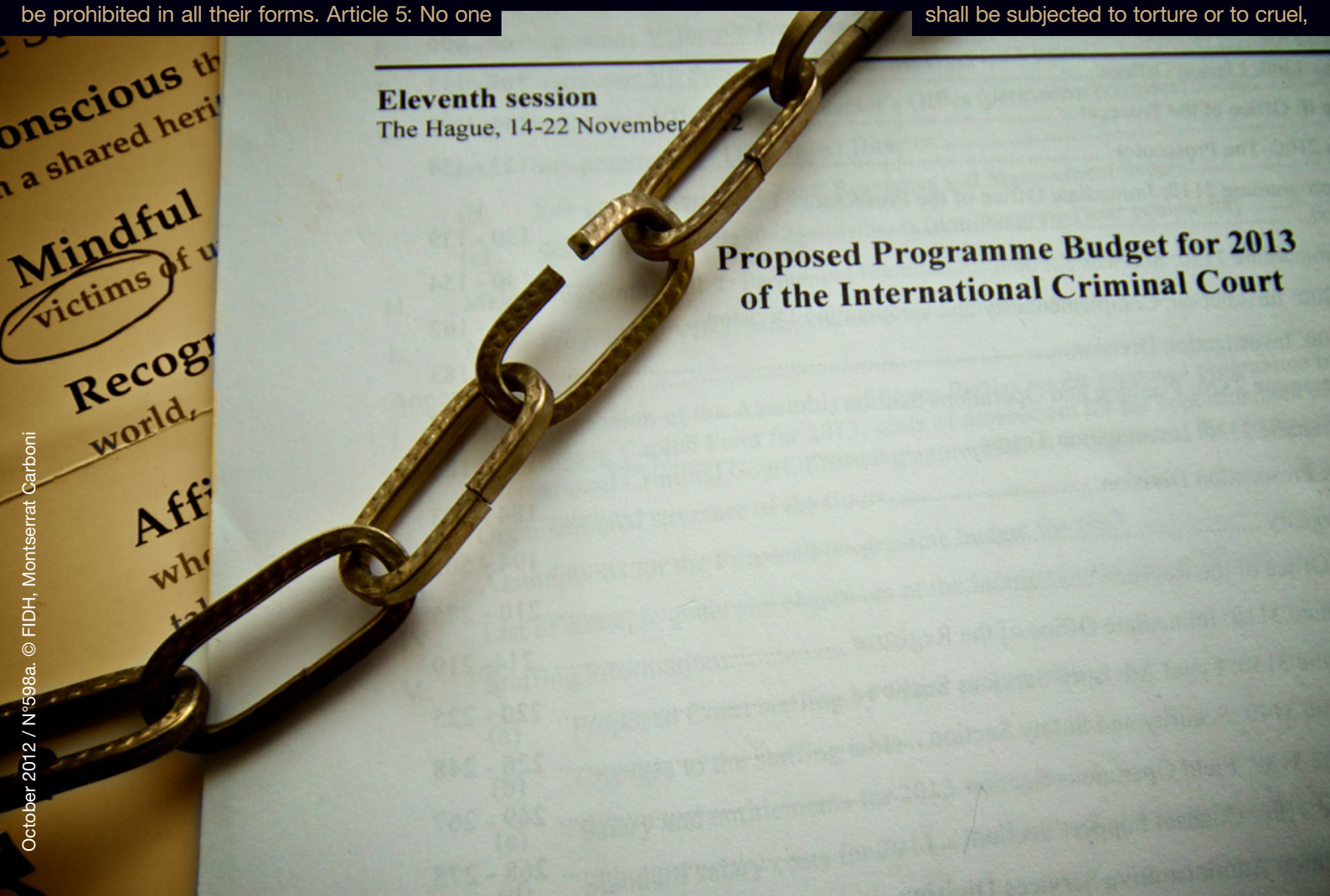


CUTTING THE WEAKEST LINK

Budget Discussions and their Impact on Victims Rights to Participate in the Proceedings

Position Paper, 11th Session of the Assembly of States Parties to the Rome Statute

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,



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Introduction

At the opening of the Rome Conference, in 1998, Kofi Annan, then UN Secretary General, reminded the State representatives that, in drafting the Statute, “the overriding interest must be that of the victims, and of the international community as a whole. I trust you will not flinch from creating a court strong and independent enough to carry out its task. It must be an instrument of justice, not expediency. It must be able to protect the weak against the strong.”

The discussions towards the 11th Assembly of State Parties (ASP) have been driven by budgetary concerns, triggered by the difficult financial environment suffered by its major contributors. The ICC has the challenge to grow in the midst of a financial crisis. FIDH is well aware of that, and is supportive of the adoption of “efficiencies” in the Court, as long as

they do not transform the institution from an instrument of justice -particularly for victims- into one of “expediency”.

“I trust you will not flinch from creating a court strong and independent enough to carry out its task. It must be an instrument of justice, not expediency. It must be able to protect the weak against the strong”.

Kofi Annan,

Opening Statement of the Rome Conference, 1998

FIDH understands the exceptional financial constraints of member states. We consider, however, that the zero growth principle that has been driving some of the discussions is just not acceptable if the international community is looking to reinforce a sustainable and relevant ICC. It is in these difficult circumstances that the commitment of member states to justice for the most serious crimes is put to a test.

Quality justice does have a cost, and that is a reality for any judicial institution.

The Court has already presented an extremely lean budget for 2013. However, the Assembly of States Parties, during its 10th session, requested the Court, in preparing its budget, to identify possible reductions to bring it to the level of the 2012 approved budget. The Court did so in a paper of 12 September 2012. However it warned that: “The Court believes that the activities affected by the identified reduction measures and their corresponding resources are of high importance and part of the mandatory activities within the Court’s legal framework”¹.

The OTP also had to identify some reductions to bring its budget to the level of 2012. Due to the nature of its activities, “the only option under the control of [the OTP] where significant costs can be reduced is the reduction of investigations, which strikes at the core of the Rome Statute and protracts impunity”².

The situation is worrying. Financial concerns should not limit the Court to act in relation to situations or crimes that fall under its jurisdiction. To the contrary, the Court should be provided with enough funding to comply with the Rome Statute, independently. State Parties, civil society and the Court itself should remain vigilant that judicial and prosecutorial decisions do not become tied up by financial constraints.

States should listen to the President of the ICC warning that rushed and short term saving may eventually be more costly:

1. Impact of measures to bring the level of the International Criminal Court’s budget for 2012 in line with the level of the approved budget for 2012, CBF19/03p04/Rev.1, 12 September 2012, par. 4.

2. *Ibid*, par. 28.

“Cost reductions need to be thought through very carefully. Otherwise resource constraints can lead to further delays in proceedings. The long-term additional cost of such delays, in terms of legal aid, witness protection or extension of judges, can be much higher than any short-term savings.³

The ICC tries the most massive and heinous crimes and it has to do so in countries still suffering from armed conflicts or in challenging post-conflict situations. ICC proceedings, in The Hague, will only have a real impact in the field, if those affected by those crimes are able to seek justice in a meaningful manner. For this, they need to be duly informed of the proceedings and be able to participate in them.

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”⁴. And then 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 concerns⁵.

Victims should be at the centre of concerns of the ICC and the Assembly of State Parties, including the Committee on Budget and Finance (CBF). FIDH is however concerned that some of the budget lines affected by cuts or the zero growth principle are related to programs that actually benefit the victims’ participation. Victims should not bear a disproportionate burden in the financial difficulties of the Court.

The long-term additional cost of such delays, in terms of legal aid, witness protection or extension of judges, can be much higher than any short-term savings.

Judge Sang-Hyun Song
President of the International Criminal Court

At the first decade of the ICC, The Hague Working Group facilitation on victims, affected communities and the Trust Fund for Victims and The Hague Working Group facilitation on Reparations have identified that the current system to deal with applications from victims to participate in the proceedings is unsustainable. Indeed, resources allocated to the Registry’s Victims Participation and Reparations Section (VPRS) are insufficient. In 2011, this section had to deal with 564 applications per month for seven situations, with the same resources it had in 2007, when it received 28 applications per month from four situations⁶.

The discussions on the legal aid system present particular concerns and challenges since it is key to ensure meaningful participation for victims. FIDH welcomes that the views of civil society have been taken into consideration, and that there is a call towards a comprehensive review of the system. However, FIDH wants to respectfully warn States, that some of the discussions have included topics -that may be reiterated in the review- that are at risk of overstepping the powers of the Judges in deciding about some crucial judicial issues⁷.

We present the Assembly some of our views and recommendations in relation to some of these issues affecting victims’ participation in the proceedings. Furthermore, in the midst of the discussions in relation to budgetary cuts, FIDH respectfully submits the need to base the discussions on these issues on the principles underlying victims’ participation, according to the legal texts and the jurisprudence of the Court.

3. Judge Sang-Hyun Song, President of the International Criminal Court, Remarks at the 22nd Diplomatic Briefing, 19 September 2012.

4. Rome Statute, Preamble par. 2.

5. Rome Statute, Art. 68.3

6. ICC Report on the Review of the System for Victims to Apply to Participate in Proceedings, 24 September 2012, page 4.

7. See below on the issue of legal aid.

II. The Right of Victims to Participate in the Proceedings: Established Principles

The Rome Statute allows victims to present their views and concerns in proceedings before the Court where their personal interests are affected. Victims' participation at the ICC allows them to engage in the proceedings beyond sitting as witnesses. Their participation is viewed as assisting justice - thus, contributing to the purpose of the Statute to fight impunity. It is also meant to have a restorative significance; therefore, it needs to be meaningful for victims.

“ The object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules is to provide victims with a meaningful role in criminal proceedings before the Court (including at the pre-trial stage of the case) so that they can have a substantial impact in the proceedings”.

Single Judge, Pre-Trial Chamber I
*The Prosecutor v. Germain Katanga
and Mathieu Ngudjolo Chui*

The Rome Statute⁸ and the Rules of Procedure and Evidence (RPE)⁹ grant victims an independent role in the proceedings. They contribute with their views to a case, the sentence of which is likely to have significance to their lives, families and communities¹⁰. As long as a sentence serves to acknowledge the victims and their suffering, it will be a form of reparation¹¹ and, within the Rome Statute system; this has been sought by enhancing participation for victims.

At the ICC, victims do have an independent standing in the proceedings. Very early in the development of the Court's jurisprudence, Pre-Trial Chamber I ruled that: “the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on several occasions, victims participating in criminal proceedings cannot be regarded as ‘either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different’”.¹²

The jurisprudence of the court has been consistent in that victims' participation cannot be limited to a symbolic nature. It should be meaningful¹³, as clearly stated by the Single Judge in the Katanga case:

“[T]he Single Judge cannot agree with those claiming that the object and purpose of these provisions is confined to provide victims with a limited access to the Court's

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

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

10. 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

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

12. ICC-01/04-101-tEN-Corr 22-03-2006, para. 51.

13. See: ICC-01/04-01-07-1788-tENG, par. 57 and ICC-01/04-01/07-474, par. 51.

criminal proceedings, so that they become ‘second-class’ participants, who have a sort of ‘in-courtroom observer status’ and must request the leave of the Court at any time if they would like to perform any kind of procedural activity.

“Quite the contrary, the Single Judge considers that the object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules is to provide victims with a meaningful role in criminal proceedings before the Court (including at the pre-trial stage of the case) so that they can have a substantial impact in the proceedings”¹⁴.

The RPE and the decisions of the Judges have developed how this participation in the proceedings is to take place.

1. The Application to Participate

According to the RPE, victims who want to present their views and concerns should make a written application to the Registrar¹⁵. Applications are reviewed by the Victims Participation and Representation Section (VPRS) of the Registry, which may, sometimes, provide victims with assistance in filling in a form. VPRS analyses the applications and presents a report to the relevant Chamber, which then decides on the right of victims to participate and at what stage. The form applicants have to fill in has been simplified by VPRS to facilitate the process.

Applications may also be presented via a representative, with the consent of victims. Where there are a significant number of applications, the Judges may establish a manner to consider them in a way to ensure the effectiveness of the proceedings¹⁶.

As the Judges have established very clearly in their decisions, the modalities of victims’ participation in the proceedings is, ultimately, a matter requiring a judicial determination. It is for the Judges to decide whether the person or organisation can be considered as a victim, in terms Rule 85, and how they will participate in the proceedings¹⁷.

2. Legal Representation at the ICC

At the ICC, victims have a right to have a legal representative¹⁸. Proper and quality legal representation ensures a meaningful participation. The legal texts and the case law have drawn some basic principles governing victims’ legal representation:

Freedom to choose a legal representative

Victims should be able to choose their legal representatives freely¹⁹. However, this is not an absolute right. Firstly, legal representatives should meet certain criteria and be admitted in the list of counsel kept by the Registry. And secondly, under certain circumstances, the Court may require the victims to designate a common legal representative²⁰.

14. See: ICC-01/04-01/07-474, paras 156-157.

15. Rules of Procedure and Evidence, Rule 89.

16. *Ibid*, Rule. 89 (4)

17. ICC-01/04-01/06-601, Pre-Trial Chamber I, 20 October 2006, p. 10-11, ICC-01/04-01/06-824, ICC-02/04-101, Pre-Trial Chamber II, 10 August 2007, ICC-01/04-01/06-1119, Pre Trial Chamber I, 18 January 2008, ICC-01/04-423, Pre-Trial Chamber, 24 September 2007, par. 5.

18. Rules of Procedure and Evidence, Rule 90.

19. *Ibid*.

20. FIDH, Victims’ Rights Before the International Criminal Court. A guide for Victims, their Legal Representatives and NGO’s. Chapter 5, page, 5.

Common Legal Representation

If a large number of victims apply to participate, in a case, they may be requested to choose a common legal representative for victims (CLRV)²¹. Because of the massive nature of the crimes the ICC deals with, some form of common legal representation has been the norm, rather than the exception.

Registry's Proposed Criteria for the Designation of Common Legal Representatives for Victims

- **Trust with victims.** Having an established relationship of trust with the victims or the ability to establish one. This could entail having already represented or engaged with them, or being known by the victims as a human rights lawyer or community leader. In relation to this, common cultural, ethnic or linguistic background may be considered, as well as the lawyer's gender.
- **Committed to victims.** Having a demonstrated victims' centred approach to work.
- **Familiarity with the situation.** Being familiar with the situation or the country.
- **Experience.** Having relevant experience in international criminal law trials, either at international jurisdiction or litigating in relation to international crimes before national courts, specialized studies, experience representing large numbers of victims, etc.
- **Availability.** In particular, to maintain communication with victims and the Court, follow the proceedings and litigate. Full time dedication is required during trial and reparations proceedings.
- **Information technology skills.** Some basic skills are required to ensure proper use of e-Court systems, email and word processing.

Source: ICC-01/09-02/11-214- Anx3, 5 August 2011.

If victims are unable to choose a common legal representative, the Judges may request the Registrar to appoint one. When choosing a CLRV, the views of the victims should be taken into consideration²².

In the selection of the common legal representative, the Judges and the Registry should ensure that distinct interests of victims are properly represented, and that conflicts of interest are avoided.²³ The designation of a common legal representative should also take into consideration local traditions²⁴.

The Registrar has proposed some general criteria common legal representatives should meet²⁵ that have been supported by the jurisprudence of the Court. These requirements may be adapted to the specifics of different situations and cases.

The system of representation has led to an increasing presence in the field. Presently, all legal representation teams have some form field presence in the respective situation countries of the victims they represent²⁶.

Field presence is essential to ensure proper communication with victims, and to ensure a due representation of their interests and concerns in the courtroom.

21. Rules of Procedure and Evidence, Rule 90.2.

22. Regulations of the Court, Regulation 79.2.

23. Rules of Procedure and Evidence, Rule 90. See also, ICC-01/04-374, par. 40.

24. Regulations of the Court, Regulation 79.2.

25. ICC-01/09-02/11-214- Anx3, 5 August 2011.

26. Comments by the Legal Representatives in the Kenya cases, page 2.

Legal Aid

According to the Rules of Procedure, victims who do not have the financial means to pay for their representatives should be provided with legal aid²⁷.

In 2004, the legal aid system of the Court was established²⁸ to rest on the following principles:

Equality of arms. Legal aid should help in maintaining equilibrium of resources and means of the accused and those of the prosecution.

Objectivity. Resources should be allocated in relation to the needs of the case and not of the individual needs of the legal representation or defence team.

Transparency. Whilst confidentiality of substantive work of the teams should be protected, the payment system should meet the requirements of public funds budgeting oversight and auditing.

Continuity. “The payment system must provide for mechanisms that are flexible enough to adapt to situations as they arise in order to preclude any paralysis prejudicial to the interests of the due administration of justice”.

Economy. Legal aid should cover expenses that are reasonable and necessary.

The scheme was reviewed in 2007²⁹, basically introducing more flexibility.

27. RPE, See also, ICC-01/04-374, par. 40.

28. 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.

29. 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.

II. Challenges for Victims Participation

1. Dealing with applications

The crimes under the jurisdiction of the ICC are, by their very nature, massive. It should not be surprising, then, that as the judicial activities of the Court develop into new proceedings, more and more victims apply to participate in the proceedings. Whilst this shows the trust victims' have on the capacity of the ICC to render justice, it triggers serious challenges on how to deal with significant numbers of applications from victims who show an interest to express their views and concerns, and on how to represent them.

The Registry has developed standard forms for victims' applications to participate in the proceedings, and to establish whether they qualify as victims³⁰. The Registry has reviewed the forms, to simplify them and make it easier for victims to fill them in by reducing the number of questions and pages.

Even if these forms may render the work easier, the Court has been faced with difficulties in processing them on time due to the scarcity of its resources in comparison to the amount of applications. According to the Court, between 2010 and 2011 the number of applications received per month grew 300 per cent, from 187 to 564. As a result, there is a backlog of applications.

This has not escaped the attention of the ASP. During its 10th session, it requested the Court to review the system for victims' application to ensure its sustainability, efficiency and effectiveness³¹. FIDH welcomes this concern.

The Study Group on Governance (Cluster I) has also identified victims' participation as one of the issues to be reflected upon in the lessons learnt exercise of the first decade to expedite the judicial process.

On 24 September 2012, the Court presented a report on victims' participation, and it shows the difficulties to strike a balance between the present budgetary expectations of some State Parties to zero growth and the ability to ensure the rights of victims and other parties in the proceedings. Many of the proposals also affect their participation. However, some would require changes to the RPE, the Regulations of the Court, and even the Rome Statute.

The Court concluded that, to maintain the present system to deal with victims' application it would require more resources. Even then, it may not be a viable solution in the long run. The Court explored different options, including a partly collective application process and a fully collective application process that would lead to collective participation in the proceedings.

The report of the facilitation on Victims and affected communities and the Trust Fund for Victims and the facilitation on Reparations suggests that a collective approach to victims' applications should be adopted.³²

30. Rules of Procedure and Evidence, Rule 85.

31. 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.

32. ICC-ASP/11/32, Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations,

FIDH supports the efforts to find an efficient manner to deal with victims' applications, with a view to ensure their rights under the ICC framework. Nevertheless, since the Court deals with challenging situations in the field, it may be the case that one single modality could not be adopted, and flexibility may need to be considered as a necessary principle of any system adopted.

FIDH is not opposed, in principle, to a collective approach to applications. However, changes should not be driven, solely, by budgetary concerns. When considering their efficiency, short-term savings should not be privileged over long term ones. The right of victims to have a meaningful participation in the proceedings should be the overriding interest.

The review of the system of application, being crucial for the modalities of participation of victims and the length of the proceedings should not be rushed. In the meantime, VPRS should be granted enough resources to effectively deal with the existing backlog.

Before adopting any measures, consultation with victims' groups, legal representatives, experts, civil society and other relevant stakeholders, including those based in situation countries, would be essential to ensure the legitimacy of the process. This is necessary, particularly, when victims' participation modalities are proposed.

2. Legal Aid for Victims

Victims of grave international crimes suffer from different forms of denial of their rights, which at the same time has made them an easy target for perpetrators: discrimination of all sorts -gender based, racial, ethnic, religious-, social exclusion, lack of access to state institutions and services and, most likely, poverty. For the large majority of victims who suffer from poverty or lack sufficient financial means, legal aid is essential to ensure their right to participate in the proceedings.

FIDH believes that proper and independent legal representation can only be achieved with an efficient and comprehensive legal aid system. Over the years, FIDH has consistently supported the efforts to establish an adequate and efficient legal aid scheme to ensure participation for victims³³.

Legal aid should be a tool, not a limitation, to ensure a representation capable of providing a meaningful representation for victims. Such assistance should provide the financial resources necessary to ensure independence of legal representatives, communication between the lawyer and her or his clients and that distinct interests are represented.

It should not come as a surprise that as the number of proceedings increase, the costs of legal aid would also increase, since for each new case, new lawyers should be appointed for the defence and for the victims. Legal aid has been identified as one of the cost drivers of the budget.

The discussion set off after the 10th Assembly of State Parties noted that the cost of the legal aid system (for the defence and victims) showed 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 EUR 1.5 million Euros.

23 October 2012, para. 25.

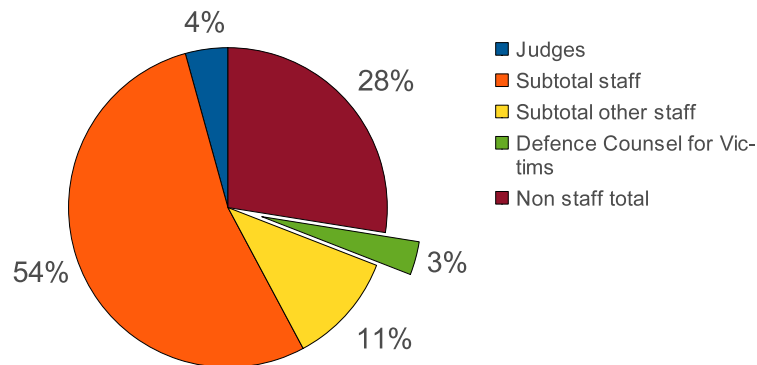
33. FIDH, Recommendations to the Seventh Assembly of States Parties to the Rome Statute, The Hague, 14-22 November 2008, Position Paper No. 13. In 2009, FIDH also issued a report on Legal and financial aspects for funding victims' legal representation before the Court. FIDH has also actively participated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

For the year 2013, the increase in the proposed budget of legal aid (for victims and the defence) would be EUR 0.9 million³⁴. But these numbers do not reflect the EUR 1,1 million reductions resulting from measures suggested by the Registry, if they are approved. Thus, for the year 2013, the budget for legal aid, could in fact be reduced.

The total budget for Counsel for Victims approved for the year 2012 was almost EUR 4,3 million, 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 4 million, representing 6% of the Registry's proposed budget and 3,4% of the overall proposed budget for the Court. Without taking into account the measures proposed by the Registry below, the proposed budget for paying victims' legal representative presents a reduction of 6.3%³⁵.

Expenditure by subject

Proposed Budget 2013



Whilst reduction in the budget for the Counsel for Victims may lead to significant problems to ensure proper representation, it is also clear that it will not entail a substantial impact in the overall financial situation of the Court. **In other words, cutting an already slim slice may not reduce significantly the size of the budgetary pie.**

In addition, any cuts in the budget for victims should be carefully considered so as to make sure that they would not, in the long run, be translated in more expenses.

FIDH has insisted that 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 (such as freezing and seizing of assets).

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

34. Proposed Budget for 2013 of the International Criminal Court, ICC-ASP/11/10, Table 5.

35. Proposed Budget for 2013 of the International Criminal Court, ICC-ASP/11/10, Table 51, and para. 266.

The deficit in the 2012 budget has impacted legal aid³⁶. In the search for cost savings measures on this financial assistance, the teams working on legal representation for victims have already faced problems to do their job. The consultation with victims has been made more difficult in the Kenya case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, and the DRC case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. In the latter case, the lawyers could not communicate with the victims in the preparation of the closing arguments³⁷. According to their lawyer, they felt that: "The ICC did not need victims, that the ICC does not want to listen to us. How can we believe that they want to listen to us when they deny our lawyer the opportunity to defend us?".

In addition, for many legal representation teams, the stability of their composition was shaken up, and they suffered from less availability of supporting staff. For instance, legal aid discussions have led to several changes in the composition of the teams of Kenyan victims legal representatives. In these circumstances, it is difficult to ensure a coherent and meaningful representation for victims.

The 2012 Discussions on Legal Aid

During the year, several changes to the legal aid system were implemented, and civil society groups who have consistently called for a comprehensive review of the system have extensively commented the reform.³⁸

On 7th December 2011, the Registrar produced a discussion paper on legal aid for the defence and victims. During its 10th Session, the Assembly of States Parties³⁹ requested the Registrar to further consultations with different stakeholders. Nevertheless, 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 (...) "⁴⁰.

By the end of December, the Registrar submitted a "Discussion Paper on the Review of the ICC Legal Aid System"⁴¹. The consultation process was limited and took place in a very short time. On 20 February the Registry produced the "*Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011*". In April, the consultation was finally extended following a request from States Parties, answering to concerns from lawyers associations and civil society. The Registry sought comments on the different changes proposed.

Cost Saving Measures Proposed by the Registry on Legal Aid

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.

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 to 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.

36. Impact of measures to bring the level of the International Criminal Court's budget for 2012 in line with the level of the approved budget for 2012, CBF19/03p04/Rev.1, 12 September 2012, par. 7-

37. Transcripts of Closing Statements of 16 May 2012, ICC-01/04-01/07-T-337-Red-ENG CT WT 16-05-2012, page 53.

38. See: CICC, Comments and Recommendations on the Discussion Paper on the Review of the ICC Legal Aid System, in: <http://www.fidh.org/Comments-and-Recommandations-on>

39. 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.

40. ICC-ASP/10/20, para. 19.

41. "Discussion Paper on the Review of the ICC Legal Aid System", 19 December 2011.

Remuneration during phases in which activities are considerably reduced. After a 30 days prior notification, payment to teams will be automatically stopped 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 for hours effectively worked on necessary tasks, with a ceiling equal to the monthly remuneration of each team member.

The possibility of an enhanced role for the OPCV. 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 decision:

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

Source: Supplementary Report of the Registry on four Aspects of the Court’s Legal Aid System

On 17 August 2012, taking into account the different comments received through the consultation process, the Registry proposed a “*Supplementary Report of the Registry on Four Aspects of the Court’s Legal Aid System*” (the Supplementary Report). FIDH has welcomed the efforts of the Registry to reflect the views and recommendations of civil society and practitioners consulted in its latest proposal.⁴²

The Registry’s report of 17 August 2012 focuses, as per request of the Bureau of the Assembly of States Parties, focuses on four issues: remuneration for counsels in the case of several mandates, expenses policy, remuneration during phases in which activities are considerably reduced, and the possibility of an enhanced role for OPCV.

The report of the Bureau on Legal Aid suggests the immediate adoption of the first three measures. In relation to the fourth measure, the Report of the Bureau noted that “some States Parties

and other stakeholders voiced concerns that the proposed enhanced role of the OPCV could have an impact on the quality of legal representation or on the fairness of the judicial process, or regarding the OPCV- related measures, that issues of independence, accountability, unnecessary competition, overlap or conflict of interests could arise”⁴³. Therefore, there was no consensus on adopting an enhanced role of the OPCV. The report of the Bureau recommends then, to start a comprehensive or systemic review.

However, there is still no certainty –not even for some of the current legal representatives- on how the changes in expenses policy will affect the work of victims’ legal teams – if it is going to affect it at all. In this sense, there is a need of the Registry to communicate in this regard with all counsels and to ensure proper consultation on the implementation of these policies.

FIDH would specifically like to comment on the issue of the enhance role of the OPCV and the remuneration phases.

An enhanced role for the OPCV and the establishment of mixed teams for the representation of victims

FIDH welcomes that the option of an exclusive representation by OPCV has been ruled out from the proposal. External counsels provide the proceedings with an added value for their independence, their privileged access to victims, and their understanding of local realities that contributes to build a relationship of trust between victims and their legal representatives.

42. FIDH, Comments on the Proposed Changes to Legal Aid, September 2012 in: http://www.fidh.org/IMG/pdf/fidh_position_paper_on_legal_aid_-_cbf_-_sep_2012.pdf

43. ICC-ASP/11/2, Report of Bureau on Legal Aid, 22 October 2012, para. 18.

Whilst, in principle FIDH agrees with the Bureau's report that the right to a free choice of counsel is not an absolute one, we want to stress that it could be limited only by a request to appoint a CLRV, and by the requirements of appointing a lawyer that meets certain criteria. Furthermore, in the designation of a common legal representative, the views of victims should be taken into consideration.

OPCV was created as an office to provide assistance for victims' legal representation⁴⁴. Whilst administratively depending on the Registry, OPCV should conduct its substantive work as a wholly independent office. Such independence extends to its staff⁴⁵.

The role of OPCV is to assist legal representatives of victims and victims. According to the Regulations of the Court, the tasks of the Office include:

- “ a) Providing general support and assistance to the legal representative of victims and to victims, including legal research and advice and, on the instruction with the leave of the Chamber, advising on and assisting with the detailed factual circumstances of the case;
- b) Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues;
- c) Advancing submissions, on the instruction or with the leave of the Chamber, in particular, prior to the submission of victims' applications to participate in the proceedings, when applications to rule 89 are pending, or when a legal representative has not yet been appointed;
- d) Acting when appointed [by the Chamber⁴⁶ or as a duty counsel when a person has not yet representation or in a situation of urgency⁴⁷. In the later case, the Registrar shall take into consideration the wishes of the persons –the victims-, the geographical proximity of and the languages spoken by the counsel⁴⁸].
- e) Representing a victim or victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice”⁴⁹.

The role of OPCV in leading victims representation is foreseen only in exceptional cases – in respect to specific issues, when a legal representative has not yet been appointed or victims have not been granted leave to participate, in cases of urgency- and it would always need leave from

“The Chamber is of the view that it is necessary that the power to determine the role of the Office of the Public Counsel for Victims is vested in the Chamber, in particular because of the latter's responsibility to manage the proceedings and ensure the fair and expeditious conduct of the trial. Significant problems could emerge if the Chamber is not able to prevent conflicts of interest or other events that may result in a damaging diminution of the Office's core role, which is to provide support and assistance to the legal representatives of victims and to the victims [...] One important example of potential conflicts of interest are those that may emerge between victims represented by the Office, on the one hand, and those to whom the Office should be providing support and assistance on the other”

Trial Chamber I
The Prosecutor v. Thomas Lubanga Dyilo

44. Regulations of the Court, Regulation 81.1

45. Regulations of the Court, Regulation 81.2.

46. Regulations of the Court, Regulation 80

47. Regulations of the Court, Regulation 73.2

48. Regulations of the Court, Regulation 73. 2

49. Regulations of the Court, Regulation 81.4.

the Chamber for such a role. Whilst the RPE⁵⁰ allows the Chamber to seek the assistance for the Registry in the designation of a common legal representative, the extent of the participation of OPCV in relation to the representation of victims remains a matter for the Judges to decide, as has been stressed by the jurisprudence of the Court.⁵¹

As clearly stated, the Judges foresaw that the role of OPCV in representing victims could trigger conflicts of interest that they would need to prevent. In fact, in their decisions, the Judges of the ICC have consistently considered the role of OPCV in representing victims as exceptional or limited to specific issues⁵².

In addition, it is not clear whether OPCV staff will necessarily comply with all criteria proposed by the Registrar for representing counsel. Furthermore, OPCV lacks presence in the field, which would limit its communication with victims.

FIDH agrees with the Registry in that “the question of whether the Office should have an enhanced role in the representation of victims in proceedings before the Court is first and foremost a judicial determination, in particular as it relates to common legal representation as mandated by the relevant legal texts of the Court”.⁵³ **According to the aforementioned Court’s jurisprudence, the role of OPCV is limited, and can only be enhanced by a decision from a Chamber.**

The role of OPCV in the representation of victims triggers a series of considerations requiring judicial determination, and therefore, it escapes the issue of legal aid. FIDH is concerned as whether the Bureau on Legal Aid is the right setting to discuss about such issues, and to conduct a comprehensive review that is separate from the discussions taking place in the Bureau on Victims and Affected Communities and Reparations.

The options proposed by the Registry pose some practical concerns that FIDH would like to stress. First of all, FIDH agrees with the Registry that there is a need to have a case-by-case approach. This has been upheld by the jurisprudence of the Court⁵⁴. But this approach needs also to be coherent and predictable for the victims, and to avoid changes in the system leaving victims with uncertainties, unanswered questions and frustrations around their participation and the lack of consultation and information about their new legal representation system.

Option 1, included in the Supplementary Report, may trigger some of the concerns mentioned before as to whether OPCV should actually play a leading role as legal representative in the proceedings.

According to the Registry the Chamber in the Gbagbo case have already adopted Option 1⁵⁵. This is true, but it was adopted following a recommendation by the Registry of a different system with external counsels⁵⁶, and before any victim was accepted for participation in the proceedings⁵⁷. It should be noted that the Registry provided the Single Judge a document recommending external counsel after a selection process and following a public call for counsel⁵⁸. In parallel to that selection process, the Principal Counsel of OPCV expressed the availability of OPCV to be appointed as legal representative “for the purposes of the pre-trial proceedings”⁵⁹. It should

50. Rules of Procedure and Evidence, 90 (3)

51. See: ICC-01/04-01/06-1211, 7 March 2008, par. 30.

52. See: ICC-01/04-01/06-1211, 7 March 2008, par. 34-35, ICC-01/04-01/07-1328, 22 July 2009, par. 16, ICC-01/05-01/08-1005, paras.

53. Supplementary Report of the Registry on four aspects of the Court’s legal aid system, CBF/19/6, 17 August 2012, para. 46.

54. See: ICC-01/04-01/07-1788-tENG, par. 54.

55. Supplementary Report of the Registry on four aspects of the Court’s legal aid system, CBF/19/6, 17 August 2012, para. 55.

56. See: ICC-02/11-01/11-86, 5 April 2012, par.16-18.

57. See: ICC-02/11-01/11-120, 16 April 2012, par. 4.

58. See: ICC-02/11-01/11-120, 16 April 2012, paras. 11-16.

59. See: ICC-02/11-01/11-120, 16 April 2012, par. 25.

be noted that the single Judge appointed OPCV “in light of the short time remaining until the scheduled date for the confirmation hearing, consideration should be given to the possibility of asking the Office of Public Counsel for Victims to act on behalf of victims”⁶⁰. The Single Judge also stated: “[t]his system may be revisited at a later stage in light of the views expressed by the victims”⁶¹. Therefore, in the Gbagbo case, OPCV was granted a role as leading counsel in light of particular circumstances, and has not been foreseen as the system of representation for the whole extent of the proceedings.

In relation to option 2, FIDH is concerned as to whether the composition of teams proposed can actually work efficiently for the benefit of victims.

Staff of the Court is internally accountable, but they would be faced with a situation with a situation where they may have two different superiors, one of which would be an external counsel who should act independently from any organ or office of the Court. 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.

In relation to this option, OPCV has also expressed concerns that such a system “gives rise to both legal and practical impediments”. The main concerns of the Office relate to its lack of resources, the threat to its independence and ability to work on multiple cases, and accountability issues for its staff.

A system similar to the proposed by the Registry in option 2 has been advanced by the Judges in the Kenyan cases, which has already triggered many concerns. On 3 October, the Trial Chamber V established a new scheme for the participation of victims in the two cases related to the post-electoral violence of 2007-2008 in Kenya. The Judges adopted a differentiated procedure. Amongst others, they decided that victims might participate through a common legal representative, based in Kenya, and through a registration process that would be less detailed than the present individual application. The Office of Public Counsel for Victims (OPCV) should assist the common legal representatives in Court and act on his or her behalf. The Trial Chamber also enabled victims who wish to appear directly before the Chamber to present an individual application.

In relation to this decision, in a memorandum to the Registrar, OPCV reiterated its view of legal and practical impediments to its implementation. The Office’s position has constantly been that its staff cannot form part of, or be otherwise assimilated to, external legal representatives’ teams: “such a scenario would jeopardize the core principle of the independence of the Office as enshrined in the Regulations of the Court as well as its ability to work on multiple cases simultaneously.”⁶² OPCV raised the issue of accountability as one concern, and the lack of resources. The Registry refuted that these concerns would impede the implementation of the decision.

In light of the reply of OPCV, and according to other informal consultations of FIDH, there was no consultation from the Chamber to relevant entities and persons, including OPCV, VPRS, and mainly victims, the already appointed legal representatives of victims or any other organisation, to try to seek the victims’ views. Particularly in Kenya, the model adopted raises security concerns for the legal representative and the Chamber could have considered this would victims have been consulted. Besides, this form of participation imposes serious challenges of coordination between the CLVR and OPCV, to ensure that the legal representative is able to represent the victims effectively -and their distinct interests- and does not become a mere intermediary.

60. See: ICC-02/11-01/11-138, 4 June 2012, par. 42.

61. See: ICC-02/11-01/11-138, 4 June 2012, par. 46.

62. ICC-01/09-01/11-463-Anx3, page 1.

The decision, and the discussion thereof, shows not only the problems of option 2, but also mainly, the consequences of not consulting victims and their representatives on the adoption of different legal representation models.

Finally, it is FIDH's understanding that the proposed options do not exclude the appointment of a totally external team. An external team of common legal representations may not be as or more costly as the appointment of a mixed team, or as the intervention of the sole OPCV whose resources would need to be added. 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 the 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 the victims' legal representatives is also reduced. That may not be the case. The needs and interests of victims also dictate the workload of the victims' legal team, not only the activity of the Chambers. For instance, when the Court declares a stay of proceedings, legal representation teams may be more requested in the field to ensure communication with their clients and that they are fully informed of the consequences of a Court 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, would take place, and how the Registry would assess the necessity of the work, to ensure that this policy will not affect the efficiency and adequacy of victims' representation.

Towards a Comprehensive Review

The Facilitation of the Bureau on Legal Aid, taking into account the call from civil society for a comprehensive review on judicial financial assistance, proposes to start a review of the system. FIDH welcomes this proposal.

In its report, the Hague Working Group recognises that there are many legal aid aspects that are crosscutting. FIDH considers that it is certainly important to consider the impact of legal aid on other key issues, particularly in the rights of victims to have a meaningful participation in the proceedings.

However, in the choice of topics, caution should be exercised to separate issues affecting procedural rights -a matter for the determination of the Judges- and the financial concerns in relation to legal aid. In this sense, FIDH considers that discussions on issues that affect the participation of victims should be analysed separately.

The Bureau's report suggests that the comprehensive review should study "whether ways can be found to implement the option of the enhanced role of the OPCV, as indicated in the Supplementary Report and tasked by the Bureau, without legal and practical impediments, and with particular concern towards issues of accountability, independence, conflict of interests and quality of legal representations in general." As FIDH has explained, the issue of an enhanced role for OPCV is a matter that can only be decided by the Judges. Because of the complexity of the legal representation for victims, FIDH would call for the broadest consultation before reaching any decision.

We insist that, as it has been stated in the Jurisprudence of the Court, the participation of OPCV as legal representative may trigger some conflicts of interests that, as they affect the victims' rights, should remain an issue for the Judges to decide.

FIDH appreciates the interests of State Parties in reaching a model that is efficient, viable, and sustainable and at the same times ensures quality and professionalism of legal representation for victims. We share the view that the sooner a solution is found; the better would be for all. But, as this is such a crucial issue for the Court, it should not be rushed. We are concerned that the time frame set up in the report may not be sufficient, and that the limitations of the 2012 discussions may arise again in 2013.

The comprehensive review should allow enough time for proper consultations within the different relevant sections of the Court, civil society, experts, members of victims' legal representation teams and seek a proper way to consider the views of victims.

In this sense, the experience of legal representatives for victims should be valued. The review should not work under the assumption that the defence and victims work in the same manner. To the contrary, representatives for victims may face challenges dictated by their victims' realities in the field. The review should gather their experiences into the specificities of their work.

Conclusions and Recommendations

This 11th Assembly of States Parties (ASP) will be marked by painful budgetary discussions. Whilst FIDH understands the difficult financial situation of some States Parties, the International Criminal Court needs to remain capable of fulfilling its mandate. For this, the zero growth principle cannot be established as the governing standard to measure the budget of the Court.

The interests of victims and of the international community as a whole should remain the overriding concern of the ASP in all the discussions. Unfortunately, the budgetary situation is impacting issues that affect victims' participation in the proceedings of the Court, a right guaranteed in the Rome Statute. FIDH calls States to make sure that victims do not bare a disproportionate burden in the financial difficulties of the Court.

FIDH has welcomed the concerns of States Parties in relation to the existing backlog of applications from victims who want to participate in proceedings at the ICC. Whilst we share the view that the present system needs to be reviewed, the Registry's Victims' Participation and Reparations Section needs more resources to process an increasing number of applications. States should be mindful that, because of the nature of the crimes under the jurisdiction of the Court, the number of applications may be substantial and will grow as the number of situations and cases increase.

The legal aid system has been identified as a major cost-driver. Nevertheless, in relation to legal aid for victims in the proposed budget for 2013 presents a reduction of 6%, without taking into account additional saving measures proposed by the Registry. However, seen in the general budget of the Court, whilst this reduction may have a substantial impact in the work of the victims' legal representation teams, they may not contribute substantially in solving the financial difficulties of the Court.

FIDH is concerned about the impact the measures adopted this year have had in the work of legal representatives for victims. Some teams of common legal representatives for victims have already felt a negative impact in their possibility to communicate with their clients and the stability of their teams.

The discussions towards a review of the legal aid scheme were difficult in early 2012, with limited time for consultations and proposals that raised serious concerns. Some of those concerns remain in relation to the measures presented by the Bureau on Legal Aid to this 11th Assembly, particularly in relation to a reduction of payments during phases of reduced activity of the Court and the call for an enhanced role of OPCV.

The work of victims' legal representatives is mainly dictated by the victims' concerns and circumstances in the field. Phases such as a stay of proceedings, whilst leading to a reduced activity in the courtroom, may require an increasing presence of the legal representatives in the field to communicate with their clients about the impact of the decision on the interests.

In relation to whether OPCV could represent victims, the legal texts and the jurisprudence of the Court are consistent in requiring a decision of the judges. The role of OPCV can only be enhanced by a decision of a Chamber.

The Bureau on Legal Aid has suggested a comprehensive review of the system. FIDH welcomes such proposal, but call States to consider, carefully the issues to be analysed, so as not to infringe the independence of the Judges on matters requiring a judicial determination. Sufficient time should be allocated for ensuring proper consultation with different stakeholders, including trying to devise a way to gather the views of victims.

Recommendations

Budget

Taking into account the difficult financial situation, FIDH calls States Parties to, as a minimum, not to approve budgetary cuts that would go beyond CBF recommendations.

FIDH calls States Parties to drop the zero growth principle as the driving goal of budgetary discussions, and adopt the goal of an independent, fair, efficient and relevant ICC.

Victims Participation

The review of the victims' application and participation system must have the rights of victims as its overriding concern. It should also be careful in identifying those issues that require a judicial determination.

There is a need to devise a strategy to ensure that the views of the victims are taken into account.

In light of the specificities of each case, FIDH submits that whatever system is adopted, flexibility would be needed.

Whilst understanding the budgetary concerns, and in awaiting the results of the review, FIDH calls States to provide VPRS with the required resources to deal with the present backlog of applications.

Legal Aid

FIDH calls State Parties not to adopt the measures proposed by the Bureau. In its place, further information should be sought as to the impact such measures will have on the work of legal representatives for victims. Consultation should culminate in the organisation of a special seminar, in the presence of victims' legal representatives and members of their team at the ICC in the next months. If nevertheless adopted, the Registry should be required to inform, after consultation with the legal representatives, on the impact of such measures in the work of legal representatives.

In relation to the comprehensive review:

- The review of the legal aid system should not consider any issue on modalities of participation, which should be separated from financial discussions.
- The role of OPCV should not be considered in the comprehensive review, since it can only be decided by a judicial decision.
- Due to the relevance of legal aid in the rights of victims to participate in the proceedings, the process should not be rushed. Enough time should be allowed for external consultations with States Parties, experts, civil society, legal representatives and to devise a strategy to consider the views of victims.

The Ministry for Foreign Affairs of Finland and the Paris Bar Association have contributed to this project and made available financial resources therefore.

Establishing the facts

investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

Supporting civil society

training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level

Mobilising the international community

permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

Informing and reporting

mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.

FIDH
represents 164
human rights organisations
on 5 continents

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inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 164 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

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Find information concerning FIDH's 164 member organisations on **www.fidh.org**