



LEGAL REPRESENTATION TEAM
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)
RECOMMENDATIONS AND COMMENTS ON AMENDMENT OPTIONS
Concerning the Legal Aid Consultation 2012

5 July 2012

This paper, prepared by the CICC's Legal Representation Team¹ (Team), has been produced in response to the Registrar's letter of 20th April 2012 inviting comments on four proposals relating to the ongoing review of the legal aid system. The Team continues to welcome the Registry's efforts to review and ultimately improve the efficiency of the ICC's legal aid scheme and is generally supportive of measures that would seek to improve and increase the efficiency of the legal aid system. In this regard the Team welcomes the opportunity to meaningfully engage in this process. The Team recalls that during the consultation process, Mr. William Pace, on behalf of the Team, has submitted two letters to the Registry². In response to these letters, the CICC received a letter on 27 June 2012 with a number of clarifications relating to the proposals from the Registrar of the Court³. This present submission reiterates a number of the concerns contained in this correspondence and the Team's comments below reflect on the clarifications provided.

A. Recommendations

- **The Registry must undertake a considered and holistic review of the entire Legal Aid System.**
The Team remains extremely concerned with the focus on four discrete proposals which reflects a piecemeal approach to the current review of the legal aid system. The Team considers that the four proposals have been arbitrarily selected in order to cut costs, without clear and detailed analysis of the potential impact on the qualitative representation of defendants or victims, for whom the legal aid system exists. The Team acknowledges the immense pressure being placed on the Court, particularly on the Registry, by some States to reduce its expenditure; nevertheless, we urge the Registry to resist efforts by States to only identify savings without a genuine and holistic review following extensive consultation.

- **The Registry must make clear that any proposals it may adopt following the present review are purely temporary and provisional in nature pending a holistic review of the legal aid system following the conclusion of the Court's first cases.**
The *Lubanga* and *Katanga and Chui* cases are nearing the end of their trial cycles. It is regrettable that the current legal aid review is taking place before the completion of the first full trial cycle, without the further benefit of the experience of any possible reparations or possible appeals proceedings. The Team recognises the pressure put on the Registry by States Parties and the Committee on Budget and Finance to develop proposals to find savings in the legal aid budget,

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 Please see letters annexed to email of 5th July 2012

³ Please see letter annexed to email of 5th July 2012

but understands that the Registry will undertake a further comprehensive review of the legal aid system at the conclusion of these cases. Therefore, the Team urges the Registry, in formulating any report or proposals following the present review, to strongly emphasise and insist that any proposal adopted is purely temporary and provisional in nature, pending a holistic review of the entire legal aid system at the conclusion of the Court's first cases.

▪ **The Team urges the Registry to establish an expert commission to review the entire legal aid system**

In its letter of 25 May 2012 the Team queried whether and to what extent the Registry had considered establishing an independent Expert Commission to undertake a considered and holistic review by those with the requisite expertise and understanding of the complex issues involved in devising a legal aid system. Such a commission would allow for an independent and external review of the legal aid system which could benefit from the expertise of a wide range of stakeholders, including global networks of legal practitioners with intimate knowledge of a wide array of legal aid systems, without the burden of excessive budgetary pressures. It was suggested that such a commission could be comprised of representatives from the Court, representatives of independent associations of counsel and members of the legal profession, and experts from civil society organisations. The Team notes that the Registrar, in the letter of 25 June 2012, has indicated that the ICC has consulted externally and that the ICC has extensive competence in the issues at hand. Nonetheless given the complexity of the legal aid issue and the breadth of expertise, opinion and experience which exists amongst external stakeholders, the Team would strongly recommend that the Registry reconsider the establishment of an expert body.

B. Comments on Discrete proposals

I. Remuneration in the case of several simultaneous mandates for legal team members

The Team urges the Registry to consider whether it is desirable for a counsel to undertake several mandates at the ICC. Furthermore, the Team notes that if counsel were to undertake two mandates (and therefore receive fifty percent remuneration for one of the mandates) there may be a *prima facie* 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.

II. Remuneration during phases when activities are considerably reduced

The Team notes from the Registry's letter of 25 June 2012 that "presential" and "non-presential" phases are determined based on objective criteria and on the grounds that during "non-presential" phases of a case, "counsel and associate counsel are not based in the Hague." However, the Team notes that a correlation between presence in the Hague and level of work cannot always be made. Indeed, the Team would caution the Registry against making such presumptions that work during these phases is considerably reduced, which may not always be correct. This was recognised by Trial Chamber I in the *Lubanga* case, which 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."⁴

⁴ 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

Whilst during “non-presential” phases there might be reason to believe that activities will be reduced, this presumption does not necessarily fit with the reality of a case. For example during stays of proceedings further investigations may be conducted by the defence and defence teams may continue to file applications and observations to the Court. During the two stays of proceedings during the *Lubanga* case, the defence made twenty-eight filings to the Trial Chamber.

The same observation can be made in relation to victims’ counsel. For example, phases of reduced courtroom activity provide opportunities for victims counsel and their teams to undertake tasks that could not be performed during periods at which counsel is required in the Courtroom, for example the attendance at trial hearings will often prevent Legal Representatives for Victims 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 consider the appropriate level of remuneration and other resources during non-presential phases for victims’ representatives who may, as described, use non-presential phases to meet with clients, conduct missions and take further instructions.

The Team notes in the Registrar’s letter of 25 June 2012, that the practice of the Registry in current cases has been to provide more than thirty calendar days notice period to counsel of any decision relating to legal aid during periods of reduced activity. Whilst the giving of notice to counsel is important, the Registry should consider giving more notice to counsel as the filing of requests for reconsideration and decisions on said requests and possible appeals to chambers will likely take longer than thirty days which would likely leave counsel in a very uncertain position.

The Team also has strong reservations regarding the designation of periods where activity is considerably reduced. However, if the Registry implements the proposed amendment to the system of legal aid, the Team strongly recommends that the Registry endeavours to outline as much as possible, a clearly structured system of which phases would constitute phases where activities are considerably reduced. The Registry should also ensure that mechanisms are in place to regularly remind counsels of such phases and the consequences it will have on their remuneration/resources. This would place counsels in a more certain position well in advance of any reduction in remuneration and give sufficient time to counsel to discuss with the Registry such reductions

Finally, the Team notes that the Court provides an IT system which is designed to allow counsel to work on Court cases from their home (in order to save travel costs). Given this resource, counsel may continue to work full time on ICC cases at home. Thus equating presence in The Hague with work which is undertaken may again not be fully accurate.

III. Legal Aid Travel Policy

The Team is grateful for the Registry’s clarifications provided on this proposal in its letter of 25 June 2012. However, the Team regrets that the proposal does not include any monetary figures which have been paid in actual practice to counsel for travel to The Hague in current cases before the ICC. This has made it very difficult to make any comparison or a meaningful judgment on the viability and suitability of the Registry’s proposal, formulated as it is in monetary terms.

The Team also notes that a fixed sum of €16,182 and €14,917 would be payable to counsel at the “opening of a trial.” The Team also notes that these payments would not be subject to review and possible increase during the trial. However, the Team would strongly urge the Registry to consider whether or not the payment of a fixed sum at the opening of a trial is a suitable means for compensating for travel during a trial. The length of each case at the Court may vary substantially in number of years and the proposed compensatory figures may not be sufficient depending on the

length of the trial. Therefore, rather than proposing suitable monetary figures, the Team recommends that the Registry ensure that the fixed sums provided are subject to review and also strongly urges the Registry to ensure that the fixed amounts provided meet the differing needs of counsel in each case.

The Team is also concerned that any arbitrary fixing of travel compensation may in fact deter a number of counsel from applying for positions as legal representatives at the ICC and may also adversely affect counsel who may have to travel from great distances, thus affecting the regional diversity of counsel appearing at the ICC.

IV. Enhanced role of the Office of Public Counsel for Victims (OPCV)

It must be emphasised that the most fundamental principle behind a review of an enhanced role for the OPCV must be the effective and meaningful participation of victims in a case. To implement a novel system of victims' representation at the ICC for purely budgetary reasons will doubtless be to the severe detriment of victims' participation at the ICC. Victims must receive the best possible representation before the ICC and this must be the basis for any review of an "enhanced OPCV". It should also be added that to consolidate victims' representation into the OPCV for solely budgetary reasons would be a great disservice to the staff and work of the OPCV whose role should be assessed on the basis on the level of quality representation they may give, rather than their perception as purely a less expensive option for victims' representation.

In light of the substantial impact of the current proposal on the meaningful participation of victims before the Court, the Team strongly encourages the Registry to ensure victims themselves are given an opportunity to provide input on this important issue, being those who will be most affected by the current proposal.

The Team regrets at the outset that it is not able to make concrete comments on the current proposal. Although the Registry has provided a number of clarifications on a possible enhanced role of the OPCV in its letter of 25 June 2012, in the absence of a concrete proposal from the Court, the Team is limited in its ability to provide substantive comments.

The Team notes that the current proposal has not provided any information on the level of resources required in order to ensure that OPCV can effectively represent victims from The Hague, including consulting with them, taking instructions and reporting on the developments at trial. Neither has the proposal indicated whether an enhanced role for the OPCV would entail an increase in the number of its permanent and support staff. The Team is cognisant of the Registrar's response in the letter of 25 June 2012, that the Registry has been unable to provide such information prior to the assessment of the OPCV's response in the present consultation. It is apparent though, 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, **the OPCV would require a substantive increase in staff and non-staff resources.** Today the OPCV has ten staff persons and none in the field. This direct connection with victims in situation countries will be key to ensure a meaningful participation and representation but also cost savings compared to regular travel missions. Furthermore, as the number of cases before the ICC increases and the number of victims applying to participate also increases, the resources of the OPCV would also have to be significantly augmented. Notwithstanding the Team's position that any review of victims' representation should not be based on budgetary reasoning, absent any information to the contrary which may have enabled a comparison to be made between current costs of victims' representation and proposed costs of an enhanced OPCV, it is possible that an enhanced OPCV proposal may not be cheaper or more cost efficient, either in the near future (with the takeover of currently active cases) nor in the longer-term with the likely increase in victims applying to appear at the ICC.

Furthermore, as acknowledged by the Registrar in the letter of 25 June 2011, Rule 22 of the Rules of Procedure and Evidence and Regulation 67 of the Regulations of the Court⁵ provide that counsel representing victims must have the proper level of experience, including ten years relevant experience. The current Registry proposal is unclear as to whether or not the OPCV presently has a sufficient number of principal counsels with the requisite level of experience to represent victims in a case. In its **2009 Report**⁶, the Court stated that “a counsel representing a group of victims should continue to be remunerated at the P-5 level, to reflect the level of experience required and to ensure quality representation for victims before the Court.” As stated, given that the number of victims applying to participate at the ICC is increasing, the costs of employing a large number of permanent staff under the UN common system to act as principal counsels in cases may not in fact be cheaper.

The Team recalls that, in its 2009 Report, the Court had considered the issue of “In-house and external representation of victims”. In the Report, the Court had indicated that “there are clearly advantages in having specialised in-house counsel who practice exclusively before the Court”. The Court’s paper continues “there are, are however, also important advantages in having a broader involvement of external counsel experienced in criminal proceedings generally intervening before the Court”⁷. In conclusion the paper states that “there are sound policy reasons to provide resources for external counsel experienced in criminal proceedings to represent victims participating in Court proceedings or seeking reparations, so long as there is no duplication with the role played by in-house counsel”. In the letter of 25 June 2012, the Registrar indicates that the position of the Registry “still stands” but a final determination will be made on the issue at the conclusion of the current consultation process.

⁵ Regulation 67 Regulations of the Court - Criteria to be met by counsel

1. The necessary relevant experience for counsel as described in rule 22 shall be at least ten years.

2. Counsel should not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court.

⁶ Report of the Court on legal aid: Legal and financial aspects of funding victims’ legal representation before the Court, ICC-ASP/8/25

⁷ Report of the Court on legal aid: Legal and financial aspects of funding victims’ legal representation before the Court, ICC-ASP/8/25 at 38:

a) Clients benefit from representation by counsel specialized in the law and practice before this Court; in-house counsel are able to appear and follow the proceedings before the Court on a permanent basis, enabling them to keep up to date with all the relevant jurisprudence of the Court;

b) Counsel are free from other external obligations and are able to focus exclusively on their cases before the Court; and

c) Savings can be made on fees, and costs such as those involved in the travel of external counsel to the Court for hearings would be avoided.

at 39:

a) Excluding external counsel would compromise the principle of freedom to choose one’s counsel, including the choice to be represented by counsel from one’s own country. The Court in The Hague may appear to victims as distant, and having a legal representative who is familiar with their situation and may speak their language, and with whom they may have developed a relationship of trust, can be crucial in making the experience of participation meaningful;

b) Local lawyers from the victims’ country are able to bring to the Court their unique qualities and experience, including knowledge of the culture and background of the victims and the context of the alleged crimes;

c) External lawyers play an important role, in that the number of victims accessing the Court might be considerably less if there were to be a total “internalization” of legal representation of victims. External lawyers play an important role in enabling victims to access the Court, for example assisting victims to make their applications on a pro-bono basis and reaching areas where Court staff are not able to go. They might be discouraged from doing so if they were not able to continue to represent the victims once the latter’s status had been recognized;

d) Involvement of external counsel enables the Court to benefit to a greater extent from the richness of experience acquired by lawyers through their practice at national level, and to encourage the participation of more counsel from around the world in the work of the Court; and

e) Involvement of external counsel enables the Court to contribute to a greater extent towards capacity building and the promotion of international criminal law in national legal systems, in line with the principle of complementarity.

In 2009, the CICC's legal representation team also made comments on the reasons why it is strongly advisable that external counsel continue to represent the interest of victims and that victims be given, as foreseen in the Rules of Procedure and Evidence, an opportunity to choose their counsel⁸. The Team maintains its position from 2009 in relation to external counsel and reiterates the following reasons for continuing to utilise external counsel for legal representation:

- External counsel often have easier access to victims due to their understanding of the local context. They usually have networks already in place in the country where their client resides, including in situations where the victims happen to live outside their countries of origin, enabling them to contact their client at minimal costs and in a discrete way necessary to ensure their protection, safety and security. Independent lawyers are also best placed to conduct numerous activities necessary to victim representation, such as locating victims and potential intermediaries.
- External counsel bridge the gap between international and national proceedings in relation to the crimes covered in the Rome Statute. Participation of external counsel helps train lawyers from different legal systems in ICC law and proceedings, thus contributing to the mainstreaming of Rome Statute principles and reinforcement of the relevant country's capacity to organize domestic trials for crimes under the jurisdiction of the Court, under the complementarity principle.
- External counsel bring a wide array of experience and practice to the Court and contribute to making the Court an "international" Court: they contribute to creating an outward looking ICC.

The Team notes that the Registrar's letter of 25 June 2012 indicates that external counsel or support staff may be required at any time. The OPCV does not currently have staff permanently based in the field. The team stresses, as Chambers through the jurisprudence of the Court have also emphasised, that a field element is central to enable victims to participate meaningfully in procedures. It can thus be foreseen that OPCV, should it be appointed as LRV in all cases, would also require such a field element. In the absence of any concrete proposal of how this may work in practice the Team regrets that it cannot give more concrete observations on how the system may work.

It is currently unclear to the Team how the automatic appointment of OPCV whenever legal aid is required would be reconciled with Rule 90 of the Rules of Procedure and Evidence, which provides that foremost "a victim shall be free to choose a legal representative." In the proposed automatic appointment of the OPCV there is a real danger that, contrary to [the above], victims would have to accept representation by OPCV and not be given the option of choice or views as to their own representation, vital to ensuring victim ownership over the process of participation and crucial to engender confidence in counsel representing their interests and in the process overall, with the only alternative available for victims to be unrepresented at the ICC.

Also, Regulation 79(2) of the Regulations of the Court provides that "when choosing a common legal representative for victims in accordance with Rule 90(3) consideration should be given to the views of the victims, and the need to respect local traditions and to assist specific groups of victims". In appointing automatically OPCV whenever legal aid is required, the Team is concerned that meeting the requirements of Regulation 79 may be difficult with sole representation by the OPCV. Regulation 79 is absolutely vital in ensuring that a common legal representative is chosen who is able to "establish a relationship of trust" which will enable victims to "speak frankly about crimes committed"⁹ against themselves with their representative and will ensure that a representative is chosen with personal experience of the country from which the victims originates. This might

⁸ http://iccnow.org/documents/CICC_Legal_Representation_Team_Paper_ASP_8.pdf

⁹ *Prosecutor v. Ruto et. Al*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 august 2011, ICC-01/09-01/11-249 at para. 69

require, as held in 2011 by the Pre-Trial Chamber II in the *Ruto et al.* case that, amongst others, the OPCV share “cultural, ethnic [and] linguistic heritage”¹⁰ with victims, which in turn would likely require an increase in staff both in the Hague and in the field.

The core mandate of the OPCV, as confirmed through the jurisprudence of the Court, is defined in Regulation 81(4) of the Regulations of the Court, which starts by stating that the OPCV *shall* provide support and assistance to legal representatives of victims and victims.¹¹ If victims’ representation was to be consolidated within the OPCV, without an increase in resources (see above), it is very likely that the OPCV’s ability to fulfil this mandatory part of its mandate will be detrimentally affected.

The Team also highlights that an enhanced OPCV acting on many cases with many victims could very likely give rise to a *prima facie* or perceived conflict of interest. Rule 90 Rules of Procedure and Evidence¹² provides that the Chamber and Registry must take reasonable steps to ensure that a conflict of interest is avoided when selecting common legal representatives. The Team notes that conflicts of interest have already arisen in a number of instances of legally aided victims’ representation at the ICC. For example, in the *Katanga* case it was necessary to constitute two victims representation teams to avoid a conflict of interest. Also in the Kenya situation, the victims represented in the two cases come from opposing parties in the post-election violence. The Team is not convinced, given inherent conflicts of interests amongst victims in ICC situation countries and cases, that conflicts of interest could realistically always be avoided should OPCV represent all victims requiring legal aid. Given that the principal counsel might act as principal counsel on a number of cases but also maintain managerial oversight of the office, the Team has concerns on whether internal logistical measures to avoid conflicts of interest would be sufficient to ensure conflicts of interest would not *de facto* occur.

More important however could be the perceived conflict of interest within the OPCV and the appearance of such a conflict to victims who may potentially be represented by the office as well as to observers of the Court. Such a perceived conflict may adversely affect the faith and trust which victims may have in their own impartial representation and in the Court.

The Team also notes that as the Court’s caseload increases, the risk of a conflict of interest will become greater. Also, as mentioned above, if the OPCV is only provided with the resources for a small number of counsel with the requisite experience to act as a common legal representative, this may make the chances of conflict even greater. Again, this likely to impact the resources (both human and financial) needed by the OPCV, and should be fully taken into account when considering the financial implications of having OPCV represent all victims requiring legal aid.

Another consideration which must be borne in mind by the Registry when assessing the current proposal is the need to ensure that the legal representatives of victims are independent of the Court. The Team notes that the fact that members of the OPCV are employees of the Court may lead to the risk that as such the actions of the OPCV might not be perceived as being wholly independent. Furthermore, that the OPCV falls within the remit of the Registry for administrative purposes means

¹⁰ *Ibid*

¹¹ Regulation 81(4) Regulations of the Court:

The tasks of the Office of Public Counsel for victims shall 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 or with the leave of the Chamber, advising on and assisting with the detailed factual circumstances of the case

¹² Rule 90(4) Rules of Procedure and Evidence:

4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.

that there is a risk that under the current administrative oversight arrangement with the Registry, the OPCV's ability to represent victims may at the very least incidentally be tied in with administrative decisions of the Registry.

Furthermore, by virtue of being employees of the Court, OPCV staff may be *perceived* as being agents of the Court, even if this is not the case. This perception may not only hamper the work of the OPCV in situation countries but may also lead to a lack of trust amongst victims and observers of the Court who may as a result view victims and their participation as linked to the Prosecution and possibly defendants appearing before the ICC. Furthermore, representation of victims by an organ of the Court may lead to perceptions that victims representatives are under the instruction and oversight of the Court and not fully and independently representing victims' views in the proceedings.

Finally, the Team notes from the proposal that *"for currently active cases takeover would happen at the end of the current phase or whenever there is a team change, unless the Chamber decides otherwise"* The Team is concerned by this statement which does not seem to account for the relationship which will have been forged between victims and their representatives in the course of representation. Such a relationship, based above all on trust and faith the victim has in the victims' representative and knowledge the representative will have of his or her clients is particularly important for victims who have been severely traumatised by the worst crimes. Therefore great consideration and care must be exercised before such a relationship is broken up by any transfer of representation to the OPCV.