



LEGAL REPRESENTATION TEAM¹
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)

COMMENTS AND RECOMMENDATIONS
TO THE EIGHTH SESSION OF THE ASSEMBLY OF STATES PARTIES
18 - 26 NOVEMBER 2009, The Hague, Netherlands

The Legal Representation Team ("Team") is part of the CICC NGO team structure and is a group of non-governmental organizations and lawyers' organizations with expertise in issues related to the legal representation of defendants and victims. The Team has been following the development and implementation of the Court's legal aid system since the early stages.

This position paper addresses the following areas:

I) Victims' Legal Representation: The International Criminal Court (ICC) and Assembly of States Parties' (ASP) Bureau Reports on "Legal and financial aspects of funding victims' legal representation before the Court"

- 1) Basis for funding victims' legal representation
- 2) External and internal counsel

II) ICC Strategy in Relation to Victims

III) Legal Aid Budget for 2010 (defence and victims)

<p>I) "Legal and financial aspects of funding victims' legal representation before the Court"- Considerations on the Reports submitted by the Court and the ASP Bureau</p>
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At its previous session in November 2008, the Assembly of States Parties invited the Court to present to the Assembly at its eighth session an updated report on the "legal and financial aspects for funding victims' legal representation before the Court" and to "engage in a constructive dialogue with States on this issue". In the course of 2009, members of CICC's Legal Representation Team were actively involved in consultations with the Court as well as with the Hague Working Group. Furthermore, NGOs addressed the Committee of Budget and Finance (CBF) during its thirteenth session in August 2009 to present their views on the issues under discussion.

The CICC Legal Representation Team would like to put forward the following considerations in relation to the analysis and recommendations contained in the ASP Bureau's and the Court's final reports² on "Legal and financial aspects of funding victims' legal representation before the Court".

1. Basis for funding victims' legal representation

The Team supports the conclusion of the Court and the Hague Working Group that legal representation for indigent victims must be funded in order to give effect to their rights to participate in the proceedings.

The drafters of the Rome Statute clearly intended to establish an International Criminal Court which gave victims the right to participate in proceedings (Article 68) and to claim reparations (Article 75) and recognised the importance of victims' legal representation for the exercise of those rights. In fact, it would be impossible for victims to participate in any meaningful way in

proceedings without legal representatives. Since its establishment, the Court in its judicial and administrative work has affirmed both the right to participate and the right to legal representation. Victims will rarely come in person to The Hague and as expressed by Trial Chamber 1 in the Lubanga Case, participation requires technical knowledge of legal and procedural matters best provided by legal representatives, which can also represent large groups of victims in the interests of justice. Given the overwhelming indigence of victims, denying legal assistance provided for in Regulation 83 of the Regulations of the Court would in practice devoid victims of their right to participate.

->The Team therefore strongly recommends to adopt the language proposed by the Hague Working Group for inclusion in the ASP resolution "Strengthening the International Criminal Court and the Assembly of States Parties" ("omnibus resolution")

2. External and internal counsel

An issue that has come to the forefront of discussions surrounding the legal representation of victims in proceedings before the ICC are the respective roles external and internal counsel (ie counsel from the Office of Public Counsel for Victims - OPCV).

Following a recommendation of the CBF at the 12th session to consider further possible uses of the OPCV in relation to victims' representation, the Court analyzed the advantages and disadvantages of external and internal representation in its report to the ASP.

The Court concluded that there were strong policy reasons for retaining the involvement of both external and internal lawyers in the representation of victims (para. 40 of the Court's report³). The Team concurs with the Court's conclusion but with the understanding that victims should be primarily represented by external counsel and that the OPCV should remain in a role akin to that of the OPCD (ie to assist counsel and to represent victims only as a temporary measure or one of last resort) as reflected in Regulation 81 of the Regulations of the Court, which establishes OPCV.

In this respect, the Team would like to recall some of the reasons why it is strongly advisable that external counsel continue to represent the interest of victims and that victims be offered an opportunity to choose them:

- External counsel help 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 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
- 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 best placed to conduct numerous activities necessary to victim representation, such as locating victims and potential intermediaries.
- Last but important, as indicated by Trial Chamber I, in its decision of 6 March 2008⁴, there is a potential risk of conflicts of interest and duplication of functions with respect to the dual role of OPCV; given its limited resources, the core role of the Office should

be providing *support and assistance* to legal representatives of victims and victims themselves.

Cost of legal representation

The CBF in its latest report⁵ observed that the information provided by the Court did not allow for a full comparison between the OPCV and external counsel costs. The CBF noted that “in the absence of a common baseline for calculation, the figures provided were highly unreliable and could lead an unwary reader to conclude that choosing the OPCV was automatically the most economical option without proper justification” (para.128 CBF Report). The Team agrees with this observation as well as with the CBF’s recommendation that the Court should report back with more detailed information including common parameters allowing for a proper cost comparison. The Team calls on the Court to include and explain the increasing resources that would be needed by the OPCV should internal representation be the only possible option (increased travel budget, further personnel in The Hague, local staff, etc). At the same time, the Team would like to stress that even if the calculation of internal representation is ultimately less costly than external representation, the budgetary advantages will have to be carefully balanced with other concerns and advantages.

II) Draft ICC Strategy in Relation to Victims

The Team welcomes the revised “Draft ICC Strategy in Relation to Victims” and its commitment to “ensur[ing] that victims obtain high quality legal representation before the Court” as a key objective. The revised draft strategy represents progress in the Court’s approach to victims’ legal representation and victim participation more broadly. The Team believes that in finalizing the strategy, further efforts are required to identify specific targets for its implementation.

->The Team encourages the Assembly to recognize in this session’s omnibus resolution the Court’s progress in revising the “ICC Strategy in Relations to Victims” and to call for the inclusion of specific targets in an update of the strategy to be presented to the ninth Assembly session.

III) Legal Aid Budget for 2010

Concern relating to cuts in legal aid

The Committee has recommended that the budget for legal aid for the defence should be reduced by 7% and that the budget for legal representation of victims should be reduced by 15%. The Committee justifies its recommendation on “the current trends in expenditure.”⁶ The Team is concerned that recommendations made by the Committee to reduce the legal aid budget for both defence and victims’ representatives, could undermine the vital work of both types of counsel.

In relation to legal aid for defence, the Team has been informed that the Court expects an actual overspend in its 2009 legal aid budget. This is contrary to the trend relied upon by the Committee. The Team is therefore concerned that a cut to a budget which is already insufficient could undermine the resources available for the defence.

In relation to legal aid for victims’ representation, the Team is informed there has been a significant underspend in the legal aid budget for victims’ representatives in 2009. Given the amount of activity by victims’ representatives this year on situations and cases, the reason for the underspend is unclear, though may be related to security risks linked to the novelty of the first trial and consequently reduced travel expenditure. The Team is concerned that the existing legal aid scheme at the Court does not allow for the allocation of resources to victims’ legal representatives in a manner that best reflects their needs and the obligations of counsel under the ICC code of conduct to maintain regular contact with their clients. The Team recalls that the scheme for legal aid for victims was created at a time when the Court had little guidance on the role of victims in proceedings and that legal aid was disbursed cautiously in accordance with the developing procedural rights of victims. As the Courts’ jurisprudence has now established

more clearly the role of victims and the importance of more linkages between counsel in the Hague and their clients in the field, the Team calls on the Court to conduct an urgent review to determine the reasons for the low level of implementation of the 2009 budget and to address any problems that are identified. More generally, the Teams calls on the Court to continue to review the structure of victims' legal aid and adjust it accordingly, in order to allow legal representation teams to duly exercise their duties in accordance with the modalities for victim participation established by the relevant chambers.

Given the expected increase in trial activities next year, as well as increasingly clear jurisprudence on the role and expectations of legal representatives, the cautious expenditure and limited trial activity of 2009 is due to change. An encouraging number of victims have been recognized in the second case,⁷ Furthermore, potential reparations proceedings in the Lubanga case in 2010 will generate significant activity. Reparations proceedings are the most active phase for victims, who may be required to provide evidence of their harm in the form of medical or psychosocial reports, and most likely satisfy higher standards of proof than for participation.

The Team further notes that, in the proposed 2010 budget, the Court had already implemented a reduction of approximately 20% in legal aid for victims' representatives from the 2009 level. The Team is therefore concerned that resources will be insufficient to meet the obligations of counsel representing victims.

->In relation to both cuts the Team urges the Assembly to review the Committee's recommendation together with information supplied by the Court to ensure that, if implemented, the cuts would not undermine the ability of the Court to fund the defence or victims' representatives in 2010. If the Assembly determines that the cut would risk underfunding either form of counsel, it should decide either not to implement the Committee's recommendations or to reduce the percentage to a more appropriate level.

¹ While the work of the CICC Legal Representation Team reflects the positions of those Coalition members most active on particular issues and this paper has been prepared in consultation with other Coalition teams, 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 <http://www.icc-cpi.int/NR/rdonlyres/C65E4F3A-BAF7-4FFA-B6CE-0718AD495873/0/ICCASP838ENG.pdf>

³ <http://www.icc-cpi.int/NR/rdonlyres/B57B2475-5B57-49DD-8037-791E20A7D127/0/ICCASP825ENG.pdf>

⁴ Decision Trial Chamber I, of 6 March 2008, ICC-01/04-01/06-1211

⁵ <http://www.icc-cpi.int/NR/rdonlyres/93F7C5C4-6DF0-41B3-BCA5-C34B417F115A/0/ICCASP815ENGAdvance.pdf>

⁶ Report of the Committee on Budget and Finance on the work of its thirteenth session, ICC-ASP/8/15, paras. 95 and 96.

⁷ Figures for Katanga/Ngudjolo 345 as opposed to 101 in Lubanga case