



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

SUBMISSION and RECOMMENDATIONS
On the **“Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011’**

9 March 2012

The Legal Representation Team (Team) of the Coalition for the International Criminal Court (CICC) ¹ was established to monitor the work of the Assembly of States Parties (ASP) and the International Criminal Court (ICC) on issues concerning the legal representation of victims and defendants before the ICC. This Team submission has been produced in response to the Registry’s second review document entitled ‘Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011’ of 15th February 2012 as mandated by the Assembly of States Parties (ASP) during its tenth session.

The Team, while supportive of measures that seek to improve and make more efficient the legal aid system, calls on the Bureau of the Assembly of States Parties, when it meets in March, to decline to adopt the proposed changes to the legal aid system at this time. The current, expedited review process provides an inadequate basis for amendments.² In particular:

1. The process has been rushed without adequate consultation;
2. The focus of the review has been piecemeal, driven by budgetary pressure to reduce legal aid rather than a genuine review of the existing system;
3. It is unclear whether the Registry’s proposal will lead to greater efficiency; and
4. There are many specific and outstanding questions relating to the Registry’s proposal, including its potential impact on the rights of the accused in Article 67 of the Rome Statute and the rights of victims in Articles 68 and 75, as well as whether the proposal will achieve greater efficiency. These outstanding questions are discussed in more detail below.

Instead, the Team calls on the Bureau to mandate the ICC, in consultation with States Parties and stakeholders, including civil society organisations, to conduct a comprehensive review of the entire legal aid system at the end of the ICC’s first trials, to be presented to the Committee on Budget and Finance at its 20th session in 2013 following the consideration of a progress report by the Assembly at its 11th session in November 2012.

A. Overall concerns

This is the Team’s second submission on this issue. The first submission - a response to a Registry discussion paper on the review of the legal aid system of 19 December 2011- was widely circulated and can be accessed from the Coalition’s website³. The first Team submission - which expressed strong reservations regarding aspects of the paper - articulated three central concerns which, in light of the continued expedited pace of review, we wish to reiterate here.

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.

² ‘Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011’ of 15th February 2012 as mandated by the Assembly of States Parties (ASP) during its tenth session.

³ <http://www.iccnw.org/?mod=legalrep>.

1. The absence of adequate and genuine consultations with stakeholders.

The Team is concerned that the Registry and States Parties have persisted in undertaking an expedited review and cost-cutting exercise, within the extremely short period of two months, into the Court's legal aid system - a critically important institutional mechanism established to ensure access to justice for indigent victims and defendants. The Team is troubled that a system which was devised over a period of twenty months and developed over seven and a half years is being reviewed in a piecemeal manner in this short period.

The Team considers that the expedited nature of the current review will negatively impact the effective representation of victims and defendants before the Court. The Team is also concerned that States Parties in seeking to identify additional savings (€1.5 million – see below), beyond those proposed by the Registry, may pre-empt appropriate consultation on key issues.

For these reasons, the Team strongly reiterates its previous recommendation urging States Parties to **defer any decision on the present issues until a considered and measured review into the legal aid system as a whole has been conducted** including broad consultations with relevant stakeholders including members of the legal profession, representative bodies of counsel pursuant to Rule 20(3) of the ICC Rules of Procedure and Evidence and members of civil society organisations. The Team suggests that the consultation should at the earliest commence after the conclusion of the ICC's first trials which would have concluded by the 20th Session of the Committee on Budget and Finance, giving the Court and States Parties time to gather and assess all relevant information and input before taking steps to improve the overall viability and effectiveness of the system.

2. The Registry Proposal appears to be driven by a need to identify savings due to budgetary restrictions rather than an intention to genuinely review the existing system.⁴

The team notes that the ASP Resolution⁵ mandates the Registry to 'review' the legal aid system, which the Team understands would lead to cuts to the legal aid budget amounting to approximately €1.5 million. Legal aid appears to have been arbitrarily selected for the implementation of these measures without clear and detailed analysis of the potential impact of the qualitative representation of victims and defendants, or of other areas within the overall budget where efficiencies can be made. The Team notes that this is arguably in contravention of the "fairness of proceedings" and the "rights of defendants and victims" as iterated by the Resolution.

In addition, this budgetary pressure has produced a piecemeal review of the legal aid scheme before a full judicial process had been completed, as had originally been foreseen⁶. The Legal Aid scheme is complex and its elements are interrelated. It should be reviewed as a whole taking into account experience in practice. The discussion paper presented to the Assembly and the Registry's subsequent proposal do not review the scheme in its entirety or even explain clearly how the system currently operates. The changes proposed are isolated, they are not fully substantiated and it is unclear what broader impact they will have. Given that the ICC is expected to deliver decisions in accordance with Article 74 in the next months, which would paint a better picture where, if any, the legal aid system could be streamlined or improved, it would be more appropriate to conduct a comprehensive review of the legal aid scheme following those decisions and any possible appeals and reparations phases.

⁴ Registry 'Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011' at para. 12

⁵ ICC-ASP/10/Res.4 - Programme budget for 2012, the Working Capital Fund for 2012, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2012 and the Contingency Fund

⁶ See Registry 'Discussion Paper on the Review of the ICC Legal Aid System' at page 1, and *Report of the Committee on Budget and Finance on the work of its fourteenth session* (ICC-ASP/9/5), para 77.

The Team strongly urges States Parties to avoid imposing selective and hurried cuts to certain elements of the Court's overall budget based only on an incorrect assumption that savings can be made more quickly and instead conduct a review into the overall budget⁷ of the ICC in order to find efficiencies, where possible.

3. ***Implementing the current proposed adjustments to the Legal Aid system from 1 April 2012 may negatively impact the efficiency of proceedings at the Court and likely lead to additional costs rather than overall savings.***

The Team notes in particular that if the Registry's proposal is applied to existing teams, one immediate impact of a reduction of available resources is the likelihood that existing legal teams will be increasingly overstretched to cope with limited resources. Given the current practise at the Court (for example in relation to the need for consultation by legal representatives with their victim clients) there is every likelihood that this will result in delays to trials, such as where counsel is unable to adequately consult with those they are representing due to inadequate or exhausted resources. There is also a potentially negative impact on the workload of the Registry staff who may be inundated with requests for additional legal aid, and on Chambers to adjudicate disputed legal aid issues.

B. Specific concerns and recommendations

The Team makes the following observations and recommendations regarding the Registry's proposal and other issues relevant to current discussions on legal aid. In particular, there remain a number of outstanding questions regarding the potential impact on the rights of the accused in Article 67 of the Rome Statute and the rights of victims in Articles 68 and 75.

1. Need to consider proposal in light of existing practice

The expedited pace of the preparation of the Registry's second proposal has resulted in a document which does not fully reflect the existing practice of the Court and is somewhat unclear. Though the Registry has made some welcome adjustments to the proposal addressing a number of the concerns articulated by stakeholders including the Team, many of the proposals are still worrisome. The Team considers that if a decision is made to amend the system based on recommendations derived from the Registry's 'Discussion Paper' which does not take into account existing practice, there is a real risk of error with grave repercussions in the future.

2. Victims representation

(a) Victims Representative Team Composition

The Registry proposal does not outline the current compositions of Legal Representation of Victims LRV teams (see Annex I) which have evolved since the 2007 Legal Aid Paper to meet the needs of a meaningful participation, the challenges that meeting with victims from remote areas may represent, and large numbers of victims. Current representation teams are currently larger than the proposed 'core-team' and may have up to three team-members in the field. This is due to the need for larger teams to ensure meaningful representation as has been acknowledged in a number of Court decisions. It is therefore unclear how the proposal to add a resource person to a 'core-team' will affect existing victims' representation teams and what impact this will have on future representation given

⁷ Overall budgetary figures relating to legal aid have not been provided in the Registry proposal. The Team strongly urges States Parties to gain clarification from the Registry on the current monetary figures relating to legal aid. Viewed in their proper light, it can be seen that the legal aid system is not a cost driver which has suddenly nearly doubled in size from 2011 to 2012, but rather reflects under budgeting by the Registry (below) and the increase in the number of cases being processed by the ICC. In 2010 there were four cases – and in 2012 there are nine legally aided cases.

2010: Actual Expenditure on Legal Aid - €4.13 million
2011: Approved Budget for Legal Aid - €2.7 million
2012: Estimated Budget Legal Aid - €7.6 million.

that the proposal does not reflect current practice. Any addition to the core legal representative teams must not in practice lead to a reduction in LRV teams.

b. Victims Investigations Budget

The Registry proposal does not address the current travel activities of victims' teams and fails to provide actual figures for current victims travel practices, nor does the proposal include the number and duration of travel missions undertaken to date.

The proposed sum of €22,152 for investigations is insufficient to cover *the entire duration of the proceedings* including conducting investigations in relation to any potential reparation phase. For example, in the Kenya 1 case, over €11,000 had already been approved by the Registry, and spent, by the end of October 2011, to allow the LRV to meet with 244 clients⁸, in a recent mission by the same Legal Representative to Kenya, the requested amount for a *single two-week* mission was €13,020.⁹ While the Team does not take a position on the amount requested by victims' counsel in this instance, what these figures serve to highlight and at the very least question is the appropriateness of allocating the arbitrary amount of €22,152 to cover expenditure for an entire year without first reflecting on actual costs. The investigations budget should be allocated with a view to limiting to the extent possible the need for counsel to seek further resources from the Registry or petition Chambers in the event of a refusal.

c. Reduction to one victims' representation team per case

The current proposed reduction to one LRV team per case must be considered in light of current practice. For example, in the Kenya cases, whilst each case only has one team, each team has in fact been granted the *resources* that are the equivalent of *two* teams. The Registry's proposal also does not reflect on practice and jurisprudence which has illustrated that it may well be necessary to appoint two (or more) legal representatives of victims per case due to a large number of victims and in order to ensure that victims' representation remains effective¹⁰. Any decision on the number of legal teams or resources granted will only be possible after an assessment of the number and needs of victims on a case by case basis. To do otherwise would be to disregard recent Court decisions and the progress made in the evolving practice of victim participation.

d. OPCV in place of external counsel

Although the Registry's proposal does not go into any detail concerning this issue pending the finalisation of a Review by an internal Court committee, the Team is aware that the issue has been mentioned by the CBF and is under consideration by the HWG. Pending the final outcome of the internal review, the team strongly notes that any determination of this matter must be consistent with the right of victims to meaningful representation, independent of any conflicts of interests and consistent with Rule 90(1) of the Rules of Procedure and Evidence. The team also notes that there have been numerous debates in relation to such a possibility which warrant a very careful consideration of this issue.¹¹

3. Defence representation

The Team notes that the Registry has proposed a monthly remuneration of €1,800 (an increase of €800 over the previous draft proposal) for the Defence investigations resource person. As with victims, the team is concerned that this proposal does not appear to take into account other relevant factors including additional costs which such persons may incur and it is unclear whether these must

⁸ ICC-01/09-01/11 *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Urgent Request by the Victims' Representative for an order from the Chamber requiring the Registrar to provide appropriate resources for the current mission in Kenya, 29 February 2012, at para 47

⁹ *Ibid.*

¹⁰ ICC-01/05-01/08- 1005, *Prosecutor v. Bemba*, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, at para 7.

¹¹ See Legal representation team Comments on the court's draft legal aid report: "legal and financial aspects for funding victims' legal representation before the court", 15 august 2009,

http://www.iccnw.org/documents/CICC_Legal_RepTeam_Comments_on_Legal_Aid_Report09_170809_f1.pdf

be taken from the resource person's remuneration or from the overall defence investigation budget. The negative impact on investigations will also be compounded by the closure of a number of field offices and the inability of investigators to rely on the resources which may previously have been provided in the field.

4. Remuneration of Victims and Defence Counsel and Support Staff

Remuneration of counsel and support staff must be adequate in order to ensure that sufficiently experienced, qualified and competent counsel appear on behalf of defendants and victims before the International Criminal Court. The level of remuneration presently provided to legal representatives for victims and defence does not also include any other benefits such as social security, pension advantages and rental subsidies amongst others. Given that legal representatives may engage in full-time cases for several years, the payment by counsel and support staff of these expenses will amount to a significant sum.

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

The Team notes that the issue of remuneration in the case of a representative holding several mandates is not found in the Registry proposal. The Team welcomes the decision of the Registry to defer the above matter for consideration throughout 2012. Multiple representation raises a number of issues, in particular relating to the fair representation of defendants and victims if a counsel receives a proportionally lower fee in taking on a second case than received for just one case. The Team is concerned that such lower fees for multiple cases may also lead to the perception of defendants, victims and the public at large that one case will be favoured over the other. In light of the complexity of this issue, **the Team supports the Registry recommendation to defer the issue for more comprehensive review and urges States Parties to accept this recommendation.**

6. Subdivision of the Trial Phase

A correlation between phases when courtroom activity is reduced and level of work cannot always be made and the presumption that these phases of a trial necessarily entail a reduced work load is not always correct. Practice in a number of cases as well as jurisprudence in the *Lubanga* case has highlighted that the level of representation of defendants and victims must continue during all periods of the trial phase and that therefore legal aid must reflect this level of work and engagement.

Recommendations

In light of the foregoing concerns, the Team strongly urges States Parties not to endorse the Registry's proposals for changes to the existing legal aid system and to defer all the issues currently under consideration to a more comprehensive review throughout 2012.

Most importantly, the Team encourages the Registry and the Assembly to continue efforts in a systematic and informed manner to find areas where greater overall efficiency can be achieved in the Court's budget without resorting to arbitrary cuts.

ANNEX I

Legal Representation for Victims (LRV) Team Composition

Proposed Core Team v. Examples of Current Practice*

Proposed 'Core Team'

(Paragraphs 21 – 25 – Registry proposal)

During Trial Phase:

- One Counsel
- One Case Manager
- One Resource Person
- (One Legal Assistant – during Reparations phase)

Current LRV Team Compositions

Katanga Case - Two LRV Teams (Trial Phase)

Team One

- One Counsel
- One Case-manager

Team Two

- One Counsel
- One Legal Assistant,
- One Case-manager
- One field staff member

Bemba case – Two LRV Teams (Trial Phase)

Team One**

- One Counsel
- One Case-manager
- One Full Time Legal Assistant based in the field

Team Two**

- One Counsel
- One Case-manager
- One Full Time Legal Assistant based in the field

Ruto and Sang Case (Pre-Trial Phase)

- One Counsel
- One Legal Assistant
- One Case-manager
- Three Field Assistants

Muthaura and Kenyatta Case (Pre-Trial Phase)

- One Counsel
- One Legal Assistant
- One Case-manager
- Three Field Assistants

* This annex is based on informal consultations with members of Victims' Representation Teams

**In the *Bemba* case the two case-managers are shared between the two teams