient to ensure genuine investigation. Any decision on legal aid for investigations must allow for flexibility and be based on a sound review of current defence investigations.*

IV. Remuneration for Victims and Defence legal Teams

Remuneration to Counsel must be sufficient to guarantee experienced, competent and effective professional legal representation.

- *The Registry must maintain the gross pensionable rate of remuneration for legal team members.*
- *Compensation for professional charges must be maintained.*
- *Remuneration levels during 'non-presential' phases must be maintained at the current level.*

I. Consultations

(i) Review of the ICC legal aid system should be considered and holistic.

Since the legal aid scheme was conceived in 2004, a number of reviews into the legal aid system have been conducted, which have sought to ensure that each person entitled to legal assistance paid by the Court receives 'equal treatment, logistical support and appropriate counsel in keeping with the requirements of cases'.² The CICC Legal Representation Team ('Team') welcomes initiatives taken by Court, and by the Registry, which aim to improve the legal aid system.

The Team is cognisant of the context in which this review is being undertaken, namely the global financial crisis and a bid to find additional savings in what has been described as a cost-driver of the Court by the Committee on Budget and Finance. The review which began prior to the tenth session of the Assembly of States Parties was endorsed by the Assembly in its resolution on the budget with a request to expedite the review by 15 February for submission to the Bureau.³ As a result the Registry has expedited a review prior and after consultations, both internal and external. This has led to a document which has overly simplified a number of issues and proposals which are inherently more complicated and which will have large and serious ramifications for the future legal aid system.

Notwithstanding this, the Team is seriously concerned by the manner in which the present review has been undertaken by the Registry, not least prior to the completion of a full judicial cycle, which would have been a more opportune time in which to undertake such an assessment. The Team notes that the current review has been proactively undertaken 'in order to reduce as far as possible the financial incidence of the increase in the activities of the Court where they risk putting an excessive burden on the overall budget of the institution'⁴. Such an expedited review, which has as its aim to reduce costs, has given rise to a proposal to cut legal aid, with great detrimental effect to all parties – above all defendants and victims - without adequate consultation and considered reflection with stakeholders over a practical length of time.

In order to undertake a review which 'recognises the fundamental importance of the legal aid system to ensure the fairness of proceedings, including in particular the rights of the defendants and victims', as requested by States Parties at the Tenth Session, it is necessary for a review to be undertaken into the legal aid system as a whole.

A considered and measured review of the legal aid system, through continuing broad consultations with interested stakeholders, including with reference to the existing practice of other international courts, would enable the Court to develop a robust legal aid system which would still be flexible enough to meet the needs of defendants, victims and legal representatives. A review of the legal aid system should aim foremost at improving the effectiveness of the legal aid system, including the role of the Court vis-à-vis legal

² ICC-ASP/6/4, Report on the operation of the Court's legal aid system and proposals for its amendment, 31 May 2007, para. 2.

³ 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 appropriations for 2012 and the Contingency Fund, 21 December 2011, Para. J, page 4

⁴ Discussion document paragraph 5.

representatives, rather than only in identifying cost savings. A comprehensive and holistic review may contribute to increased transparency and identification of best practices, which, in turn, would contribute to stronger dialogue between the Registry, Legal Representatives and States Parties in order to implement a financially sound and sustainable legal aid system for the future.

(ii) Any legal aid review should include genuine consultations with interested stakeholders, victims and legal representatives

In 2004, with a view to developing the legal aid system, the Registry carried out consultations with various organizations and the ad hoc tribunals. Questionnaires were also sent out to more than 50 experts and independent bodies representing legal counsel and lawyers' associations. Concurrently, bilateral consultations were carried out with NGOs.⁵ It is noteworthy that the review prior to establishing the ICC legal aid system took place over 20 months, between January 2003 and August 2004, with the presentation of the final report to the ASP at its third session. When the legal aid system was reviewed in 2007, the Registry also conducted extensive consultations with the legal profession and civil society. The consultation extended over several months and included both meetings with relevant stakeholders as well as a possibility for written comments.

In contrast, the timeframe envisaged for the present consultations is approximately 6 weeks. The Team has grave doubts whether the present consultations can be genuine or considered, given the length of time for consultations. Therefore the Team recommends that following the 6 weeks consultation process, a new proposal should be circulated with a second opportunity for input, preferably through the organisation of a meeting with all relevant stakeholders.

Rule 20(3) of the Rules of Procedure and Evidence, states that 'the Registrar *shall* consult, as appropriate, with any independent body of counsel or legal associations.' This legal provision obligates the Registrar to consult with the legal profession. However, the Legal Representation Team, which comprises representatives of Independent Bar Councils, legal representatives on the List of Counsel before the ICC, and others has serious reservations regarding these consultations, which in its view, have not been undertaken in a manner which has adequately engaged relevant stakeholders from the legal profession, both in terms of the number and breadth of representatives approached and in relation to the length of time given to legal representatives to make submissions, not least those representatives currently at the Court who have had to provide detailed responses as an addition to their ongoing work on cases currently proceeding before the ICC.

Finally, it should be noted any meaningful review of the legal aid system should seek to reflect to the extent possible, the views of its primary stakeholders on the effectiveness of the legal aid system: accused persons and participating victims.

(iii) Any legal aid review should draw on experiences gained following the ICC's first trials.

Proceedings in the *Lubanga* case, as well as the *Katanga and Ngudjolo Chui* case are coming to an end. The Team recognises the pressure put on the Registry by the Committee on Budget and Finance, but nonetheless urges the Registry to undertake a further comprehensive review of the

⁵ ICC-ASP/3/16, Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons, para. 3.

legal aid system at the conclusion of these trials. It is regrettable that the current review is taking place before the completion of the first trial, without the further benefit of the experience of any possible reparations proceedings. In this respect the Coalition has already proffered through its Budget and Finance Team that a detailed review of the legal aid system should be conducted on the completion of the full first judicial process to determine whether efficiencies can be found, without compromising the rights set out in the Rome Statute. Since those rights are at the heart of the meaning and purpose of the ICC and are important indicators for persons, groups and States not yet convinced of the value and viability of the ICC, maintaining them is vital for the ICC's credibility and future⁶.

A review reflecting on experiences from a full cycle of proceedings would enable the Registry, the OPCV and legal representatives to undertake a 'lessons-learned' exercise, which would benefit from experiences of all relevant participants, including defendants and represented victims, and would also give the Registry a final and empirical monetary basis for its legal aid calculations.

(iv) The discussion document or proposal on which comments are given should be sufficiently clear and provide a detailed description of any consequences of proposals made.

The final discussion document lacks sufficient clarity and information to allow for genuine and meaningful consultations. For example, it is unclear how the Registry has produced monetary figures (such as the figure of €1000 for resource persons), nor is the discussion document sufficiently detailed⁷ to give an overview of the present composition of legal teams or current practice. Consequently, the current review does not allow for a genuine assessment of the impact of proposed cuts. The Team strongly urges the Registry to provide a clear and detailed description of the consequences of the cuts proposed to each legal aid item - on the Court's performance in general and on the relevant services and activities.

Given that the present review is to apply to 'cases currently before the Court and future cases'⁸, and in light of these concerns, the Team would strongly recommend that any review allow for genuine and far-reaching consultations to be undertaken and for sufficient time in which to do so.

II. Legal aid for Victims

At the outset, the team wishes to stress that contrary to certain misconceptions and statements made in relation to legal aid, the legal aid system of the Court only represents a small percentage of the ICC's overall budget.

⁶ See CICC Budget and Finance Team Comments and Recommendations to the Tenth Session of the Assembly of States Parties 12-21 December 2011, New York, 29 November 2011, available at: http://www.coalitionfortheicc.org/documents/CICC_Budget_and_Finance_Team_Paper_ASP10.pdf

⁷ For example, the discussion document details 'subdivisions of the trial phase' (paras, 8 & 9) without making reference to proposals for the Pre-Trial phase.

⁸ 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 appropriations for 2012 and the Contingency Fund, 21 December 2011, page 4.

(i) Legal Representatives for Victims (LRV) must receive adequate legal aid and resources in order to give genuine and effective legal representation to victims.

Genuine and meaningful victim participation can only be ensured if legal representatives for victims receive a sufficient level of legal aid. LRVs play a unique role at the ICC. While providing representation of victims at the Court, victims' representatives and their teams provide a sense of genuine involvement in proceedings and in principle, should bring a genuine sense of meaning to victims. In the field, LRV team members act as the face of counsel, communicate with victims and are engaged with issues which often go beyond simple legal representation. The Team is therefore extremely concerned that a number of cuts to legal aid and resources for victims' representatives have been proposed, despite the system of common legal representation, which already places significant burden on the Common Legal representative of victims given the huge number of clients they are obligated to represent. A genuine level of involvement, proficiency and professionalism in legal representation can only be maintained if resources are maintained.

(ii) The current legal aid system for victim's legal representation and existing practices (including the compositions of LRV teams) which have evolved to meet the needs of a meaningful participation, and of representing ever-increasing numbers of victims, in distant locations, should not be reduced. The current proposal goes against existing ICC jurisprudence on legal aid.

In the 2007 Report on the operation of the Court's legal aid system, it was stated that 'During the trial phase...in principle, legal aid paid by the Court should cover a 'core team'. It was foreseen that the 'core team' at Trial Phase would consist of one Lead Counsel and one Case Manager⁹. The 2007 review also gave the Registrar discretion to respond to 'actual participation procedures decided by the Chambers' and 'other relevant factors'.¹⁰ Consequently, the Registrar was able to take a flexible approach to the composition of victims' representation teams, in order that teams would have the necessary resources to meet their needs. However, as the number of cases at the Court has increased, so have the number of victims participating in trials.

In line with its flexible approach, the Registry has increased the number of staff members to meet the requirements for representing and reaching out to many victims in extended territories. The Trial Chambers have also recognised the need for additional staff members to those provided for in the core teams.¹¹ In the *Katanga* case, Trial Chamber II held that the

⁹ ICC-ASP/6/4, Report on the operation of the Court's legal aid system and proposals for its amendment, 31 May 2007, para. 55.

¹⁰ Ibid

¹¹ The jurisprudence of the Court has established that a support structure, to be proposed by the Registrar, should allow the common legal representative to: "a. Keep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Conduct for Counsel. The support structure should also allow the common legal representative to respond to a reasonable number of specific legal inquiries from individual victims; b. Receive general guidelines or instructions from his or her clients as a group and particular requests from individual victims; c. Maintain up to date files of all participating victims and their whereabouts; d. Obtain qualified legal support on a need basis; e. Store and process any confidential filings or other information, including the identity of his or her clients, in a safe and secure manner; f. Communicate with victims in a language they understand. Trial Chamber III, "Decision on common legal representation of victims for the purpose of trial", ICC-01/05-01/08-1005, para. 25; Trial Chamber II, "Order on the organisation of common legal representation of victims", ICC-01/04-01/07-1328, para. 17 ICC-01/09-01/11-243, para. 32; *Prosecutor v. Ruto et. Al*,

Registry had to provide 'a suitable support structure, in order to provide the common legal representative with the necessary legal and administrative support...in the field'.¹² Therefore, the Team is aware that in the *Katanga* case, two LRV teams have been composed, consisting of a legal representative and a case-manager in one team, and a legal representative, a legal assistant, a case manager and one field staff member in the other team. In the current *Bemba* case, two LRV teams were appointed. In this regard, the two *Bemba* LRV teams are currently composed of one legal representative per team, two case-managers (shared between the two teams) and two full time legal assistants based in the field (one per team). This was consistent with a Court decision, which held that at least one member of the LRV team must be based in the Central African Republic 'as a minimum'¹³. Finally, in the Kenya cases, the Pre-Trial Chamber endorsed the Registry's proposals to finance "to a reasonable level" the assistance of: (i) a legal assistant; (ii) a qualified case manager; and (iii) two field assistants'.¹⁴

The cases cited above, demonstrate that, despite the designation in 2007 of small 'core teams', the legal aid system has evolved to cope with and adapt to; an ever-increasing numbers of victims, the need for meaningful participation, and the challenges presented by representing victims in remote areas and in the field. This evolution has also been due to the realisation that, in order for the system of victims' representation to provide for effective and genuine representation, the original 'core team' required modification. This has been recognised in judicial decisions and through the discretion of the Registrar. The Team therefore welcomes the recognition by the Registry of the challenges created due to 'an insufficient budget to guarantee the appropriate liaison between the legal representatives and the persons represented by them'¹⁵.

The Team also welcomes, in principle, the addition of an additional 'resource person'¹⁶ in the field. Nonetheless, the Team is concerned by the imprecise mandate and remuneration as envisaged. It is not clear whether the allocation of the sum of €1,000 per month to the 'resource

Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11-249

¹² ICC-01/04-01/07-1328, *Prosecutor v. Katanga*, Order on Common Legal Representation of Victims, 22 July 2009, at para. 17: 'In order to allow the common legal representative to perform his or her duties efficiently, the Registry, in consultation with the common legal representative, shall propose a suitable support structure, in order to provide the common legal representative with the necessary legal and administrative support, both at the seat of the Court and in the field.'

¹³ ICC-01/05-01/08- 1005, *Prosecutor v. Bemba*, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, at para. 36: 'The Chamber endorses this proposal provided that each team is composed of two persons, one based in The Hague and the other in the CAR, as the minimum...Indeed, the Chamber is convinced that, for a meaningful representation of victims, it is of crucial importance that the legal representatives are enabled to maintain effective contacts with the victims in the CAR. The Chamber thus emphasises that the support teams should be composed so as to facilitate regular exchanges between the legal representatives appearing in Court in The Hague and their respective assistants based in the field who will liaise with the victims.'

¹⁴ ICC-01/09-01/11-249, *Prosecutor v. Ruto et al.*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011 at para. 79. and ICC-01/09-02/11-267, *Prosecutor v. Muthaura et al.*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 26 August 2011 at para. 93. See also ICC-01/09-01/11-243 at para.32.

¹⁵ Discussion Document at Para. 12

¹⁶ The indeterminacy of the term 'resource person' has also raised concerns in the Team. It is unclear from the proposal if the 'resource person' is to replace the role undertaken by intermediaries in the field. That the discussion paper does not tackle the question of intermediaries is unfortunate, as in the current scheme, to the Team's knowledge, it is often intermediaries that liaise with victims in the field.

person' would be provided as remuneration for the work done and/or also be expected to cover other costs such as travelling to and from victims' residence and organising information sessions as appropriate. In the latter case, this amount would likely fall short of the monetary resources necessary to undertake activities in the field. Further, with LRV field personnel currently not able to make use of Court resources in the field (including ICC field offices) which has added to the burden upon field staff, conducting meaningful, quality and efficient victim participation would not be possible with the field resources foreseen. Regardless of whether a single resource person is deemed to be sufficient, representation of victims in the field also requires sufficient personnel resources to ensure that staff can operate. For example, LRV field staff require a secure place of work, with adequate communications and IT resources, in order to liaise with victims and communicate. It is unclear if the proposed €1000 is a salary paid in addition to resources which will be allocated by the Registry. However, the Team consider it not viable to suppose that one (or more) resource persons can effectively liaise with victims and represent victims' needs and concerns in the field without other resources in addition to their salaries. It must also be noted that LRV field staff are often faced with serious security risks in the field and it is unlikely that the sum of €1000 would be sufficient to guarantee the protection of field based team members.

The Team is also very concerned that while the proposed change may appear to 'add' a 'resource person' to the core team, in practice, given the composition of existing teams already includes in some cases (in the Kenyan situation for example) more than one field-based assistant and a legal assistant based in the Hague, the proposal 'addition' to the 'core team' could actually lead to an overall reduction in resources available. Although this is not strictly detailed in the discussion paper, the Team is mindful that the effectiveness of common legal representation depends, on assistance, in terms of financial and human resources provided by the Registry. Considering the current number of victims participating in cases before the Court, a 'core team' and a 'resource person' in the field would clearly not suffice to undertake meaningful representation. The Team therefore strongly urges the Registry not to reduce the current formulation of LRV teams, even where that formulation would exceed the 'core team' as enhanced by an additional resource person. As described above, the evolved practice of the Registry has shown that in some instances, a team consisting of five members has been determined as the minimum to ensure a *meaningful* representation of victims and *effective contact* with victims. Any 'addition' to the core legal representative teams must not in practice lead to a reduction in LRV teams which would be to the severe detriment of the existing evolved and flexible practice and would constitute a backward step in representation of victims.

In that regard, the Team notes that the discussion paper is unclear as to whether resources will need to be requested or will be granted automatically to LRV teams in certain situations, or whether counsel will have to resort to litigation to obtain resources. The Team recommends that while allowing sufficient flexibility, a framework similar what is described as applicable to the Defence in Annex V of the ASP/6/2 document, could be adopted in relation to variable additional resources for victims' legal teams. Such a framework could extrapolate on the practice that has developed in relation to the first cases before the Court, providing clarification and transparency on which criteria would lead to automatic increase in the composition of the team or its travel resources.¹⁷

¹⁷ For example, set thresholds could be established in relation to the number of victims represented, and/or the number of crimes being charged, and /or the geographical location of victim which would automatically entitle legal teams to extra assistants, travel budget, resource persons etc.

(iii) The Registry must not reduce the current travel budget allocated to victims legal Representation for Victims Teams

Experience gained from the ICC's first trials has shown that it is not practicable to have meaningful legal representation at the Court without the capability of and budget for legal representatives to liaise and meet with victims in the field. It is critically important that legal representatives not only have regular contact with victim-clients through their staff in the field, but that they also have sufficient opportunity to engage with them personally.

Practice has shown (and in this regard the Team concurs with the Registry's statement) that 'direct contact between the legal representatives and the victims they represent is fundamental for adequate representation' and for a trust relationship to be established and maintained between victims and those who represent them. The Team notes also that judicial decisions have recognised the need for travel missions, in order for LRVs to keep their clients informed, receive general guidelines or instructions from their clients and to maintain up to date files of all participating victims and their whereabouts.¹⁸

From the discussion paper, it is not clear what the current amount allocated to legal teams for travel would be. The Team therefore calls on the Registry to provide more detail as to the number and costs of missions currently funded for LRVs and on how the amount of €18,000, which is recommended in the paper, has been established. The Team is not convinced that this amount would be sufficient for legal representatives to meet client victims, whose numbers will almost certainly increase and whose locations are also widespread and far-reaching. Indeed, in the Kenyan cases a number of missions have already been undertaken during the pre-trial phase, over the first six months of the case¹⁹. Furthermore, following consultations with a number of LRV teams, the Coalition understands that, for example, in the *Bemba* case, in one year, two teams of legal representatives have approximately undertaken up to eight missions a year (four each) with each trip lasting two to three weeks. On this basis, the current registry proposal of two missions a year per team in some cases represents a fifty percent reduction in missions, which will have severe implications for legal representatives to meet with victims and would seriously affect victims' genuine participation.

During missions, discussions with victims include gaining permission to disclose victims' identities to case parties, discussing the reasons behind the new appointment of a common legal representative and the victims' concerns for their personal safety. During meetings, victims have also expressed concerns about their personal safety, reporting instances of threats or coercion from within their communities, since they have been wrongly perceived as witnesses rather than victims. The legal representatives have committed themselves to raising the views and concerns of the victims before the Court and to "keep the Chamber apprised of the constantly evolving security situation".²⁰ In light of the clear needs for victims to meet with their legal representative, both for legal advice, related reassurance and information, the Team has

¹⁸ See for example, ICC-01/04-01/07-1328, *Prosecutor v. Katanga*, Order on Common Legal Representation of Victims, 22 July 2009, at para. 17

¹⁹ ICC-CPI-20110921-PR724, Kisumu: Registry and the common legal representative for victims consult with Kenyan victims ahead of the Confirmation of Charges Hearing in the case *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, and ICC-CPI-20110830-PR715, Nairobi: ICC legal representative consults with Kenyan victims on identity disclosure and clarifies distinction between victims and witnesses.

²⁰ ICC-CPI-20110830-PR715, Nairobi: ICC legal representative consults with Kenyan victims on identity disclosure and clarifies distinction between victims and witnesses, 30 August 2011

serious reservations as to whether the travel budget or number of travel missions provided for in the proposed system will be sufficient. Indeed, the Team submits that two missions a year should be considered the bare minimum per team and the possibility for an increase in the number of missions, in order to meet the needs of victims, should have been outlined in the proposal.

(iv) The number of budgeted Legal Representatives of Victims teams must be adequate to give genuine and effective legal representation to victims.

As the Court's profile grows and it takes on more cases, the likelihood is that the number of victims applying to participate in trials will also increase. For example, in the *Bemba* case some 2287 victims have been granted participatory status in the case. The Team is therefore concerned that the current discussion paper proposes to reduce the number of budgeted LRV teams to one per case, without also detailing that if one team is designated, that this team will be given the necessary resources to undertake its mandate, which may necessitate resources being allocated which go beyond the proposed 'core team' resources. Further, as the *Bemba* case has illustrated, it may well be necessary to appoint two (or more) legal representatives of victims per case, in order to ensure that victims' representation remains effective²¹. In this regard it is noteworthy that two legal representatives for victims were appointed, due to the large number of victims who had applied, rather than a conflict of interest. Rather than assuming that one LRV team will be adequate per case, either the approach taken in the *Bemba* case should be followed, and a number of LRV teams be appointed, or alternatively, a single LRV team must be granted the necessary resources to meaningfully represent a large number of victims. However, any decision on the number of legal teams or resources granted will only be possible after an assessment of the number and needs of victims on a case by case basis. To do otherwise would be to disregard recent Court decisions and the progress made in the evolving practice of victim participation.

Furthermore, the Team is concerned that, if the reduction to one LRV team is matched with a reduction in resources and the number of members in the legal team, it will be impossible to guarantee a level of genuine involvement, proficiency and professionalism in legal representation. Indeed, if legal representative teams are reduced to one per case, they will require more resources and more staff members in order to represent the needs of victims. The current proposal is therefore particularly disturbing at a time where the workload of LRV teams is increasing and at a time that it is highly likely that many more victims will be accepted in cases. Finally it should be noted that a reduction in the quality of victims representation would also impact on the expediency of cases, which, in the long run, would have the effect of increasing the cost of cases, contrary to the rationale behind the present review.

III. Legal Aid for Defence Teams

(i) Legal aid for defence counsel must be sufficient to guarantee the accused's right to experienced, competent and effective defence counsel; their right to adequate time and facilities to prepare a defence; and equality of arms to present their case.

Article 67(1) of the Rome Statute sets out the rights of the accused before the Court to have adequate time and facilities for the preparation of the defence and details the right to have legal

²¹ ICC-01/05-01/08- 1005, *Prosecutor v. Bemba*, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, at para 7.

assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it. These provisions therefore define the rights of every defendant to effective and competent representation. This is even more important at the ICC because of the distance, possible bias against the defence by the governments of situation countries and because most defence counsel do not have permanent offices in The Hague, as well as other disadvantages. The absence of adequate legal aid for defence exacerbates all of these factors and is a major theme of opponents of the Court.

In 2004, the document outlining the Court's legal aid system made specific provision that 'the payment system must contribute to maintaining equilibrium between the resources and means of the accused and those of the prosecution.' Legal aid for the defence goes to the very heart of ensuring fair trials, equality of arms and due process. The Team notes that the discussion paper proposes a severe disequilibrium between the proposed resources for defence counsel and for the Office of the Prosecutor (OTP). The Team highlights, that in order to ensure that a true equality of arms can be achieved, legal aid must be sufficient, in accordance with Principle 6 of the Basic Principles on the Role of Lawyers to ensure that the accused is assigned a "lawyer of experience and competence commensurate with the nature of the offence." Furthermore, appointed defence counsel must be able to provide the same level of utmost engagement in the preparation and conduct of the defence without incurring a financial detriment for doing so.

Finally, the Team wishes to highlight that due to the nature of conducting a defence, defence-teams often have to undertake similar functions as the OTP, often in a much more reduced amount of time which often results in working weeks of at least 60 hours. Currently no compensation for these additional hours is foreseen.

Accordingly, the Team firmly believes that legal aid and resources for the defence counsel must not be arbitrarily cut.

(ii) Legal aid for defence teams must be sufficient to ensure genuine investigation. Any decision on legal aid for investigations must allow for flexibility and be based on a sound review of current defence investigations.

The minimum guarantee of "adequate facilities for the preparation of the defence" (Article 67(1)(b)) grants the defence teams the right to all resources and access which are necessary to prepare the defence for trial. Further, article 67(1)(e) grants the right to 'obtain the attendance and examination of witnesses' and states that 'the accused shall also be entitled to...present other evidence'. This necessarily implies a right to carry out defence investigations at the scene of the alleged crimes.²²

The Team is very concerned by the proposal by the Registry to cut the professional investigator currently foreseen in the legal aid budget for defence investigations. The current system employed by the Court foresees a defence team of a professional investigator and a resource person (remunerated at the level of an assistant investigator).²³ By effectively reducing a defence investigation team by half, and maintaining only a resource person at the level of assistant investigator, the team has severe concerns regarding the ability of a defence team to

²² ICC-02/05-03/09, *The Prosecutor v. Banda and Jerbo*, Defence Request for a Temporary Stay of Proceedings, 6 January 2012, para. 26 onwards

²³ ICC-ASP/6/4, Report on the operation of the Court's legal aid system and proposals for its amendment, 31 May 2007, para. 47

carry out professional and effective investigations and a reduced capacity of the defence to carry out investigations. The Team strongly recommends that the Registry must maintain a full-time professional investigator, and the Team insists that recourse to an *ad hoc* and temporary professional defence investigator will not be sufficient to ensure the defence right to investigate.

Whilst the Team welcomes the incorporation of a long-term resource person into the basic defence team, the Team is concerned that recourse to a 'resource person' in order to undertake full-time investigations may be accepted by defence teams as an unsatisfactory compromise between long-term 'resource person' investigations or the inadequate figure of ninety days of professional investigations over the course of a case.

The Team is also concerned that the remuneration of the resource person of €1,000 is insufficient to guarantee quality investigations by experienced persons. Furthermore, it is unclear if the €1,000 per month would be in addition to other benefits and resources. It is also unclear if the budget of €1,000 would include the costs of conducting investigations (for example travel to remote areas), or the costs of ensuring the security of the resource person, or if €1,000 is a total budget for the resource person. The negative consequences of a budget allocation of only €1,000 will also be compounded in light of the closure of a number of field offices and the inability of investigators to rely on the resources which may have previously been provided in the field. The Team also notes that 2007 budget for resource persons was €14,616 for 90 days of investigation.²⁴ This equates to roughly €4870 per month. Therefore, the proposed incorporation of the resource person into the basic team is accompanied with a cut in the pay of the resource person by approximately €3,870 per month. The Team has strong reservations regarding the quality and competency of any investigation which may be carried out by a resource person with such a reduced amount of remuneration.

The Team also notes that the proposal lacks clarity regarding the availability of a professional investigator. The Team notes that a team may hire professional investigator where expenses 'are available' or if 'savings are generated by the team'.²⁵ It is currently unclear whether a defence team would have recourse to a professional investigator only if a surplus existed in the budget of the defence team or was generated by savings. If this is the case, this would severely impact on a defence team's ability to undertake professional investigations.

The Team strongly urges the Registry to reconsider the proposal to cut the budget for a defence team's professional investigator. The Team remains unconvinced by the Registry's assertion that 'the professional investigator foreseen in the investigations budget of defence teams has scarcely been used and therefore can be cut from the budget for investigations'. The *Banda and Jerbo* case has shown that it is often very difficult, if not impossible, for defence teams to access certain situation countries. This may be due to a lack of cooperation by the state-in-question, or may be due to overriding security concerns and unsecure environments. Whilst these circumstances, which are beyond the control of defence teams, may preclude professional investigations, they do not provide justification for cutting the budget for professional investigators.

²⁴ *Ibid.*

²⁵ Discussion document para. 16

IV. Remuneration for Victims and Defence legal Teams

(i) Remuneration to Counsel must be sufficient to guarantee experienced, competent and effective professional legal representation

At the outset, the Team wishes to recall that the remuneration of counsel must be sufficient in order to ensure that the most experienced, qualified and competent counsel appear on behalf of defendants and victims before the International Criminal Court. Defendants at the Court will have been charged with the most serious crimes which in accordance with Principle 6 of Basic Principles on the Role of Lawyers must be reflected in the experience and competence of the appointed counsel. Victims will have suffered the worst possible harm. Therefore, an exceptional calibre of defence and victim legal representation is essential in order to achieve justice at the International Criminal Court, and is a crucial component of a fair trial. As a model of judicial administration, the Court must be steadfast in its commitment to ensure the proceedings before it are in conformity with the highest legal standards and due process rights of suspects and accused persons. In order to guarantee that defendants are afforded the best defence it is absolutely crucial that representatives are capable of providing a high quality, competent and effective defence. Similarly, victims' counsels will be called to play an important role during any reparation phase and have already demonstrated that they make an important contribution to proceedings at the pre-trial and trial phases and will be called to play an important role during any reparation phase. An appropriate level of remuneration is therefore essential to ensure that only highly qualified and competent legal representatives will appear before the Court.

Finally, the Team stresses that the level of remuneration provided to legal representatives for victims and defence does not also include any other benefits such as social security, pension advantages and rental subsidies amongst others. Therefore, the basic remuneration of counsels has also to cover these expenses. Given that legal representatives may engage in full-time cases for several years, the payment by representatives of these expenses will amount to a significant sum. Ultimately, the Team is severely concerned that an insufficient level of remuneration will severely affect the quality representation at the ICC which will in turn gravely impact on the realization of defendants' and victims' rights set out in the Rome Statute.

(ii) The Registry must maintain the gross pensionable rate of remuneration for legal team members.

The Team notes that an amendment to the Headquarters Agreement or the Agreement on the Privileges and Immunities of the Court (APIC) extending exemption from income tax, may provide an avenue to reduce the level of remuneration which it currently provides to defence and victims' counsel. However, the Team remains concerned by the adverse affect the current proposal will have on the remuneration of Counsel. The change as proposed would lead to a situation where counsel would be underpaid until they could prove that they had paid income tax, which would only be verifiable after having submitted a tax return – a process which may take place well after the counsel has been paid at the net rate. While ICC staff contribute to, and benefit from, the common UN system, a legal representative, by not paying tax, would be forced out of the social security arrangement that he or she currently finds him or herself in during the appointment. Thus, while a tax exemption would achieve an equal net salary, this equality is superficial as the counsel must waive the same rights to which ICC officials and other persons falling under a collective security system are entitled. This process, rather than saving resources, will involve additional administration for the Registry and defer payment to a legal team

member, thus impacting on the Court's budget in the future. Currently, the List of Bar Counsel to the ICC incorporates counsel from approximately 62 different states²⁶. A significant length of time will be required for all of the states with bar representatives, some of whom are not States Parties to the ICC, to ratify and implement the APIC and the Agreement. In the meantime, defence and victims representatives will be adversely affected by the current proposal.

(iii) Compensation for Professional Charges must be maintained

Upon accepting a mandate at the ICC, defence and victims counsels often undertake to move to The Hague for a considerable length of time. During this time, counsel with considerable experience and expertise must leave their home practice. However, the practical costs associated with running an office continue and the payment of professional charges, such as bar fees have also to be paid. The compensation for professional charges also reflects the detriment to the 'home-office' of counsels who have to leave for several years. In this regard, a termination indemnity would be appropriate. Therefore, The Team highlights, that in removing compensation for professional charges, counsel will be severely affected to the detriment of their office and professional life. The cutting of compensation charges may severely discourage the most highly qualified and competent counsel from working at the Court, to the detriment of defendants, victims, and the institution of the International Criminal Court.

The Team recommends, that rather than cutting compensation for professional charges, clear rules should be elaborated to determine the scope of said compensation. In this regard, the Team would also welcome precise guidelines on documents to be disclosed in order to gain compensation. This would temper certain practical difficulties which have been experienced by legal representatives in gaining compensation for professional charges, and more importantly, this would enable legal representatives to gain reasonable compensation, in a manner which would be both transparent and clearly justified.

(iv) The current remuneration levels during 'non-presential' phases must be maintained at the current level

Paragraph 30 of the discussion paper proposes that during non-presential phases of a case, defence teams may receive 75 per cent of the basic remuneration. This is on the basis that during non-presential phases, 'counsel and associate counsel are not based in the Hague'. The Team notes however, that a correlation between non-presential phases and level of work cannot always be made. Indeed, the presumption that non-presential phases of a trial necessarily entail a reduced work load is not always correct. For example, in a recent decision concerning the Trial-3 phase, in the *Lubanga* case, the Trial Chamber held that 'There are a variety of tasks that the defence will need to undertake between closing arguments and the Article 74 Decision. Particularly the review of the case record that needs to occur in order to issue public, versions of the filings and the transcripts, is likely to be a time-consuming exercise. In addition... any conscientious defence team in these circumstances will give careful attention - to the extent possible - to the next stages of the trial proceedings.'²⁷ The Team is also

²⁶ See: List of Counsel before the ICC, available at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/defence/counsel/list%20of%20counsel/list%20of%20counsel%20before%20the%20icc?lan=en-GB>

²⁷ ICC-01/04-01/06, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, 30 August 2011 at para. 59

unconvinced that stays of proceedings would constitute non-presential phases. In this regard, the Team notes that during stays of proceedings, defence teams may continue to file applications and observations to the Court. For example, during the two stays of proceedings during the *Lubanga* case, the defence made 28 filings to the Trial Chamber. The Team therefore strongly urges the registry to maintain the level of remuneration during non-presential phases.

Finally, it is not clear whether the proposed change in relation to remuneration during 'non presential' phases would also apply to victims' legal representatives. As with defence counsel, The Team is not convinced that a connection between non-presential phases and level of work can automatically be made. For example, the attendance at trial hearings will often prevent LRVs from conducting missions in order to meet directly with their clients. Thus a stay of proceedings, or other 'non presential phases' are often times when these missions, and their preparation, become possible. This will be all the more important with regards to the preparation which may be necessary for any reparation phases before the ICC. The Team therefore strongly urges the registry to maintain the level of remuneration during non-presential phases for LRVs.