

RESPONSE TO THE PROPOSAL BY THE REGISTRY TO REDUCE THE LEGAL AID BUDGET AS IT RELATES TO THE VICTIMS PARTICIPATION AND REPRESENTATION

The Kenyans for Peace with truth and Justice (KPTJ) ICC WORKING GROUP¹ is a network of nongovernmental organizations and individuals whose mandate and interest involves the pursuit of criminal accountability in Kenya following the post- election violence in 2007/08. The working group envisions a society that respects the rule of law and the right of victims to justice. Its mission is to promote a greater understanding of the ICC process in Kenya through coordinated and informed outreach, participation and engagement of victims to the process as well as advocate for implementation of criminal accountability and reparation processes in Kenya.

Executive Summary

On 31ST March 2010, Pre-Trial Chamber II authorized the Prosecutor to open an investigation *proprio motu* into the situation in the Republic of Kenya. Since then, two cases have been opened by Pre-Trial Chamber II: *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Kenya case one), and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Kenya case two).

By the decisions issued by the Pre-Trial Chamber on 5th and 26th August 2011 respectively, 560 victims were approved to participate in the confirmation of charges hearings for the two Kenyan cases under consideration before the ICC. In these decisions two common legal representatives – one in each case - were appointed to represent the views of all 560 victims approved to so participate. Pursuant to the aforementioned decisions, the Single Judge of Pre Trial Chamber II endorsed and authorized the proposal by the Registrar for the recruitment of: (i) a legal assistant; (ii) a qualified case manager; and (iii) two field assistants, to work under each appointed

¹Members of the ICC working group include:

- ✚ Africa Center for Open Governance (AfricOG)
- ✚ Coalition On Violence Against Women (COVAW)
- ✚ Federation Of Women Lawyers (FIDA)Kenya
- ✚ Human Rights Watch (HRW)
- ✚ Independent Medical Legal Unit (IMLU)
- ✚ International Centre For Policy And Conflict (ICPC)
- ✚ International Commission Of Jurists (ICJ) Kenya
- ✚ International Centre for Transitional (ICTJ)
- ✚ Kenya Human Rights Commission (KHRC)
- ✚ Kenya National Commission On Human Rights(KNCHR)
- ✚ Kituo Cha Sheria

Legal Representative, owing to the peculiarities of the case – including the number of victims admitted to participate, the geographical and linguistic difficulties in establishing contact with the victims and, the legal and factual complexity of the present cases.

On 19th December 2011, the Registrar of the ICC issued a paper termed to be a “Discussion Paper on the Review of the ICC Legal Aid System”(the Discussion Paper). In the Discussion Paper, the Registrar describes the intention of the Discussion Paper as being to initiate a consultation with all relevant stakeholders, including Counsels, interested NGOs and States Parties, for purposes of presenting her proposal for the review of the legal aid system to the Committee on Budget and Finance for its consideration at its April 2012 session.

Within the Discussion Paper the registrar makes certain recommendations for the administration of the ICC funds for legal aid vis-à-vis the defence and victims’ participation, which would have a profound effect on the efficacy of these two parties, and significantly on the victims’ representatives’ ability to meaningfully advance the interests of victims participating in cases before the ICC. The most significant of these recommendations include the reduction of remuneration benefits; the composition of field staff; and the facilitation for air travel for the legal teams in question.

This document seeks to respond to the registrar recommendation by highlighting the effect of the proposed changes to the Legal aid budget.

The provision of support to indigent defendants and victims permitted to participate through the various phases of the pre-trial, trial and post trial process is inarguably essential to the assurance of a fair judicial process. Any cuts in operational expenses therefore, must avoid rendering these services inefficient and superficial.

The Kenyan situation now involves the prosecution of four suspects in two cases for crimes against humanity – specifically, murder, forcible transfer of population, rape, other inhumane acts and persecution. The very nature of these crimes raises certain logistical difficulties in working with the victims. These include:

- a) Movement over vast geographical distances:
- b) Poor transport and communication infrastructure:
- c) The number and the nature of the victims that need assistance:
- d) Security:

From an objective assessment of the aforementioned considerations, within the Kenyan situation, it becomes highly plausible that the reduction of manpower, and or individual financial capabilities of field operatives would have profound effects on the efficiency of the operations of field staff and indeed the victims’ representatives. Indeed, due to the number and distribution of approved victims alone, one could easily argue for the need to increase the field operatives for each of the teams given the disclosed logistical complexities to full-time operations with victims.

The imposed limitations proposed within the Discussion Paper have the very real potential of rendering the operations of the victims’ representative unsustainably arduous and thereby, largely ineffective. Consequently it

is our opinion that similar assessments should be conducted to determine whether or not a reduced field staff would result in:

- a corresponding reduction in response time to urgent operational demands due to decreased delegation and resource mobilization capabilities;
- a corresponding reduction in the ability to steadfastly communicate with a majority of the victims;
- a corresponding reduction in the ability to wholesomely communicate the views of victims; and
- a corresponding inability to identify and address the manageable support and security needs of victims.

Conscious of the fact that the proposals made by the Registrar in the Discussion Paper are made in furtherance of process to review the legal aid system that began in 2007, the coalition of civil society organizations in Kenya make the following recommendations with this process in mind.

1. *The current resource allocation levels for legal aid are low and will need to be increased*
2. *The need for differential treatment between counsel for indigent defendants and counsel for victims:*
3. *Legal aid resources for victims must increase in direct proportion to the number of cases under consideration:*
4. *Attempts at cutting cost must be preceded by a comprehensive consultative impact assessment:*
5. *Need to establish a separate contingency fund dedicated to victims' representation estimations that are grounded in the approximations of resources applied in similar situations and trial phases.*

1.0 INTRODUCTION

1.1 Importance of victim's participation and representation

The International Criminal Court (ICC), as stated in its enabling treaty, is a permanent international court established to prosecute perpetrators of the most serious crimes of international concern. Its primary mission is to help put an end to impunity for the perpetrators and in so doing deter the recurrence of such crimes.

Along with the nature of crimes within its jurisdiction, victims' participation is arguably one of the most revolutionary aspects of the system for criminal justice and accountability pursued by the ICC. This process recognizes the rudimentary role that victims, who in essence are the primary beneficiaries of any criminal justice system, can play in the delivery of substantive justice by providing victims the space and facilities to present their views and concerns to the court.

Through the avenue of victims' participation, the court not only aids in restoring the dignity of the victims by giving them a voice in the judicial process, but also benefits from the victims' views, which often provide a much needed context and perspective for evaluation of the matters under the judicial considerations of the court. Consequently, victims' participation has had the effect of enriching the jurisprudence of international criminal

justice and has bolstered the image of the ICC as a criminal justice institution concerned serving the plight for justice and accountability for victims of the recognized international crimes.

On 31ST March 2010, Pre-Trial Chamber II authorized the Prosecutor to open an investigation *proprio motu* into the situation in the Republic of Kenya. Since then, two cases have been opened by Pre-Trial Chamber II: *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Kenya case one), and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Kenya case two). Confirmation of charges proceedings were held for both cases on 1st and 21st September 2011 respectively. On 23rd January 2012, the charges were confirmed against two of the suspects in each of the cases (William Samoei Ruto and Joshua Arap Sang in Kenya case one and Uhuru Muigai Kenyatta and Francis Muthaura in Kenya case two, respectively).

By the decisions issued by the Pre-Trial Chamber on 5th and 26th August 2011 respectively, 560 victims were approved to participate in the confirmation of charges hearings for the two Kenyan cases under consideration before the ICC. In these decisions two common legal representatives – one in each case - were appointed to represent the views of all 560 victims approved to so participate. Pursuant to the aforementioned decisions, the Single Judge of Pre Trial Chamber II endorsed and authorized the proposal by the Registrar for the recruitment of: (i) a legal assistant; (ii) a qualified case manager; and (iii) two field assistants, to work under each appointed Legal Representative, owing to the peculiarities of the case – including the number of victims admitted to participate, the geographical and linguistic difficulties in establishing contact with the victims and, the legal and factual complexity of the present cases.

2.0 REVIEW OF THE REGISTRY PROPOSALS REGARDING VICTIMS PARTICIPATION

On 19th December 2011, the Registrar of the ICC issued a paper termed to be a “Discussion Paper on the Review of the ICC Legal Aid System” (the Discussion Paper). In the Discussion Paper, the Registrar describes the intention of the Discussion Paper as being to initiate a consultation with all relevant stakeholders, including Counsels, interested NGOs and States Parties, for purposes of presenting her proposal for the review of the legal aid system to the Committee on Budget and Finance for its consideration at its April 2012 session.

This consultative approach is laudable and we, as a coalition of civil society organizations working around various aspects of the ICC proceedings relative to our county, believe that the matters highlighted in this response will indeed serve to improve the approach to the management of legal aid funding, especially as it concerns victims’ participation and representation.

Within the Discussion Paper the registrar makes certain recommendations for the administration of the ICC funds for legal aid vis-à-vis the defence and victims’ participation, which would have a profound effect on the efficacy of these two parties, and significantly on the victims’ representatives’ ability to meaningfully advance the interests of victims participating in cases before the ICC. The most significant of these recommendations include the reduction of remuneration benefits; the composition of field staff; and the facilitation for air travel for the legal teams in question.

2.1 General Comments

These measures are proposed seemingly toward the reduction of expenses within the legal aid budget. While this motive is noble, its value lies in its efficacy. Any process of streamlining reductions in operative costs must adhere to the following principles:

- i) It must avoid adversely affecting the efficient operation of essential functions within the institutions in question to a debilitating extent;
- ii) Its implementation must not result in the incurrence of similar or greater expenses; and
- iii) It must show significant overall savings will be effected in the short and long term;

I. Effect on essential operations

The provision of support to indigent defendants and victims permitted to participate through the various phases of the pre-trial, trial and post trial process is inarguably essential to the assurance of a fair judicial process. Any cuts in operational expenses therefore, must avoid rendering these services inefficient and superficial.

To realistically avoid this outcome, one must pragmatically assess the operational contexts of the offices to be affected by cut-backs in order to understand their operational and consequently their financial needs. In the absence of any affirmation to the contrary, we assume that this has yet to be undertaken by the Registry.

To give an illustration of why this is important we give following the local example:

Challenges of working with case victims in Kenya

The Kenyan situation involves the prosecution of four suspects in two cases for crimes against humanity – specifically, murder, forcible transfer of population, rape, other inhumane acts and persecution. The very nature of these crimes raises certain logistical difficulties in working with the victims. These include:

- a) ***Movement over vast geographical distances:*** Of particular note are the displaced victims of these crimes that number in the hundreds of thousands. The very matter of displacement means that individuals once living in the areas within the scope of the cases are now distributed widely over other geographical areas to which they have settled. In case one, for instance, the geographical scope of the crimes includes, Turbo town, Kapsabet town, Nandi hills town and the greater Eldoret area. While these geographic areas are specific the victims are spread out over 6,000 Km² within and surrounding these areas. Similarly, victims of displacement in case two of the Kenya case were originally displaced from Nakuru and Naivasha towns, yet some of these victims have moved to and relocated in Nyanza and Western provinces which are approximately 148 km to the west of Nakuru district.
- b) ***Poor transport and communication infrastructure:*** The areas within which victims are located, as aforementioned, are vast in size and poorly served by transportation and communication infrastructure. The main towns and urban centers of these areas are widely separated with few tarmac roads serving between them. Even further from the towns are the rural communities served by even fewer dirt roads for which the main mode of public transportation are motorcycles mostly

built to ferry a single passenger with some extreme circumstances where even the motorcycles do not exist and thus bicycles are used .

- c) **Sheer number of victims to assist:**It must be remembered that unlike the counsel for the defence, the victims' representative is the legal representative of each of the victims he/she has been permitted to assist. This often means that each victims' representative has multiple clients as opposed to a singular client. The field officers are the voice, eyes and ears of the appointed legal representative and, as such, must cultivate close relationships with the victims if they are to effectively play this role. Consequently, the field operatives must make frequent travels to meet, assess and communicate with each individual victim. Some of these journeys take full days depending on the transportation infrastructure and facilities available. The difficulty of this operational necessity is proportionally compounded with any increase in the number of represented victims as well as a decrease in the number of supporting field operatives.
- d) **Security:** A good number of the victims in the Kenyan situation continue to live among the ethnic communities that are militantly supportive of the suspects. Within these communities are the lower level perpetrators of the crimes for which the suspects face the prospect of prosecution, who continue to enjoy the air of impunity cultivated by the relative prosecutorial inaction of the State. In some of these areas the atmosphere of insecurity is palpable and victims live in fear of being targeted for persecution as a result of their affiliation with the ICC through the process of participation. Such victims prefer to meet outside their areas of residence and for short periods of time to avoid suspicion. Within those areas, affiliation with the ICC is almost taboo and, consequently, field operatives must function in secrecy and with immense discretion to prevent the persecution by affiliation of the victims they represent. Being ineligible to any security detail or personnel, the field operatives must also be mindful of their own safety, finding security in their numbers by watching over each other's interests.

From an objective assessment of the aforementioned considerations, within the Kenyan situation, it becomes highly plausible that the reduction of manpower, and or individual financial capabilities of field operatives would have profound effects on the efficiency of the operations of field staff and indeed the victims' representatives. Indeed, due to the number and distribution of approved victims alone, one could easily argue for the need to increase the field operatives for each of the teams given the disclosed logistical complexities to full-time operations with victims.

The imposed limitations proposed within the Discussion Paper have the very real potential of rendering the operations of the victims' representative unsustainably arduous and thereby, largely ineffective. Consequently it is our opinion that similar assessments should be conducted to determine whether or not a reduced field staff would result in:

- a corresponding reduction in response time to urgent operational demands due to decreased delegation and resource mobilization capabilities;
- a corresponding reduction in the ability to steadfastly communicate with a majority of the victims;
- a corresponding reduction in the ability to wholesomely communicate the views of victims; and

- a corresponding inability to identify and address the manageable support and security needs of victims.

II. Cost of implementation

Together with an assessment of the impact of the proposed reductions an assessment of the implicative costs of implementing said reductions should also be carried out. Will the reduction in operative field staff demand an increase in court hours to facilitate compliance with court instructions? What are the comparative costs of the additional court hours? Will reducing the number of operative field officers per team mean that more field visits must be conducted by the legal representative e.g. missions to secure victims' views or in response to court orders? What would be the comparative cost of these visits to the cost of the extra field operatives? Would the logistical difficulties of more frequent distant travel for a sole field operative require the purchase or hire of a field vehicle? Again, what is the comparative cost? Would special operative demands such as gender sensitivity in cases of victims of sexual violence require the procurement of consultants? Again what is the comparative cost of hiring consultants to having a separate field officer that can also handle sensitive matters?

III. Overall savings

There has indeed been significant concern raised in the budgeting processes over the increase in the amount of resources required to facilitate legal aid for the respective indigent defendants and participating victims of the various cases and situations under consideration before the court. Legal aid has been cited as one of the main cost drivers in the 2012² budget. This has been a sustained postulation in the preceding budgets. However, a superficial comparison seems to indicate that legal aid plays a far more limited role upon overall budgetary cost implications.

In 2010 the total expenditure on legal aid was approximately 4,864,300 Euros³ which marked a 4.69 % (of which **1.19%** or 1,235,000⁴ Euros was applied for counsel for victims in the various situations and cases operating at the time) allocation of the overall budget of 103,623,000⁵ Euros approved for the 2010 financial year, and 8.15% of the 59,631,000 Euros⁶ budget allocation to the Registry. Similarly, the approved budget for legal aid in 2011 amounted to 3,514,700 Euros⁷, which marked 3.39% of the 103,607,900 Euros⁸ approved for the 2011 budget (of which **1.55%** or 1,611,800 Euros was allotted for the counsel for victims), and 5.7% of the 61,611,400 Euros⁹ allocated to the registry.

²Proposed Programme Budget for 2012 of the International Criminal Court, para 25

³Proposed Programme Budget for 2012 of the International Criminal Court, ICC-ASP/10/10, Table 52: Sub-programme 3190: Proposed budget for 2012, pg 85

⁴Id, pg 85

⁵Report on budget performance of the International Criminal Court as at 31 March 2010, ICC-ASP/9/6, Table 1: Total ICC Budget performance as at 31 March 2010 by item of expenditure, pg 2

⁶Report on budget performance of the International Criminal Court as at 31 March 2010, ICC-ASP/9/6, Table 2: Budget performance as at 31 March 2010 by Major Programme, pg3

⁷Proposed Programme Budget for 2012 of the International Criminal Court, Table 52: Sub-programme 3190: Proposed budget for 2012, pg 85

⁸Programme budget for 2011, the Working Capital Fund for 2011, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2011 and the Contingency Fund, ICC-ASP/9/Res.4, pg 30

⁹Id, pg 30

In the Proposed Programme Budget for 2012 of the International Criminal Court, the Committee on Budget and Finance (CBF) proposed a significant increase in the budget allocation for legal aid, factoring increased judicial activity and the UNSecurityCouncil resolution 1970 (2011) referring the situation in Libya to the Court¹⁰. This would have brought up the legal aid budget to 8,534,300 Euros, amounting to 12.2% of the 69,916,100 Euros proposed as budgetary allocation to the Registry or 7.24% of the overall proposed budget of 117,733,000¹¹. However, the Assembly of State Parties (ASP) declined to endorse the amount proposed by the CBF, approving a total budget of 108, 800,000 Euros, with the Registry receiving 65,041,700¹² Euros, reflecting a possible reduction of the amount proposed by the CBF for allocation to legal aid¹³.

Presuming that the CBF proposed allocations to Legal Aid were maintained, the counsel for victim in all the situations and cases under ICC consideration would be eligible to a proportionate part of the proposed allocation of 3,990,500 Euros which amounts to **3.66%** of the 108,800,000 Euros approved by the ASP and .

These figures,while significant, reveal that the legal aid allocations which usually amounts to less than 5% of the overall budget with less than half of that being appropriated to the counsel for victims allowed to participate, are comparatively, not the major budget cost drivers as is often the propagated perception. Yet, the functions served by the counsel for victims, as previously indicated, are indispensable with the judicial processes within the ICC and require significant human as well as material resources to implement.

One must therefore wonder to what extent, in light of the comparatively small allocations availed to the counsel for victims through legal aid, would proposed cut-backs and reductions to the operative staff and remunerations of the victims legal teams lead to significant overall savings for the ICC. Indeed, an in-depth analysis of the various cost drivers among the various offices within the ICC needs to be conducted for an objective and comprehensive understanding of the operational and administrative factors affecting budget increases.

2.2. Comments on Specific matters proposed

There are certain matters raised in the Discussion Paper that need either further elaboration or raise some pertinent questions. These matters include;

1. Proposals regarding composition of field staff:

At the outset, the Discussion Paper recognizes that the main challenge to the implementation of the legal aid system for victims so far is the insufficient budget to guarantee the appropriate liaison between the legal representatives and the persons represented by them¹⁴. This statement is followed by what seems to be a proposal to add to the budget one resource person paid at the rate of €1,000

¹⁰ Id, para 25 and 26

¹¹ Id, ICC-ASP/10/10, Table 3: Comparative resource growth, pg 7:

¹² 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, ICC-ASP/10/Res.4, pg 1

¹³ The difference between the proposed and approved figures for budgetary allocation to the registry seem to reflect an exclusion of the approximately 4,870,000 additional Euros that were proposed for the legal aid budget for 2012

¹⁴ Discussion paper on the Review of the ICC Legal Aid System, (2012), Part B, para, 12

per month¹⁵. This appears on the face of it to represent a positive and quite welcome advance, if the proper construction of this proposal is to recommend an additional field officer to each of the legal teams representing victims.

There may, however, be the distant interpretation that may be implied from the context of the Discussion Paper that this proposal aims at reducing the number of field officers in each team to one per team. If, this is the implied proposal, nothing could be more disadvantageous to the functioning of the victims' representatives than such a reduction. As indicated above under the general comments, the effect of such an approach, depending on the number or distribution of victims may be debilitating to the ability of the legal representatives to effectively fulfil their mandate. Such a proposal would be heavily discouraged without the backing of an independent and widely consultative assessment on its efficacy.

2. Proposals regarding field missions and air travel

Paragraph 14 of the Discussion Paper appears to propose the provision of additional monies for field missions. However, the number of persons authorised to travel for those missions are two. If these monies are in addition to resources already factored in for field visits, then it is a welcome addition. However, if the proposal represents a fixed figure for the total budgetary allocation for field missions, the certain questions arise;

- How does the figure cater for the proportionate distribution of the allotted monies? This is as different as situation or case countries have different dynamics that may require comparatively more or less facilitation.
- Are there contingency monies assigned for purposes of extra field visits that may become necessary with the developments in specific cases and situations?
- The application of paragraph 14 together with part C can be read as excluding the case managers from eligibility for travel reimbursement. Is this an accurate position, and if so what is the rationale behind it? We would advise that case managers should be facilitated to travel on mission at least once a year. Their experience of the dynamics in the field relating to victims and operation of field officers would offer a foreign case manager the much needed understanding of the operating conditions in the field. This would be of significant benefit to the case managers in helping synergise the administrative considerations relative to the office and the field

3. Proposals regarding adjustment to the remuneration benefits of team members

While the Discussion Paper in paragraph 19 alludes to the principle of fair treatment in the pay awarded to victims representatives and their team vis-a-vis their counterparts working in the Office of the Prosecutor, the paper goes on to propose certain reductions based on the phases of the court process and specifically what has been termed the non-presential phases. These reductions raise certain questions of interest

- The proposals based on the assumption that the work of the victims' representatives ceases or diminishes during these "non-presential phases". Is this presumption accurate?
- To what extent is this presumption of decreased activity during non-presential phases an assessment in the operations of the legal teams? This is because, in the activities of legal

¹⁵ Id, para 13

teams during both civil and criminal litigation, a significant amount of labour goes into preparatory periods in between appointed court dates as counsel look to consult their clients and bolster their cases. Concordantly, the more realistic presumption would be that the legal teams would have to put in more man hours in the preparatory periods preceding their court-room appearances given number of victims to be consulted and the limited room for such operations while participating in designated court-room sessions.

3.0 THE JUDICIAL PREROGATIVES AFFECTING LEGAL AID

It must be remembered that the courts play a significant role in setting the operative terms of reference for victims' representatives and their teams based on the number and groups of victims, geographical, political as well as legal factors. This in turn educates the resource requirements of the counsel for victims and their teams. With the Kenyan situation, for example, the court has adopted certain standards in victim's participation, which ought to be given weight in any administrative decision impacting on the same.

The decision on common legal representation of victims in *the Prosecutor Vs William Ruto et al* addresses in a comprehensive manner the issues relating to the participation of victims at the confirmation of charges hearing and in the proceedings related thereto (this gives a pointer to the views of the chambers).¹⁶

*"The Single Judge, heedful of the number of victims admitted as participants in the proceedings and with the view to ensuring meaningful victims' participation as well as fairness and expeditiousness of the proceedings, is of the opinion that common legal representation should be provided for the victims(hereby) admitted as participants and that all of them should be represented by a single common legal representative."*¹⁷

In the chamber's opinion the Common Legal Representative should be ready to commit a significant amount of time:¹⁸

- (i) to maintain contact with a large number of clients;
- (ii) to follow developments in Court's proceedings;
- (iii) to take any appropriate steps in the proceedings; and
- (iv) to maintain adequate contact with the Court...

These therefore set the broad parameters and duties within which the chamber expects any counsel for victims to operate.

In the *ProsecutorVs William Ruto et al* decision, a single Judge concurred with other Chambers of the Court with respect to the necessity that an appropriate legal and administrative support be provided to the common legal representative in order to perform her/his duties in an efficient and expeditious manner¹⁹.

¹⁶ Paragraph 1 ICC-01/09-01/11-249 05-08-2011

¹⁷ Para 65 supra

¹⁸ Para 73, supra

¹⁹ Trial Chamber III, "Decision on common legal representation of victims for the purpose of trial", ICC-01/05-01/08-1005, Para.25; Trial Chamber II, "Order on the organisation of common legal \Representation of victims", ICC-01/04-01/07-1328, Para. 17

In this respect, the Single Judge adopts such approach as also reiterated by the Registrar in her Proposal on Common Legal Representation, according to which a support structure to be proposed by the Registrar would allow the common legal representative to:²⁰

- a) Keep his or her clients informed about the progress of the proceedings and any;
- b) Relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Conduct for Counsel;
- c) The support structure should also allow the common legal representative to respond to a reasonable number of specific legal inquiries from individual victims;
- d) Receive general guidelines or instructions from his or her clients as a group and particular requests from individual victims;
- e) Maintain up to date files of all participating victims and their whereabouts;
- f) Obtain qualified legal support on a need basis;
- g) Store and process any confidential filings or other information, including the identity of his or her clients, in a safe and secure manner; and
- h) Communicate with victims in a language they understand.

The Chambers have noted and concurred with the Registrar that common legal representation presumably relies on the Court's legal aid scheme under rule 90(5) of the Rules, and, therefore, that the size and nature of the legal team to support the common legal representative "will largely depend on the resources made available for that purpose by the Registry".....The objective question, therefore, is whether the Registry, in its Discussion Paper, has factored the effective realization of these minimum standards within the recommendations of the Discussion Paper.

4.0 RECOMMENDATIONS FOR THE REVIEW OF THE LEGAL AID SYSTEM

Conscious of the fact that the proposals made by the Registrar in the Discussion Paper are made in furtherance of process to review the legal aid system that began in 2007, the coalition of civil society organizations in Kenya make their recommendations with this process in mind. Through this process of review, certain important factors must be borne in mind. As civil society organizations that have worked extensively on diverse matters of concern to victims we feel that the following considerations must educate the review of the legal aid system:

1. *The current resource allocation levels for legal aid are low and will need to be increased:* As situations and cases continue to increase and awareness spreads concerning victims participation, more victims will apply to participate with each successive situation. The reviewed system must factor this increase. In Kenya for example, it is estimated that hundreds more victims will apply to participate in the trial phase after the charges against some of the suspects were confirmed on 23rd January 2012. There will, therefore, arise the need for greater mobilization of human and material resources to facilitate effective victims' representation.
2. *The need for differential treatment between counsel for indigent defendants and counsel for victims:* As indicated hereinbefore, there is a stark difference between counsel for indigent victims and counsel for indigent defendants and that difference is essentially the divide in the number of clients

²⁰ Para 78 supra note 1

represented by the respective counsel. The victims' legal representatives by their function have a multiplicity of clients as opposed to the single client for the defence counsel. Consequently, any legal aid system must develop different operational and resource guidelines that reflect this difference. Similar across the broad application of legal aid as well as limitations in the overall legal aid regime will necessarily affect the victims representative and his/her clients far more profoundly than it would the defence.

3. *Legal aid resources for victims must increase in direct proportion to the number of cases under consideration:* The reviewed legal aid system must take cognisance of the fact that the types of crimes within the jurisdiction of the ICC typically affect a large number of victims. Consequently, every new situation and case under review by the court requires a corresponding increase to the fund akin to the increase in the investigatory budget for the prosecution
4. *Attempts at cutting cost must be preceded by a comprehensive consultative impact assessment:* The inevitable demands for increase in the legal aid budget will often be met by counter demands for the reduction in expenditure on legal aid, especially if it continues to be categorized as a major cost driver. To effectively manage such demands, wide and consultative discussions should be had with civil society, victims' representative teams, state parties, CBF etc. A cost reduction review must objectively assess all departments of the court with regards to the cost saving measure and measures applied specifically to one department or group must have clear criteria stated for the discrimination in the application of the proposed measures.
5. *Need to establish a separate contingency fund dedicated to victims' representation:* While the budget process looks to cater for unexpected expenditure demands on legal aid funds, this maximalist approach to budget design is largely frowned upon by the ASP and instead incurs the opposite effect of advancing the call for reduction in allocated funds. The flexibility sought in the design of the legal aid budget can be better affected by having allocations proposed to separate contingency funds established for the separate recipients. The counsel for indigent defendants as well as counsel for victims must have separate contingency funds to cater for unexpected demands for funding. The amount allocated in these funds will be based on estimations that are grounded in the approximations of resources applied in similar situations and trial phases.