



LEGAL REPRESENTATION TEAM¹
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)
**COMMENTS AND RECOMMENDATIONS TO THE ELEVENTH SESSION
OF THE ASSEMBLY OF STATES PARTIES**
14 -22 NOVEMBER 2012, THE HAGUE

8 November 2012

I. LEGAL REPRESENTATION

Key Recommendations:

- States Parties should ensure that the Court undertakes a **comprehensive review of legal representation** prior to further reviews of the legal aid system.
- The Team strongly urges states parties to mandate the Bureau to consider, in consultation with the court, the timeframe, parameters, and modes of consultation with all relevant stakeholders, including the judiciary, external experts, legal representatives, bar organizations, clients, and NGOs, for an eventual comprehensive review of legal representation.

The CICC Legal Representation Team ('Team') supports efforts to review and ultimately improve the effectiveness and meaningfulness of legal representation at the ICC, including through an efficient legal aid system. At the outset, the Team wishes to recall that the final decision on the specific modalities of representation in each case rests exclusively with the judiciary of the ICC. Furthermore, the Team places utmost importance on effective legal representation, which 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 central to the legitimacy and purpose of the Rome Statute system.

The Team firmly believes that discussions on legal representation must be separated from discussions relating to the Court's legal aid system. Legal aid exists as a result of the need to ensure that indigent defendants and victims can be afforded representation in an effective and meaningful manner. Therefore, states parties must first ensure that legal representation of defendants and victims at the ICC is effective and meaningful and only then review the legal aid system. However, the Team remains concerned that in 2012, states parties have 'put the cart before the horse' and first sought to make cost savings to the legal aid system with the effective and meaningful representation of defendants and victims as a secondary consideration.

The Team therefore strongly urges states parties to ensure that the Court undertakes a **holistic and comprehensive review of legal representation, both for defence and victims**. This review of

¹ The CICC's legal representation team was established to ensure and monitor the effective and meaningful representation of defendants and victims at the ICC. 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. 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.

legal representation should be undertaken following the Court's first cases, after the completion of any reparations proceedings, reflecting on lessons learned and in full consultation with legal representatives and associations of counsel at the ICC, the judges of the ICC, experts on defence and victims' representation, civil society and victims. The review must also take into account particular nuances and differences which exist in the legal representation of defendants and victims. Following such a review, states parties and the Court would be fully informed on the current and particular needs and modalities of legal representation of defence and victims at the ICC and as a result would be able to implement an appropriate and necessary legal aid system. The Team therefore strongly urges states parties to postpone any further review of the legal aid system pending the completion of a comprehensive review of representation.

The Team therefore strongly urges states parties to mandate the Bureau to consider, in consultation with the Court, the timeframe, parameters, and modes of consultation with all relevant stakeholders, including the judiciary, external experts, legal representatives, bar organizations, clients, and NGOs, for an eventual comprehensive review of legal representation.

II. LEGAL AID

Recommendations

- If the proposed legal aid amendments are adopted, States Parties must ensure that a monitoring mechanism is established to assess the implementation of the proposals as proposed by the Bureau in its report on legal aid.
- In reviewing the Court's legal aid system in the future, the emphasis must be changed by states parties from pushing for cost-savings to establishing the most effective and efficient legal aid system possible following a review of representation at the ICC.

Throughout 2012, the Team has provided comments and recommendations to the Registry and States Parties as part of the discussions 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 Registry's submission to the CBF². The Team continues to support efforts to review and ultimately improve the efficiency and effectiveness of the ICC's legal aid scheme; however these exercises must follow a comprehensive review and understanding of legal representation at the ICC and not just assess the means in which to fund it.

In addition, the legal aid scheme should be considered in its entirety. The Team remains concerned that the piecemeal approach to the review of the legal aid system in 2012, with minimal consultations by the Court with stakeholders, including legal representatives, and which included issues not strictly related to the operation of the legal aid system itself, including a possible enhanced role for the Office of the Public Counsel for Victims, has risked subordinating the goal of guaranteeing Rome Statute fair trial rights to the identification of cost-savings in the short-term, which may have a detrimental impact on legal representation in the future.

The Team maintains that any changes to the legal aid system must not affect the quality and effectiveness of legal representation at the ICC. Indeed emphasis must be placed by states parties on first establishing the most effective and efficient representation system which ensures

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

fair trial and participatory rights, prior to pushing for possible cost-savings through amending the legal aid system.

In considering the adoption of the Registry's four proposals on legal aid as set out in the Bureau's report on Legal Aid³, the Team urges states parties to bear in mind the central goal of the legal aid scheme: to facilitate the effective exercise of fair trial rights by indigent defendants and victims. States parties should therefore carefully consider the impact that the proposals or other amendments to the legal aid system may have on defendants' and victims' rights to a fair trial and effective representation and participation.

The Team remains concerned about the possible immediate as well as future 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 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. Should the proposals be adopted by the ASP at its eleventh session, the Team urges the Assembly to establish a monitoring mechanism to assess the implementation of the proposals, as proposed by the Bureau in its report on legal aid.⁴ Such a mechanism should fully take into account the views and observations of those affected by the changes, including *inter alia* legal representatives, and to the extent possible defendants and victims, and must reflect on any qualitative impacts on representation and not just financial impacts.

The Team notes also that the proposal regarding 'remuneration in phases in which activities are considerably reduced' in particular lacks clarity and the Team strongly urges that these phases be clearly defined.

The Team notes proposals for the 'comprehensive review of legal aid' as set out in the Bureau's report on legal aid. As stated above, however, the Team is of the view that any further review of the legal aid system should be postponed until a timely, comprehensive review of legal representation can be conducted. This would keep separate an evaluation of the current system of legal representation from a discussion of how best to fund that representation in the event of indigent victims and defendants.

This is not to say that many of discrete issues outlined in the report are not worthy of further serious consideration. In 2011, a Court report highlighted that 'main challenge it faces regarding the assessment of indigence is...[related] to exhaustively identifying the assets belonging to an individual in cases where steps have been taken to conceal those assets.' In this regard, the issue of cooperation of states in identifying assets is highlighted as impacting on ensuring that the legal aid system is as efficient and sustainable as possible.⁵ Other topics, like trial management may already be the subject of other reviews, including the "Working Group on Lessons Learned." Still other topics, such as indigence and counsel evaluation, should be considered as part of a comprehensive review of legal representation, rather than of just the legal aid system. However,

³ Report of Bureau on legal aid, ICC-ASP/11/2, 22 October 2012

⁴ Report of Bureau on legal aid, ICC-ASP/11/2, 22 October 2012, Annex para. 4

⁵ Report of the Court regarding the desirability of absolute thresholds for the purposes of indigence calculation, ICC-ASP/10/4, 17 June 2011, at para. 5.

the topics outlined must not be considered purely with a view to reducing the legal aid budget, but rather with a view to ensuring that the legal aid system is as efficient as possible.

The Team strongly urges states parties, therefore, to postpone a further review of the legal aid system. As recommended above, States parties should instead mandate the Bureau to consider, in consultation with the court, the timeframe, parameters, and modes of consultation with all relevant stakeholders, including the judiciary, external experts, legal representatives, bar organizations, clients, and NGOs, for an eventual comprehensive review of legal representation.

III. VICTIMS REPRESENTATION AND AN 'ENHANCED ROLE OF THE OFFICE OF PUBLIC COUNSEL FOR VICTIMS (OPCV)'

Recommendations

- The modality of victims' representation at the ICC and the possibility of a role for the OPCV is an exclusively judicial determination. States Parties must refrain from endorsing or pursuing an enhanced role for the OPCV; which would threaten the independence of the judiciary.
- The Team strongly recommends states parties to take note of the Registry's comments regarding the necessary role of external counsel in victims' representation.
- The Team calls for any review of the legal representation of victims to ensure victims provide input on the quality of the representation they have received so far and areas for improvement.

The possibility of an 'enhanced role of the OPCV' has been discussed as part of the legal aid discussions throughout 2012, furthermore the Bureau has identified an enhanced role of the OPCV as one of the issues in the 'comprehensive review' of legal aid to be undertaken in 2013. The Team remains very concerned that throughout 2012 the role of the OPCV in victims' representation has been driven primarily by cost considerations. The Team stresses that victims' representation must be based on the particular needs of victims in order to ensure meaningful representation in each case, and the consideration of the most cost-effective means to implement this representation must not be secondary the primary objective. Therefore, the Team strongly urges states parties, in their discussions on victims representation to be cognisant of the needs of victims, and wherever possible to consult with victims and their representatives.

The Team also remains concerned that the role of the OPCV in victims' representation is considered by the Bureau to be an 'option'⁶ or a 'proposal'⁷ that can be implemented by the Registry following a decision of the ASP. The Team stresses that 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.'⁸ The Team notes therefore that states parties may not in fact endorse or ensure that an 'enhanced OPCV' option is implemented. **Such action would threaten the independent decision making mandate of the judiciary relating to the**

⁶ Report of Bureau on legal aid, ICC-ASP/11/2, 22 October 2012, para. 22(a)

⁷ Report of Bureau on legal aid, ICC-ASP/11/2, 22 October 2012, para. 7

⁸ Supplementary Report of the Registry on four aspects of the Court's legal aid system, ICC-ASP/11/43, para. 48

modality of victims' representation and would also contradict the right of victims to choose counsel of their choice as provided for under the Rules of Procedure and Evidence.

In addition, the Team strongly recommends states parties to take note of the Registry's comments regarding the necessary role of external counsel in victims' representation⁹. The Team also highlights that 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 notes 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'¹⁰. The 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'¹¹.

The Team concurs with the Registry position expressed in its supplementary report 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.'¹² 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 requires 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 and hypothetical substantive increase in staff and non-staff resources, which may be less cost-efficient than the current system.

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. Indeed the Team notes a number of these concerns have recently been highlighted in cases related to the Kenya situation. In filings made by the Registry and OPCV and in a number of annexes, issues related to 'legal and practical impediments' including *inter alia* a lack of resources, conflict of interest, independence issues and accountability issues.

⁹ Report of the Court on legal aid: Legal and financial aspects of funding victims' legal representation before the Court, ICC-ASP/8/25, para. 38 and 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'

¹⁰ Supplementary Report of the Registry on four aspects of the Court's legal aid system, ICC-ASP/11/43, para. 54

¹¹ Supplementary Report of the Registry on four aspects of the Court's legal aid system, ICC-ASP/11/43, para. 49

¹² *Ibid.*

For these reasons, the Team strongly urges states parties to reserve any pronouncements on victims representation, the role of the OPCV or the necessary legal aid for victims, pending a holistic and thorough review of victims' representation at the ICC as part of a comprehensive review of representation at the ICC, with full consultation with all stakeholders including victims and legal representatives. This would allow all stakeholders, including the Court and states parties to be cognisant of all of the options and issues, both legal and practical, for victims' representation. The Team also notes that the nuances of victims' representation may differ from defence representation, and any review must be cognisant of possible differences between victims' and defence representation.

The Team notes that the modalities for representation of victims at the ICC has not been uniform and a number of different models for victims representation have been used in the Court's first cases. For example, the victims' representation models in the Court's first cases (*Lubanga* and *Katanga & Chui*) and those in *Gbagbo* and the Kenya cases differ greatly from each other particularly in the different roles envisaged for the OPCV. Therefore a holistic and considered review of victims' representation, as part of a comprehensive review of representation at the ICC should consider the Court's and victims' experiences in these cases and the numerous other practical and legal issues which have arisen in ensuring the meaningful and effective representation of victims at the ICC.

IV. REVIEW OF THE OFFICE OF PUBLIC COUNSEL FOR DEFENCE

Recommendations

- The Team strongly urges states parties to ensure that any review of the OPCD is carried out as part of a comprehensive review of representation at the ICC, with full consultations with all stakeholders, including, where appropriate, defendants and legal representatives - particularly those currently working on defence teams at the ICC, the judiciary, bar organisations and NGOs, drawing on lessons learned in the Court's first cases and current cases.
- The Team also strongly urges states parties to ensure that any review of the OPCD is not carried out for purely budgetary reasons.

The Team notes that the position and role of the Office of Public Counsel for Defence (OPCD) has also been highlighted by the CBF as requiring 'further review'.¹³ The Bureau has also stated that the role of the OPCD requires further analysis. The Team notes that a review of the OPCD had been conducted since 2010, under the leadership of Judge Fulford. As yet, the results of said review have not been made public, and the Team considers that the outcomes of this review may assist in reviews of the OPCD and may already have indicated areas which require consideration.

The Team however urges states parties to be cognisant of the role of OPCD in ensuring fair trial and equality of arms for defendants. Furthermore, the Team remains concerned that a rushed review of OPCD could be beset by the same problems encountered in the rushed proposals for an enhanced role of the OPCV and in particular the Team strongly urges states parties to ensure that any 'review' of the OPCD is not carried out for purely budgetary reasons. Indeed, a review of

¹³ Report of the Committee on Budget and Finance on the work of its nineteenth session, ICC-ASP/11/15, 29 October 2012, para. 99

the role of the OPCD should also consider issues which have also arisen in the context of discussions concerning the OPCV, including possible conflicts of interest, possible independence issues, as well as issues regarding the necessary resources required by the OPCD. The Team also notes that the potentially far-reaching review has been set in the context of legal aid, without elucidating how such a review would relate to the legal aid system.

Therefore the Team strongly urges states parties to ensure that a review of the OPCD is carried out as part of a comprehensive review of representation at the ICC, with full consultations with all stakeholders, including legal representatives, particularly those currently working on defence teams at the ICC. The Team reiterates that the nuances of defence representation may differ from victims' representation, and any review must be cognisant of possible differences between defence and victims representation.

Finally, the Team notes that the work of the OPCD is often crucially necessary to ensure fair and expedient trial proceedings. Furthermore, whilst the OPCD's work has been highlighted as possibly 'overlapping' with that of defence teams, in practice this has generally been due to the OPCD assisting defence teams in representation (in keeping with the mandate of the OPCD) and the OPCD's work in assisting and undertaking tasks for defence teams may be in practice be due to a lack of sufficient resources having been provided to legally aided defence teams.

V. LIST OF BAR COUNSEL – IMPORTANCE OF GENDER AND GEOGRAPHIC REPRESENTATION

Recommendation

- The ASP should request that strategies tailored to increase the number of women applying to the List of Legal Counsel and the List of Assistants to Counsel are included in any region-specific campaign from the outset.

As of 26 June 2012, there are 432 individuals on the List of Legal Counsel, of whom 109 (25.2%) are women and 323 (74.8%) are men¹⁴. The list is still overwhelmingly composed of men and the Team urges states parties to support endeavors and campaigns which aim to increase the number of female counsel on the ICC list of counsel. As the court continues to deal with gender-based crimes and victims of these crimes, the overwhelming majority of whom are women and children, the Court must ensure that its list of representatives includes those counsel with the necessary experience, expertise and skills to effectively represent the range of defendants and victims of crimes.

In this regard the Team strongly urges states parties to continue to support the Registry's "Calling African Women Lawyers" campaign that was launched in May 2010 and the "Calling Arab Counsel" campaign which was launched in May 2011 to increase the number of lawyers appointed to the List of Legal Counsel and the List of Assistants to Counsel from Arabic-speaking countries. Ensuring that the Court's list of counsel includes to the extent possible an equal gender and geographical representation base, will ensure that the Court has the widest possible range of appropriate expertise and the appropriate level of specific regional geo-political and legal understanding related to the Court's diverse range of potential situation countries.

¹⁴ List of Counsel Before the ICC, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/Counsel/List+of+Counsel/>