Legal Aid Consultation 2012

Addendum to the

Comments by the Legal Representatives in the Kenya cases

September 2012

In April 2012, the Registrar of the International Criminal Court ("Court" or "ICC") produced a document on the legal aid review, which was submitted for consultation to the legal profession and other entities, and invited comments by 30 June 2012. The Legal Representatives of Victims in the cases *Prosecutor v. Ruto et al.*, and *Prosecutor v. Muthaura et al.*, submitted joint observations on 29 June 2012 ("Comments").[1]

As a result of the contributions received, the Registry produced the "Supplementary Response of the Registry on four aspects of the Court's legal aid system"[2] ("Supplementary Response"), dated 17 August 2012.

We note that some of the proposals made in the latest document had not been formulated, or had not been formulated as such, in the original document submitted for consultations. We have produced this addendum to discuss the new aspects of the proposal. This document will be brief and aims to address only those points succinctly. We only address matters upon which we feel compelled to make further observations.

a) The possibility for an enhanced role for the OPCV

We submitted extensive views in our Comments on the reasons why an extended role for the Office of Public Counsel for Victims (OPCV) and elimination of external counsel would on the whole be inappropriate.[3] We stress here that we maintain those observations. In this regard, we welcome the fact that some of our remarks have been taken into consideration by the Registry[4] in recommending a system

> "where both OPCV and external lawyers and other relevant team members (or professionals) can be engaged in the representation of victims in Court proceedings. A carefully engineered formula, combining both in-house and external components, could

[1] Legal Aid Consultation 2012, Comments by the Legal Representative in the Kenya Cases ("Comments")
[2] CBF/19/6
[3] Comments, p. 2-12
[4] CBF/19/6, para 50

result both in cost-savings and in optimal legal representation for victims before the Court."[5]

We note, however, that paras. 55 to 60 of the Supplementary Response make new proposals which were not submitted for consideration to external actors during the April-June consultation period.

It is striking that, while paras. 45 to 50 acknowledge the reasons why a prominent or exclusive role for the OPCV would be problematic, the new proposals in paras. 54 to 60 fail to take some very relevant principles into consideration. The Supplementary Response states:

> "Thus a case-by-case approach could be adopted, so that, for example, a senior legal staff member of the OPCV who meets the criteria for admission to the Court's List of Counsel could be appointed to head the legal representation of a group of victims, yet build his or her team with external lawyers or other suitable professionals (e.g. field assistants form the situation country) (Option 1). The converse can also be conceived, where an external counsel is appointed to head the legal representation of victims, yet builds his core team from members of the OPCV (if available and willing to act in the designated capacity) (Option 2)."[6]

The new proposals seem to disregard the very reasons why external counsel must be involved. As highlighted in our Comments, there are very strong reasons why the OPCV ought not be considered as a fully independent office. Independence of counsel is a basic guarantee for clients and for the fairness of proceedings. Any system that entails direct involvement of the OPCV in representation of clients fails to guarantee that, inasmuch as the Office is a part of the Court's administrative structure with reporting requirements to Court officials and is beholden to the Court for its funding. We are particularly concerned that the mixed systems proposed under options 1 and 2, would vitiate any such independence by members of the legal profession.

Option 1 would not resolve the conflict of interest problem highlighted in our Comments.[7] It would also put in place a scheme where decisions are taken in The Hague (by an office within the Court) and where external professionals would be subordinated to counsel at the OPCV. This system severely disregards the main advantages of having external counsel, which include significant years of experience as senior counsel at the Bar, and their role to bring the victims' interest, traditions, culture and environment to the forefront, as well as legal innovation and to present creative strategies.

In our Comments, we stated that:

> "[o]utside Counsel enjoy full freedom of expression and possess a vision of the Court which also takes into account the positioning of the ICC as part of a wider system of justice and the rule of law […] We are of the considered view that external Counsel stand

[5] *Id*., para. 54
[6] *Id*., para. 54
[7] Comments, p. 5-6

> to be more creative in advocating for the rights of victims. Our perception is that the OPCV may at times be more prone to a judicial exercise of representation in Court, as opposed to genuine representation of clients' interests on the basis of direct consultations with the victims. Representing clients' interest can involve inherent risks, including breaking consistent jurisprudence. Independent external Counsel are more likely to take such risks."[8]

We submit that the best role for the OPCV is that of research and support on ICC case law and practice, akin to the role of the Office of Public Counsel for the Defence. For the reasons outlined above, we strongly believe that the strategy of the case should be crafted by external counsel. That would not be allowed in a system which subordinates external counsel to counsel within the OPCV. In particular, and in the example given by the Registry, the external professionals involved under option 1 could be the field assistants, who are normally very junior staff with limited involvement in strategic decisions.

Option 2 is particularly concerning for the following reason: an external counsel would have to work with members of the OPCV, who in turn, respond to another superior, have a staff contract with the ICC and implement the policies of an internal office within the Court. It is unthinkable that counsel could operate independently, discuss and implement autonomous strategies in such a context.

b) Remuneration during phases when activities are considerably reduced

As we explained in our Comments, there seems to be an assumption that phases of reduced work before the Court are phases of reduced work in general. It is reminded that, when it comes to legal representation of victims, in particular, the pace of work is often determined by developments in the field. In addition, such phases allow counsel and their teams to catch up on matters they cannot attend to during busy times, and to prepare for the next phase. For example, by conducting missions which cannot be undertaken when counsel is in court daily. It is, therefore, important to evaluate whether activities at a certain level can be justified not only *de jure*, but also *de facto*.[9]

At the outset, we note that the proposal made by the Registry in the Supplementary Response seems sensible in principle. The reference to a lump-sum throughout the document seems odd, given our understanding that the current system is a time sheet system. The proposal that fees during "reduced activities phases" are determined on the basis of time-sheets seems reasonable.

The legal representation teams in the Kenya cases, which we head, have been affected by what the Registry has considered to be a phase of reduced activities since March 2012. The comments made here are based on the team's direct experience over the last six months.

[8] *Id*., p. 7
[9] CBF/19/6, para. 39

The Registry states:

> "Payments will be made after a detailed review of time-sheets submitted by each team member for actual work undertaken as required by the demands of the phase in the case at that juncture. In reviewing the time-sheets, the Registry will assess whether sufficient grounds exist for team members to be reasonably engaged in work on the dossier. The Registry may consult with the Chamber and the team members concerned […]"[10]

From the perspective of the legal teams, such a system would work better than the pre-authorisation system which has been applied up until very recently to our teams. Pre-authorisation of activities takes considerable time and results in undue interference by the Registry in counsel's choice of activities and legal strategy. We worry, however, that by assessing "whether sufficient grounds exist for team members to be reasonably engaged in work on the dossier," the Registry may interfere with the work of the team. In our experience, although the Registry endeavours to work professionally and not to determine counsel's strategy, by allocating or denying resources for different specific activities the Registry's decisions very often *de facto* obstruct certain courses of action and end up affecting the implementation of the team's strategy. This has substantive consequences for the rights of the clients we represent.

In practice, we have noticed that the views of the Registry, on the one hand, and counsel, on the other hand, vary considerably as to which actions are justified and which actions are not. While, as we observed above, we are against a pre-authorisation system, we worry that evaluation of relevance of work undertaken *a posteriori* could, in practice, bring about uncertainty as to whether certain actions will be remunerated. As a consequence, members could fail to receive compensation for actions already undertaken. Also, such a system could halt team members from accomplishing certain tasks prior to reassurance that those will remunerated. It has the additional consequences of stifling initiative and creativity.

We note that the Registry's Supplementary Report states: "Not every team member will necessarily be remunerated during such phases." We understand the reasons behind this statement and sympathise with the Registry and the States Parties in this regard, as we are aware that the funds allocated to the legal aid programme are public funds and that the work compensated by such funds must imperatively be justified. Yet, we would like to comment on the consequences of temporary exclusion (i.e., during phases of "reduced activities") of certain members from the team. When members are excluded, they may be forced to seek alternative employment. Given that those members possess unique expertise in the case, and/or privileged contacts in the field, counsel may wish to call those members back at the next phase or when the workload increases. However, as a consequence of their temporary exclusion, those team members may be unavailable, either temporarily or permanently. That severely affects the team's work and dynamics, and brings about loss of expertise and a need to train new members. This poses a heavy burden on the team and, as a consequence, on the legal aid system. In practice, this also means that joining the teams is not an attractive option for professionals, given that

[10] *Id*., para. 41

continued employment cannot be guaranteed. It is suggested that all these matters be taken into serious consideration by the Registry when implementing decisions in relation to phases of reduced activities. In particular, the Registry should evaluate and adequately explain whether the disadvantages and cost implications of excluding certain team members outweigh the advantages and apparent savings.

Finally, we observe that the Registry states: "[t]he period of notice will be 30 calendar days, in accordance with the Registry's current practice regarding a phase of reduced activities in a case, or a change of phase of the proceedings, resulting in a change in the scope of the legal aid applicable." We agree that sufficient notice must be given. We note that in the Kenya cases our teams were given less than two weeks' notice at the end of the pre-trial phase.[11] It is important that the Registry remains open to extending such time when the time allocated is insufficient for the team or its team members to wrap up certain activities.

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[11] Notice was given not just for a new regime for reduced activities but the mandates of the legal representatives were abruptly terminated. This situation was later corrected by a decision of the Appeals Chamber, ICC-01/09-01/11-409 and ICC-01/09-02/11-416