



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

**RECOMMENDATIONS AND COMMENTS TO THE COMMITTEE ON BUDGET
AND FINANCE AT ITS NINETEENTH SESSION**

Comments on the 'Supplementary Report of the Registry on four aspects of
the Court's legal aid system'

20 September 2012

This paper, prepared by the CICC's Legal Representation Team¹ (Team), has been produced in response to the Registry's submission to the Committee on Budget and Finance (CBF) of 17th August 2012 on four aspects of the Court's legal aid system.

Throughout 2012, the Team has provided comments and recommendations to the Registry and States Parties as part of the review of the Court's legal aid system and the Team submitted its comments to the Registry in July 2012 as part of the consultations leading to the present Registry submission to the CBF². The Team welcomes efforts to review and ultimately improve the efficiency and effectiveness of the ICC's legal aid scheme, and appreciates that the Registry has kept the system under constant review since its inception in 2004³.

However, the purpose of revising the legal aid system must be changed from attaining cost-savings to establishing the most effective and efficient the legal aid system that ensures high quality legal representation of defendants and victims.

Effective legal representation is essential to the realization of fair trial rights, and victim rights to participation and reparation set out in the Rome Statute. These rights are also central to the legitimacy and purpose of the Rome Statute system. In reviewing the Registry's proposals, the Team urges the Committee on Budget and Finance to bear in mind that the central goal of the legal aid scheme must be to ensure the effective exercise of these rights by indigent defendants and victims. The piecemeal approach to the review of the legal aid system in 2012 risks subordinating this goal to the identification of cost-savings in the short-term, and may have a detrimental impact on legal representation in the future.

The Team continues to urge the Registry to undertake a considered and holistic review of the entire legal aid system following the conclusion of the Court's first cases and invites the Committee on Budget and Finance, as the ASP's expert technical body on financial matters, to consider the

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.

² The CICC Legal Representation Team's submissions are available at: <http://iccnow.org/?mod=legalrep>

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

observations provided below when reviewing the Registry's report and making its recommendations and observations if any.

The Team urges careful review of the Registry's proposed amendments, in light of the considerable impact states parties' adoption of the Committee's recommendations on these proposals or other amendments to the legal aid system may have on legal representation at the ICC and the rights guaranteed by the Rome Statute.

Recommendation to the CBF

- **In considering proposals concerning the remuneration of counsel, the CBF should consider the impact of the proposed changes on defendants and victims' rights to a fair trial and effective representation and participation.**

The Team remains concerned about the negative consequences to the effective and meaningful representation of defendants and victims at the ICC of the proposed changes in the remuneration scheme for counsel and legal teams. The Team notes also that the Registry's report lacks clarity in relation to a number of its proposals, and the Team urges the CBF to formulate any of its recommendations on the proposals based on clear and substantiated figures and descriptions of how the system would work in practice. The Team is also concerned that a number of the Registry's proposals may adversely and disproportionately affect representative team 'support staff' such as case-managers and legal assistants, including in the field, which would be to the severe detriment of the representation of defendants and victims.

Remuneration in the case of several mandates: Under the Registry's proposal, if counsel were to undertake two mandates for indigent clients, he or she would receive fifty percent remuneration for one of the mandates. This may carry with it the risk that representation of the client for whom the counsel is receiving fifty percent remuneration may not be of the same level in terms of time and work undertaken, in comparison with that undertaken for the client for whom counsel is receiving one hundred percent remuneration. The Team urges a cautious approach, noting that dual mandates have so far been 'exceptional'⁴ and, therefore, the practice may have 'possibly negative implications for the quality of representation provided'.⁵

Expenses: The Team notes that expenses provided to counsel in the legal aid scheme exist for the ultimate benefit of defendants and victims in order to enable counsel to meet the costs of representing clients. A reduction in travel allowance may detrimentally affect the obligation and ability of counsel to meet with their clients and take instructions at the seat of the Court. The Team urges the CBF to adopt a cautious approach in reviewing the current proposal to change the current monthly allowance to reflect the 'real needs of legal teams',⁶ in particular the consequences of reducing the per-month ceiling from €4000 to €3000. The Committee is encouraged to seek further information regarding the actual relevant expenses of current legal teams, in order to ensure that any reductions are justified and realistic. In that regard, the CBF might wish to seek information not only from the Court, but also from counsels currently representing victims and defendants in cases.

Remuneration: phases in which activities are considerably reduced: The Team is concerned at the lack of clarity provided in the current proposal to a time sheet system during phases in which activities are considerably reduced. The Team would strongly urge that 'phases in which activities are considerably reduced' be clearly outlined. The Team remains concerned that 'the Registry will assess

⁴ Supplementary Report of the Registry on four aspects of the Court's legal aid system, CBF/19/6, 17 August 2012, para. 16

⁵ Ibid. at para. 12

⁶ Ibid at para. 30

whether sufficient grounds exist for team members to be reasonably engaged on the dossier⁷ *after* the submission of time sheets by legal representation teams. This may be to the detriment of the representation of defendants and victims as representation teams may be less likely to undertake activities on behalf of their clients if there is a possibility that the Registry will refuse to approve and compensate the work already undertaken. Should the Registry proposal be implemented, systems should be put in place to allow for some form of expedited pre-approval in principle followed by the implementation of the time sheet system. Finally, the Team reiterates its concerns regarding the presumption that during phases such as those provided in paragraph 40 of the Registry's Report, the work of counsel and their teams is *in practice* considerably reduced. Current practice amongst defence and victims teams—particularly with regard to communication with victim clients and field missions— has shown that this may not always be correct.

- **The possibility of an enhanced role for the Office of Public Counsel for Victims must be further reviewed in 2013, as part of a broader review of the legal representation of victims, and driven by the need for effective and meaningful participation of victims rather than primarily cost considerations.**⁸

In its review of the Registry's comments regarding an enhanced role of the OPCV, the Team strongly recommends the CBF specifically to take note of the Registry's comments regarding the necessary role of external counsel in victims' representation.

The modality of victims' representation at the ICC is based on an exclusively judicial determination of the needs of victims in each specific situation or case for effective and meaningful representation and 'any provision on an enhanced role for the OPCV as legal representatives in Court proceedings is a matter for the Court's judges, not the Registry.'⁹ However, the Team strongly urges the CBF to ensure its recommendations and observations acknowledge that any method of victims' representation should not be based solely on how representation is funded, or cost-saving considerations. Rather, victims' representation must be based on the particular needs of victims in order to ensure meaningful representation in each case, and then consideration may be given to the most cost-effective means to implement this representation.

The Team notes that the Registry reiterates in its report, the position it had adopted in 2009¹⁰ and while it 'is not in principle opposed to an enhanced role for the OPCV in the representation of victims, it would emphasize that a policy shift towards augmenting the role of the Office as the privileged or exclusive legal representative of victims represents a significant departure from the system originally conceived for the representation of victims in Court proceedings'.¹¹ The Team notes also, the emphasis in the Registry's report on the fact that 'the legal profession and civil society have expressed their clear opposition to an overly enhanced or exclusive role of the OPCV in the representation of victims in Court proceedings' and that having reviewed feedback, including financial estimates and contributions from the OPCV, the Registry 'recommends that the system ought to be maintained as a two tier-system, where both OPCV and external lawyers and other relevant team members can be engaged in the representation of victims in Court proceedings'¹². The

⁷ Ibid at para. 41

⁸ The views expressed in the following paragraphs do not represent those of Legal Representation Team member International Criminal Bar Association

⁹ Ibid. at para. 48

¹⁰ See, 'Report of the Court on legal aid: Legal and financial aspects of funding victims' legal representation before the Court', ICC-ASP/8/25, at para. 50 which stated *inter alia*: 'there are sound policy reasons to provide resources for external counsel experienced in criminal proceedings to represent victims participating in Court proceedings'

¹¹ Supplementary Report of the Registry on four aspects of the Court's legal aid system, CBF/19/6, 17 August 2012, para. 49

¹² Ibid. at para. 54

Team further welcomes the acknowledgement by the Registry that an enhanced role of the OPCV 'involves a series of considerations and consequences which need to be carefully studied and therefore not be based merely on cost-saving incentives'¹³. Indeed the Team has raised a number of issues for consideration concerning an enhanced role of the OPCV, including *inter alia* concerns relating to possible conflict of interests if OPCV was to represent victims in multiple cases, the lack of OPCV presence in situation countries, concerns regarding the independence and perceived independence of the OPCV as an internal office of the Court and the crucial importance to the Rome Statute system of representation by external counsel. External counsels indeed provide a diversity of legal argumentation to the Court's proceedings as a result of their geographic diversity and experiences which cannot be replicated by in-house, institutional counsel and bring the court's proceedings closer to the victims and affected communities through their own networks, ensuring an outward looking and inclusive Court.

The Team concurs with the Registry position that the 'notion that exclusive legal representation of victims by the OPCV will be less costly is, at this juncture, more an assumption than a proven fact.'¹⁴ The Team further submits that the estimated resources required for the OPCV to undertake an exclusive role in representing victims or have an enhanced role as part of a mixed system of victims' representation require further consideration before such options can be accepted as more cost-efficient. Indeed, the Team is concerned that if the OPCV were to act as a common legal representative whenever legal aid was required and would also take over currently active cases, it would require an as yet unknown substantive increase in staff and non-staff resources, which may in fact be less cost-efficient than the current system.

For these reasons, the Team strongly urges the CBF, in reviewing the Registry's report on an enhanced role of the OPCV, to be cognisant of all of the options and issues, both legal and practical, set out in the Registry's report, and to reserve any pronouncements on this issue pending a holistic and thorough review of victims' representation at the ICC. Such a review should consider the Court's and victims' experiences in the first cases and the numerous other practical and legal issues which arise in ensuring the meaningful and effective representation of victims at the ICC.

¹³ Ibid at para. 49

¹⁴ Ibid