

Comments of Legal Representatives of Victims to the Registry's Discussion Paper on the Review of the ICC Legal Aid System

31 January 2012

A. Introduction

1. By a letter dated 19 December 2011, the Registrar of the International Criminal Court transmitted a document entitled "Discussion Paper on the Review of the ICC Legal Aid System" (the "**Discussion Paper**"), and invited comments on that paper by 31 January 2011. We express our appreciation for the invitation to comment on the Discussion Paper. As is acknowledged in the Registrar's letter of 19 December 2011 which accompanied the Discussion Paper, this consultative process with the legal profession (and all relevant stakeholders, including interested NGOs and States Parties)¹ is of great importance in ensuring the effectiveness of the legal aid system. We are hopeful, therefore, that our observations will be given due consideration before transmission of any proposed amendments to the Assembly of States Parties' Bureau and the Committee on Budget and Finance for consideration during its April 2012 session.

2. We are of the view that ways can be found to make all areas of the Court's activities, including the legal aid system, more cost efficient, without reducing the level and quality of outcomes. However, the Discussion Paper cannot be considered a good faith proposal for achieving that goal. We are of the considered view that the proposed changes to the legal aid system stand to render meaningless the notion of effective and competent common legal representation of victims before the Court. The changes are tantamount to a constructive dismissal of competent counsel and staff and will dissuade competent counsel from accepting assignments as common legal representatives of victims.

B. Preliminary remarks

3. The Registrar's letter indicates that the current review of the legal aid system is a "self-imposed audit".² The Discussion Paper notes at the outset that the consideration of changes to the legal aid system referred to in the Discussion Paper is an exercise that has been undertaken "proactively" by the Registrar, "before the closure of the first trial before the Court". It is noted at the outset thus

¹ The Discussion Paper confirms the need to consult with not only counsel, but with "all relevant stakeholders," including "...interested NGOs and States Parties: see, para. 7.

² Discussion Paper, para. 3.

that, at this stage, the Court does not yet have the experience of even a full cycle of *trial* proceedings, much less experience of a full cycle of proceedings in an entire case (including appeal and reparation proceedings). Furthermore, even after the entire proceedings have been completed in the first case, this initial experience of only a single case would not of itself be a reliable basis for drawing firm conclusions about legal aid funding needs. All cases have their own unique features and characteristics. This is the reason why, in practice, none of the teams receiving legal aid function on the same model. It follows that the legal aid needs will not be the same in all cases. It is suggested that at best, it would only be upon completion of a number of cycles of full proceedings that a body of experience may develop from which more reliable conclusions can be drawn. Until then, it is submitted that the Court needs to remain open-minded about the needs of legal representatives, and should remain sufficiently flexible to allocate resources to legal representatives where it can be established that there is a genuine need for them.

4. Indeed, it is unclear whether there exists a formal legal aid policy at the ICC, apart from the legal aid policy document drafted in 2007.³ It is worth mentioning that this document was drafted even before a single case had commenced at the Court. Thus it is unclear what the current modification as espoused by the Registrar is proposing to amend, in particular in view of the legal aid system as further defined by the Chambers and the Registrar, which differs from the 2007 Assembly of States Parties document. The Discussion Paper discusses only a number of proposed changes to the current legal aid system, and states that other aspects of the legal aid system would remain unchanged.⁴ Observations on those particular proposed changes are set out below. The present response to the Discussion Paper is confined to the changes discussed only to the extent that they affect victims' legal representation.
5. A further preliminary observation concerns the purpose of the proposed changes. Paragraph 2 of the Discussion Paper refers to the legal aid system as "an increasingly important cost driver", and states that the Discussion Paper is proposing to introduce "certain efficiency measures ... in order to optimise the use of resources allocated by the States Parties to legal aid". The aim of continuously improving efficiency and cost-effectiveness is of course one that should be shared by all parts of the Court and its activities at all times. There can be no reason in principle for objecting to measures which reduce costs while maintaining the levels and standards of legal representation provided to beneficiaries of the legal aid system. It is assumed that this is the intention of the Discussion Paper. The letter from the Registrar accompanying the Discussion Paper stated that the Discussion Paper "intends to make the use of the resources allocated by the States Parties to the legal aid scheme more

³ ICC-ASP/6/4, Report on the operation of the Court's legal aid system and proposals for its amendment, 31 May 2007.

⁴ Discussion Paper, para. 5.

effective”, and to ensure that “the Court’s legal aid system continues to guarantee an adequate assistance to and representation of all persons entitled thereto by the Rome Statute”.

6. The Discussion Paper confirms the relevant “basic principles” of “equality of arms, objectivity, transparency, continuity and economy,” as identified by the Assembly of States Parties (ASP) in 2004.⁵ There is no suggestion that the aim is to reduce levels or standards of legal aid representation simply in order to make cuts to the budget. It is submitted that if this were the aim, the proposed changes would need to be the subject of a much wider and more far-reaching consultation. If cuts were to be made simply in order to save money, any discussion of proposed cuts would have to look at the overall budget of the Court, in order to determine where budget cuts would most equitably fall across the entire range of the Court’s budget.
7. The present response proceeds on the basis that the Discussion Paper only envisages changes to the legal aid structure that would genuinely reduce costs without affecting the levels and quality of representation to those who receive legal aid. The premise of this response is that this type of change is possible, and avenues that might be explored are set out below. However, for the reasons given in this response, the strong view is expressed that the particular changes proposed in the Discussion Paper would not achieve this aim, and would be counterproductive.

C. Legal representation of victims before the ICC

8. Before commenting on specific sections of the Discussion Paper, we believe it is necessary to set out the framework of legal representation of victims before the International Criminal Court. The fundamental importance of the provisions in the Court’s Statute for victim participation in proceedings is universally acknowledged. Victim participation has not been a feature of *ad hoc* international criminal tribunals. Inclusion of provision for victim participation in the Rome Statute has been considered a major advancement in the development of international criminal justice.
9. Meaningful participation of victims in proceedings requires that victims be legally represented, and thus require legal aid. This has never been questioned. The hypothetical case of victims who have sufficient personal resources to fund their own representation is unlikely ever to occur in practice.
10. It must always be borne in mind that a legal representative of victims is just that—merely a legal representative. The participants in the proceedings are the *victims*, and not the *victims’ representatives*. The victims’ representatives are

⁵ Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons, ICC-ASP/3/16 (“2004 ASP Report”), para. 16.

merely legal representatives, through whom the *victims themselves* participate. The victims' representative is not an independent *amicus curiae*, expressing his or her own views on what would be in the victims' interest, or on what should be of concern to victims. The victims' representative, like any counsel in any proceedings, has the responsibility of presenting their client's views and concerns to the Court.

11. In theory, this is uncontroversial. However, it is necessary to take account of what this means in practice. For individual victims to be able to participate in any meaningful way at all in proceedings before the Court, continuous and effective communication between the victims and their legal representatives is vital. The victims' representative must be in a position to keep his or her clients abreast of developments in the proceedings, to explain to the victims the significance of those developments and their possible effect on victims' interests, and to set out various choices open to the victims as to how they might react to those developments. On the basis of this communication, the victims' representatives must then obtain their clients' informed instructions as to what position they wish to take in the proceedings, and the victims' representatives must then present that position to the Court.
12. If this kind of communication cannot be established, then meaningful victim participation in proceedings before the Court is simply not possible. Without the possibility of such communication, the provisions in the Statute relating to victim participation would become purely notional. There would be a lawyer in the courtroom with the title "victims' legal representative". However, that person would either be purely symbolic, or perhaps at best an independent *amicus curiae* rather than a voice of his or her clients. In this regard, it is worth noting that the framers of the Statute included the notion of the victims' "personal interest".⁶ This emphasises the importance of representing the victims' personal and concrete views and concerns in relation to particular matters and proceedings, as opposed to the general interest of victims.
13. While ongoing communication between victims and their representative is essential, there are formidable challenges in securing it. The level of legal aid provided to victims' representatives needs to be adequate to meet these challenges.

⁶ See Article 68(3) of the Rome Statute. The notion of "personal interest" has also been interpreted by the Court's jurisprudence. Through its decisions, the Court has emphasised the importance of such a principle.

D. Comments on specific proposals in the Discussion Paper

1. Victims: composition of the teams (paragraphs 10-15 of the Discussion Paper)

a. General

14. In order to provide specific comments in relation to the matter of team composition, it is necessary first to consider the concrete practical challenges inherent in victim legal representation. An outline of those challenges is given below, based mainly upon the experience of the victims' legal representatives in the Kenya cases. It is noted, however, that other legal representation teams have faced similar challenges, especially in relation to work in the field. Second, it is imperative to recall the development and evolution of the legal aid scheme.

b. Practical challenges

15. As stated above, ongoing communication between victims and their representatives presents immense challenges. These challenges are multifarious, but include in particular (i) transport and communication, (ii) security, and (iii) administrative resources. Examples of such challenges, drawn from the practical experience of the victims' legal representatives, include the following.

(i) Transport and communication

16. While some victims represented by the legal representatives in the Kenyan cases live within urban centres such as Nakuru, Nairobi and Eldoret, and Kisumu, most live in rural areas of their districts of residence. These areas have poor road infrastructure and transportation systems. Transport to and from the places of residence of these victims is largely by motorcycles. A majority live within the rural areas of Uasin Gishu, Nyanza, Western Province, the Rift Valley and Nandi districts, spanning an area of over 6,000 km². There are other victims in Nairobi, Nakuru, Naivasha, Vihiga districts as well as Buyale County in Uganda.

17. Infrastructure such as electricity and road are non-existent in the more rural parts of these areas. Some areas such as Vihiga district have poor communication infrastructure resulting in difficulty reaching the majority of the victims. Most of these victims do not have cell phones and are too poor to afford them.

(ii) Security

18. A great number of participating victims live in the same places as the direct perpetrators of the crimes, or among communities of the same ethnicity of the suspects or accused, who they view as their tribal leaders. Many victims are seen as outsiders in their own communities, because they belong to the victimised ethnicity in the relevant area or, because they are seen as supporting the ICC process which has been misperceived or misrepresented in their communities. At times, victims are seen as potential prosecution witnesses against the suspects or accused. They therefore need to avoid being seen speaking to officials or others involved with the ICC, or indeed with any unknown persons from outside the local community, for fear of being labelled as informers for the prosecution. Most victims from these areas have therefore insisted on never meeting with the legal representatives or members of their teams within the boundaries of their localities, which has required the victims' representatives to facilitate their travel to and from mutually designated neutral areas. Frequently, field assistants have had to make contribution to such travel from their own monies.

(iii) Administrative resources

19. The field assistants in the Kenya cases have operated without office space since their appointment in late August 2011. This has reduced them to conducting meetings with victims and key stakeholders in public hotels and restaurants at their own expense – even when discussing sensitive and confidential matters. Few organizations, including the UN Office in Nairobi, have been willing to accommodate the field assistants. Others that have request a costly monthly or quarterly rental fee which the field assistants are unable to sustain and which the Registry has refused to fund.
20. The field assistants have had to procure their own equipment, including laptops and cell-phones for communicating between themselves, victims and other members of the team. The costs of these communications are also largely borne by the field staff.
21. One of the main difficulties faced by the field assistants is the inability to engage in rapid response initiatives with regard to victims, especially those initiatives that may require funding. The common legal representatives must seek approval and funding for all expenditure that they intend to undertake through legal aid. This process, while understandable from the point of view of the need for accountability, is often time-consuming, and can be insufficiently flexible to allow genuine needs to be met effectively.
22. Meaningful engagement with victims requires some degree of flexibility of movement and operation. This is extremely difficult without readily available resources. For instance, the common legal representatives may be given a timeframe of a week to present any response on behalf of victims to a

development that has occurred in the course of the proceedings before the Court. Ascertaining the genuine views of their clients in the space of a week is an obvious challenge, and requires that the necessary resources be in place to enable quick and effective communication.

(iv) *Observations*

23. The need for adequate resources for victims' representatives to meet the challenges of representing the views and concerns of their clients before the Court is clear. At the same time, it is acknowledged that challenges will be different in each individual case, depending on factors such as the number and location of victims, and the infrastructure and security situation in the country concerned. The experiences of the victims' representative to date in the Kenya cases may not arise in every future case; however, it is likely that legal representatives of victims in other situation countries, especially in Africa, will face similar difficulties in ensuring meaningful victim participation at the Court.
24. This means, of course, that the resources required by a victims' representation team may vary significantly from case to case. However, some of the challenges (such as difficulties arising from the need to communicate with clients) are intrinsically linked to the very notion of victim participation and will most likely invariably arise in any given case before the Court. What is important is that the resources provided are tailored to the actual and genuine needs in the particular case, rather than prescribing a standard team composition and uniform resource level for all cases.
25. As explained in Part c below, historically the legal aid system for victims' representatives has displayed a degree of flexibility. If changes are to be made to the system, it is suggested that these should be in the direction of creating greater flexibility, rather than greater standardisation.

c. *Development of the ICC legal aid system*

26. The ICC legal aid scheme was conceived in 2004⁷ and reviewed in 2007.⁸ The task of setting up a legal aid programme for victims has not been easy, particularly given the lack of experience in other international tribunals, from where the Court could borrow practices and learn lessons.

(i) *The 2007 review: acknowledgement of the need for flexibility*

⁷ ICC-ASP/3/16, Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons.

⁸ ICC-ASP/6/4, Report on the operation of the Court's legal aid system and proposals for its amendment, 31 May 2007.

27. During the 2007 review, it was acknowledged that victim legal representation required different resources than those allocated to the Defence. However, given the lack of practical experience, it was decided to establish a “loose” system and to give the Registrar flexibility to adapt resources to the teams’ needs as s/he would see fit. According to the scheme in place, victims’ legal representation teams are composed as follows:

- at the trial phase: one lead counsel, one case manager
- at the reparations phase: one lead counsel, one legal assistant and one case manager.

28. During the 2007 review, the Registry refrained from establishing a system for victims specifically for the pre-trial phase.

29. In addition, the currently applicable scheme allocates a budget of €43,752 for investigations (for the whole duration of the case). At the time the scheme was adopted, it was understood that such investigations would be needed mainly in relation to reparations.

30. As indicated above, however, the Registrar was accorded flexibility to ensure that teams would have resources to meet their needs:

“For the trial phase, it is proposed in principle that legal aid paid by the Court should cover a core team, which will be reduced or increased at the Registrar’s discretion in the light of the actual participation procedures decided by the Chambers and other relevant factors” (para. 55).

“For the reparations phase, it is proposed that legal aid paid by the Court should cover a core team, which may be supplemented by additional resources at the Registrar’s discretion and subject to the oversight of the Chamber” (para. 56).

(ii) *Subsequent practice*

31. As victim participation evolved, the need for further resources and for a different use of the allocated resources became evident. The ICC Chambers acknowledged such a need and the system thus evolved in practice. However, that practice was never recorded in a Registry or Assembly of States Parties official document amending the legal aid system.

32. The Registry and Chambers realised relatively quickly that it was not practicable to have legal representation teams without resources in the field. In order to maintain contact with their clients, the legal representatives in the *Lubanga* case needed to undertake missions to the affected areas in the Democratic Republic

of Congo. Given that there was no budget for such missions, the “investigations budget” was used to that effect. The flexible approach in the scheme and the authority provided to the Registrar made it possible for that to happen. In relation to the *Lubanga* case, it must be noted, however, that most missions were executed by one person alone, which poses security risks in a region like Ituri. In addition, the number of missions authorised was insufficient to maintain regular contact with all represented victims.

33. Trial Chamber II in the *Katanga* case appointed for the first time common legal representatives,⁹ thus implementing a principle established in the Rome Statute for the sake of greater efficiency in the proceedings. The same decision by Trial Chamber II acknowledged, for the first time too, the need for legal representatives to have field staff.

“In order to allow the common legal representative to perform his or her duties efficiently, the Registry, in consultation with the common legal representative, shall propose a suitable support structure, in order to provide the common legal representative with the necessary legal and administrative support, both at the seat of the Court and in the field. This support structure must, to the extent possible and within the limits of the available legal aid structure, allow the common legal representative to:

- a. Keep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Conduct for Counsel. The support structure should also allow the common legal representative to respond to a reasonable number of specific legal inquiries from individual victims.
- b. Receive general guidelines or instructions from his or her clients as a group and particular requests from individual victims.
- c. Maintain up to date files of all participating victims and their whereabouts.
- d. Obtain qualified legal support on a need basis.”¹⁰

34. The legal representatives in the *Katanga* case are supported by staff based both in The Hague and in the Democratic Republic of Congo. However, the fees of the field staff were paid out of the mission/investigations fund, which is unsustainable in the medium term.

35. The same practice was followed in the *Bemba* case. Trial Chamber III found that there was no conflict of interest, but given the large number of victims (currently over 2200), it appointed two common legal representatives to represent groups

⁹ Given the existence of a conflict of interest, two common legal representatives were appointed.

¹⁰ ICC-01/04-01/07-1328, *Prosecutor v. Katanga*, Order on Common Legal Representation, 22 July 2009, para. 17.

from different locations. The *Bemba* case legal representation teams are assisted by legal assistants and case managers, based both in the Central African Republic and The Hague.

“The Chamber considers that the effectiveness of the common legal representation scheme indeed depends on the assistance, be it in terms of financial or human resources, which the Registry is able to consider under Regulation 83 of the Regulations of the Court, a provision referring to the Court's legal aid system. In this respect, the Chamber notes the Registry's proposal made at paragraph 8 of its Report of 24 September 2010, namely that a core team consists of one counsel (remunerated at the P-5 level) and one assistant (remunerated at the P-1 level). The Chamber endorses this proposal provided that each team is composed of two persons, one based in The Hague and the other in the CAR, as the minimum. Should the legal representatives consider that, based on the specific circumstances of the Case, additional resources are necessary, a request should be addressed to the Registry pursuant to Regulation 83(3) of the Regulations of the Court. Indeed, the Chamber is convinced that, for a meaningful representation of victims, it is of crucial importance that the legal representatives are enabled to maintain effective contacts with the victims in the CAR. The Chamber thus emphasises that the support teams should be composed so as to facilitate regular exchanges between the legal representatives appearing in Court in The Hague and their respective assistants based in the field who will liaise with the victims.”¹¹

36. Practice revealed that the number of field staff and composition of the teams was still insufficient to maintain contact with large groups so as to enable genuine victim participation.
37. Historically, the Registry budgeted for two legal representation teams per case, considering the likelihood that there would be a conflict of interest between the groups of participating victims given the nature of the violence in the countries where the Court is operating. When a decision was to be made about the Kenya cases, the Registry noted that it was not useful to have more than one team in cases where there is no conflict of interest. Instead, the Registry suggested that the resources available for two teams in each case be merged so that teams could have a larger composition and have more resources in the field as this was very much needed.
38. In the Kenya cases, the Single Judge concurred with other Chambers of the Court with respect to the necessity that an appropriate legal and administrative

¹¹ ICC-01/05-01/08- 1005, *Prosecutor v. Bemba*, Decision on common legal representation of victims of the purpose of trial, 10 November 2010, para. 36.

support be provided to the common legal representative in order to perform her/his duties in an efficient and expeditious manner. In this respect, the Single Judge decided that the legal representatives should benefit from a support structure and reiterated the jurisprudence in the *Katanga* case.¹²

39. The Single Judge noted that the size and nature of the team supporting the common legal representative "will largely depend on the resources made available for that purpose by the Registry". The Single Judge noted that, in determining the resources allocated, the Registry must pay attention to: 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 case. The Single Judge stated that the effectiveness of common legal representation depends, *inter alia*, on the assistance, in terms of financial and human resources, provided to the common legal representative thus endorsed such a proposal from the Registrar.¹³
40. At the pre-trial proceedings the Registry proposed to finance "to a reasonable level" besides the appointed common legal representative, the assistance of:
- (i) a legal assistant;
 - (ii) a qualified case manager; and
 - (iii) two field assistants. The legal representatives found that having three field assistants was in fact necessary and were able to hire three persons without increasing the overall budget assigned to them.

(iii) *Observations*

41. All in all, the above shows that historically the legal aid scheme has evolved towards greater acknowledgement of (1) the need for sufficient resources to liaise with victims in the field; and (2) the need for flexibility in the system to enable the necessary level of resources to be provided.
42. The manner in which victims' legal representation has been organised in the Kenya cases is novel in various respects. In the Kenya cases, for the first time common legal representatives were appointed at an early stage (before the confirmation of charges hearing), and the number of victims represented by each representative is the largest ever in pre-trial proceedings (327 victims were admitted to participate pre-trial in Kenya I, while 233 victims were admitted for the pre-trial phase in Kenya II.). This was also the first time that the Registry adopted a competency-based recruitment procedure when appointing common

¹² See para. 33 above

¹³ ICC-01/09-01/11-249, *Prosecutor v. Ruto et al.*, Decision on Victims' Participation at the Confirmation of Charges Hearing and Related Proceedings, 5 August 2011; ICC-01/09-02/11-267, *Prosecutor v. Muthaura et al.*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 26 August 2011

legal representatives. Additionally, given the number of applications received from persons wishing to be recognised as victims, the number of victims participating at the trial stage in the Kenya cases could also reach the highest levels in ICC history so far.

43. Thus, the practice in the Kenya cases can be seen as a further development in the Court's practice of victim representation, involving the appointment of fewer teams of victims' representatives, but with each team representing larger numbers of victims. This has made it possible, without increasing overall costs, to allocate greater resources to each of the legal teams, which may be expected to produce better cost-efficiency through economies of scale. The method of recruitment of legal representatives (an open competition with competency-based selection) should be expected to lead to further efficiency by virtue of increasing the levels of expertise and experience of team members themselves.
44. The innovations described above in the Kenya cases should be seen as simply another stage of the evolution in the practice of the Court at what is still an early stage of its history. These developments show that efficiencies and enhancements in effectiveness can both be achieved through an approach of flexibility and willingness to innovate. It is strongly urged that if the process of flexibility and innovation continues, so can improvements in efficiency and effectiveness. Rigid prescriptions of standard resource levels would simply be counterproductive.

d. *The Discussion Paper's proposals*

(i) *Resource person and missions*

45. The Discussion Paper readily acknowledges that a unique and crucial challenge faced by the legal aid system in the context of victims is the sufficiency of the budget to guarantee appropriate liaison between the legal representatives and the victims they represent.¹⁴ Despite this acknowledgement, the changes proposed in the Discussion Paper would in our view be tantamount to the end of effective and competent victim representation through the legal aid system.
46. The Discussion Paper acknowledges the flexibility with which the existing system has been applied in practice.¹⁵ The Discussion Paper is not clear about whether this flexibility will continue in the future. For the reasons given above, it is urged that this is not only essential, but that greater flexibility in the future would be key to continuing efficiency improvements.
47. Paragraph 12 of the Discussion Paper acknowledges the central challenge, referred to above, of maintaining adequate communication between victims'

¹⁴ Discussion Paper, para. 12.

¹⁵ Discussion Paper, para. 10.

representatives and the victims they represent. Paragraph 13 proposes the addition to the budget of one resource person paid at the rate of €1,000 per month, apparently in lieu of field assistants, to facilitate contact between counsel and their victim-clients. It is stated that additional resource persons could be recruited “where the number or the geographical location of victims makes it impossible to have adequate access to all of them.”

48. Reducing the number of field assistants or other staff on the legal representatives’ teams is impossible without undermining the ability of the teams to function. Counsel need to consult often with victims due to orders by the Chambers to obtain their views and concerns about specific issues that arise; such consultations are also necessary if counsel are to fulfil their advisory role to their clients. Examples of consultations held with victims include those related to anonymity and security; regular update on the case; constant instructions on the way forward and on particular proceedings; identification of victims that may appear physically before the Court; advice to dual status victims; and preparation of final conclusions to name but a few. The absence of adequate field assistants would preclude such needed consultations. Any savings that might be achieved by introducing a regime of one resource person in the field would invariably be offset either by costs associated with increased travel to the field by counsel, or intervention to resolve critical victim protection and/or support needs by other sections of the Court.
49. Providing funds for two, 14-day missions per year to Africa (€ 18,000) is also suggested in the Discussion Paper as an additional way of ensuring “direct” contact between a legal representative and his or her victim-clients.¹⁶ However, once in the field, counsel must meet and mobilize clients, travelling from one area to the other. Experience in ICC cases show that counsel must travel to the field at least between three and four times every year. It is also noted the system proposed may be inadequate for representation of diaspora victims spread over different countries, such as the situation in Darfur.
50. It is reiterated that the needs in each case may be different, and that ways should be found for genuine needs to be met. A single resource person in the field and two missions a year for the victims’ representative and another person cannot be expected to be adequate in practice in the vast majority of cases. It is not suggested that there should be any blank cheques for legal teams. However, where needs are genuine, a willingness should exist within the institution to find ways of meeting them out of existing budgetary resources. The practice in the Kenya cases of assigning one victims’ representative team in each case rather than two, so that the combined resources of two teams could be made available to a single victims’ representative, is a practical example of how such flexibility can be achieved in practice.

¹⁶ Discussion Paper, para. 14.

51. Such flexibility could also be applied to address some of the other challenges of victims' representatives, in particular the need in the field for office space, internet, and telephones. It is unrealistic to expect that one or more resource persons can undertake this work without any resources other than their salaries of €1,000 per month. Indeed, this also highlights the disparity in relation to the remuneration offered to staff based in the field, as opposed to staff that are based at the seat of the Court. This would imply, in practice, a substantial reduction of the salaries currently received by field staff. No justification is given in the Discussion Paper for such a reduction.
52. In our view, the proposals in the Discussion Paper reflect a complete lack of understanding about the current circumstances of our victim-clients and how legal representatives communicate with their clients. The proposals also raise unanswered questions about (i) whether the proposed changes would apply to existing teams and, if so, when, (ii) what happens to the configuration of teams in the face of orders by the Chambers that envisage a different configuration than the Discussion Paper, and (iii) what criteria will be used to modify the composition of a team upwards when the particular circumstances of a case dictates, to name but a few.

(ii) The number of legal teams

53. Paragraph 15 of the Discussion Paper proposes to reduce the number of budgeted teams from two per case to one per case (at least, where there is no conflict of interests). There is no objection to the proposal in principle. This is what occurred in the Kenya cases. However, the effect in the Kenya cases was to enable the combined resources of two teams to be allocated to a single team. The Discussion Paper does not appear to envisage that this practice will be followed in future. Rather, the implication appears to be that a single team would only have the resources that under the policy would be available to a single team.
54. If so, the result of the proposal in paragraph 15 would be to reduce the resources for victims' representatives on average by one half. That would be a breathtaking cut in the budget for victims' representation. While the whole premise of the present response is that all cases have their own unique circumstances and resource needs, in each of the Kenya cases, a halving of the legal representatives' resources would have left the teams wholly unequipped to discharge their duties.
55. It is urged that paragraph 15 of the Discussion Paper cannot be a serious proposal for making efficiency gains while maintaining levels of representation, if it will lead to the effect of halving the resources of victims' representation. In previous cases, victims' representatives' teams did in fact have only half the

resources of the teams in the Kenya cases, because the resources were divided between two teams per case. Although this meant that each team had fewer clients to represent, this did nonetheless leave the teams totally underequipped for the task. Realising that in most cases there is no conflict of interests between victims, the combining of the resources of two teams into a single team has proved to be an effective way of significantly improving levels of representation without increasing overall costs. With the combination of two teams' resources into a single team, it may be possible to explore further fine tuning that could lead to some additional efficiency savings. However, the suggestion that the total resources of victims' representation could be *halved*, on the simplistic logic that there is now only one team instead of two, would have the effect of totally undermining any meaningful victim participation in proceedings.

(iii) *Legal assistant*

56. When comparing the composition of core teams proposed in the Discussion Paper with the current composition of most legal representation teams, it is noted that the position of the legal assistant is not foreseen. This raises serious concerns. It must be recalled that victims' legal representation teams do not have a co-counsel. The need for a legal assistant is therefore all the more important, since counsel must discuss legal strategies with the legal assistant and heavily rely on him/her for legal research and drafting. Counsel often keep their national practice (to the extent possible) or work on other international cases, and therefore the support provided by full-time legal assistants focusing exclusively on the case is highly necessary. During trial, legal assistants provide invaluable support to draft motions, review and consider the file of the case and prepare interrogation of witnesses. It is untenable for Counsel to fulfil these duties without a legal assistant.
57. In practice, legal assistants support lead counsel on a wide range of issues, including evidence analysis, procedural and substantive issues in relation to the case in general and victim participation specifically. Legal assistants also provide meaningful support to the case during the trial and in preparation of the reparations phase. In this regard, it must be recalled that the system currently applicable, as per the 2007 review, envisages a legal assistant for the reparations phase. Again, it must be recalled that that system was built before the court had any trial experience. As the Court's jurisprudence has acknowledged, certain reparation issues are already discussed during trial.¹⁷
58. For this support to be meaningful and effective, insightful knowledge of the case as well as access to all relevant material, including confidential documentation, is crucial.

¹⁷ This is to save time and financial resources, and for reasons of procedural economy, for instance to avoid calling witnesses twice.

59. While the Office of Public Counsel for Victims (OPCV) can eventually assist by providing legal opinions about the Court's case law, such advice must then be supplemented with further research, adapted to the case strategy, and tailored to the specific matter at hand in the relevant case.

2. Other Comments

a. Subdivisions of the trial phase (paragraphs 8-9 of the Discussion Paper)

60. While breaking the trial phase down into three sub-divisions instead of two may be of some assistance in discussions of necessary levels of resources, the subdivisions should be tools of analysis, rather than watertight compartments. For the reasons that have been given above, it is strongly considered that greater flexibility, and the willingness to innovate in the light of experience, are the key to continuous improvements in efficiency, rather than formal statements of what will be the "standard" composition of a team.

61. It is noted that these paragraphs deal only with sub-divisions of the "trial" phase and therefore do not deal with the pre-trial or post-trial (appeal and reparations) stages. (It is recalled that paragraph 5 of the Discussion Paper states that any aspect of the current system not specifically mentioned would continue unchanged.) The Discussion Paper does not expressly suggest that there is any intention in the future not to follow the practice adopted in the Kenya cases of appointing victims' representatives at the pre-trial stage. As shown in the Kenya cases, victims can make very meaningful contributions during the pre-trial phase. The pre-trial phase is the time when major decisions on the case are made, in particular in relation to the formulation of the charges, as well as to issues of jurisdiction and admissibility. Indeed, the pre-trial stage is a time when decisions are taken that can have a most fundamental effect on victims' interests. It may be impossible for those decisions to be reopened at the trial stage when victims are represented.

b. Defence: budget for investigations and team composition (paragraphs 16-18 of the Discussion Paper)

62. No observations are made on these paragraphs, which concern the Defence only.

c. Basic remuneration for legal team members (paragraphs 19-22 of the Discussion Paper)

63. The Discussion Paper contains a proposal to reduce the remuneration of members of victims' representation teams by between some 18 and 24 per cent.

The justification is said to be to achieve “equivalence” with the remuneration of members of the OTP prosecution teams.

64. The principle of equivalence between the remuneration of external counsel and OTP counsel may be justifiable in principle. However, it is not straightforward to establish what amounts to equivalence when comparing the two. OTP staff typically have full time positions in ongoing employment of indefinite duration. External counsel do not have the same degree of permanence or job security. OTP staff, as officials of an international organisation, have a variety of other allowances and benefits, including maternity/paternity leave, rent subsidies, paid home leave, pension fund contribution, and educational expenses for children, which do not apply to external counsel and members of their teams.
65. If there are good reasons for considering that there is a lack of appropriate equivalence between the remuneration of external counsel and of OTP counsel, that is a matter that might be explored in more detail, in good faith. The principle works both ways. If external counsel felt that their remuneration was inadequate to provide equivalence with OTP salaries and emoluments, they should feel entitled to raise that concern in the same way.
66. For instance, it has been noted above that the field assistants in both Kenya cases currently do not have an office in Kenya, and no computers, telephones or internet access have been made available to them. Field staff are currently using their own personal resources to fund part of the cost of communicating with victims. The statement in the Discussion Paper that “all assistance necessary to effectively fulfil their tasks... including office space, computer hardware and software, etc”¹⁸ have been provided to legal representatives is inaccurate. Even the office in The Hague that is shared by both victims’ legal representatives in the Kenya cases, as well as other teams of legal representatives, was provided with a printer only on 7 December 2011, despite counsels’ appointment in August 2011.
67. A more detailed consideration of all relevant factors might justify some adjustment one way or the other, although this is not conceded. However, the simplistic proposal in the Discussion Paper that the remuneration of external representatives be cut summarily by between 18 percent (in the case of a case manager) and 24 percent (in the case of counsel) is not in any sense a detailed consideration of this kind.
68. It would be undignified to belabour the point. The Registrar cannot seriously expect that professionals would accept a summary cut in their remuneration of between 18 and 24 percent, on the basis of a mere assertion that this would achieve “equivalence” with OTP salaries. This cannot be considered more than an attempt at achieving a budget cut by reducing the remuneration of

¹⁸ Discussion Paper, para. 26.

professionals who are external to the organisation, and therefore lacking the political power to oppose it.

d. Compensation for professional charges for victims' legal representatives and defence counsel (paragraphs 23-28 of the Discussion Paper)

69. The observations in section c above are repeated. The statement in paragraph 26 of the Discussion Paper that “as the work of the Court develops, counsel receive from the Court all the assistance necessary ...” is simplistic and unsupported by detailed explanation.
70. It appears that the proposal to cut compensation for professional charges derives from the proposition that all necessary facilities are being provided to counsel by the Court.¹⁹ We have already addressed this issue above, pointing out that “facilities” is proving to be a term-of-art without substance as far as the Kenya cases are concerned. The basis for compensation for professional charges could not, in any event, be grounded upon what facilities are made available to counsel by the Court.
71. If it is genuinely considered, in good faith, that the current arrangements compensate external counsel unjustifiably, that is a matter that might be looked at depth with all relevant stakeholders. The very brief proposal in these paragraphs that compensation of charges be summarily cut is not considered to be a good faith proposal.
72. Professional charges are incurred by counsel in their national jurisdiction by virtue of appearing before the Court and no amount of facilities the Court may provide would result in a decrease in those expenses. Many counsel must continue to maintain a law practice with paid staff in their national jurisdictions due to already existing obligations to clients when they became engaged before the Court. A counsel who is at trial in a case before the Court must necessarily be absent for extended periods from their national practice and must find replacement counsel to attend to their pre-existing cases. Other costs borne by external counsel, depending on their national jurisdiction and status, may include costs of practising certificates, professional indemnity insurance, continuing professional development, and so forth.

e. Legal aid travel policy (paragraphs 35-40 of the Discussion Paper)

73. The Court should pay for all necessary travel to and from the seat of the Court by counsel (whether lead or associate). The same should apply with equal force to daily living expenses incurred by counsel while in The Hague. (For purposes of the Discussion Paper, no reference has been made to eliminating DSA/DLA

¹⁹ See, Discussion Paper, para. 26.

for periods when counsel are required to be in The Hague; hence, this response does not raise or address that issue.) In respect of travel expenses, it is common knowledge that the travel costs to The Hague for counsel who are based in Europe, for example, are significantly less expensive than those based in Australia or the North America, for example. Similarly, there are wide variations between cases regarding the sitting durations of the various Chambers during the Trial-2 phase.

74. Accordingly, proposing a regime of lump-sum or fixed payments for travel depending on the phase and/or duration of a case does not seem to be an equitable or cost-effective approach to adopt. Counsel who must travel significant distances would quickly find the advanced lump-sum inadequate to cover their travel costs in the average case before the Court. One need only count the number of recesses the Court takes each year, taking also into account the invariable but predictable issues that cause delays in complex trials, to understand why the proposed lump sums would be inadequate in a trial that lasts over a year, for example. Conversely, the proposed fixed travel payments may more likely prove adequate for those counsel who reside in Europe.
75. A better and more cost-effective, and fairer, approach is to pay as and when the need arises, so long as counsel's travel to and from The Hague is necessary.

f. *Remuneration in the case of several mandates for legal team members (paragraphs 33-34 of the Discussion Paper)*

76. No observations are made on these paragraphs, which concern the Defence only.

E. Further observations about funding legal representation for victims

77. The Court and the Assembly of States Parties have been looking at options regarding legal representation of victims for a number of years. A review was undertaken in 2009.²⁰ At the outcome of that review, it was decided that the matter should be kept under review.²¹
78. A recent report of the Committee of Budget and Finance observes:

“Furthermore, while acknowledging the benefits of using external counsel, the Committee had already made the point that a system in which victims would be represented only by the Office of Public Counsel for Victims (OPCV) would be more cost efficient. In any case, the OPCV

²⁰ ICC-ASP/8/25, Report of the Court on legal aid: Legal aid and financial aspects of funding victims' legal representation before the Court, 5 October 2009.

²¹ ICC-ASP/8/38, Report of the Bureau on legal aid for victims' legal representation, 28 October 2009

already provided sizeable support to external counsel, having assisted 39 legal representatives and more than 2,300 victims. To the extent that the Court is the only international criminal court to accept the participation of victims, all comparisons with other international courts are not based on the same situations. Such a system should not rule out the possibility of obtaining external counsel in the event of conflicting interests between the groups of victims. In that case, and applying the above-mentioned threshold reduction of 45 per cent, an amount of €223,000 per group of victims requiring, exceptionally, recourse to external counsel, could be allocated to external counsel.”²²

79. This calls for comments by the victims’ legal representatives.

80. The OPCV was created in 2005 by the Regulations of the Court. In accordance with Regulation 81.4, the mandate of the Office is “to provide support and assistance to the legal representative for victims and to victims, including, where appropriate:

- Legal research and advice; and
- Appearing before a Chamber *in respect of specific issues.*” (emphasis added)

81. Appearance before a Chamber in respect of specific issues should not be construed as permanent representation. The ICC Chambers have traditionally opposed permanent representation by the OPCV.

82. OPCV represented six victims in the *Lubanga* case (the other victims in the case being represented by two other teams of lawyers). While maintaining appointment of OPCV in respect of those clients, Trial Chamber I ruled:

“In line with the submissions of the victims’ legal representatives, in the opinion of the Trial Chamber, during this early stage in the Court’s existence it is critical that the Office concentrates its limited resources on the core functions given to it under the Rome Statute framework which, as set out above, is to provide support and assistance to the legal representatives of victims and to victims who have applied to participate (rather than representing individual victims).”²³

²² ICC-ASP/10/15, Report on the work of the Committee of Budget and Finance on the work of its seventeenth session, 18 November 2011, Annex III, para. 10.

²³ ICC-01/04-01/06-1211, *Prosecutor v. Lubanga*, Decision on the Role of the Office for Public Counsel for Victims and its request for access to documents, 6 March 2008, para. 32.

83. OPCV was excluded from representation in the *Katanga*²⁴ and *Bemba* cases.

84. In the *Bemba* case, the Court noted:

“Therefore, in line with the ICC jurisprudence, the Chamber is of the view that the OPCV's role is primarily to assist the legal representatives of victims rather than representing individual victims in court. The OPCV's mandate is to provide support and assistance to legal representatives of victims and to victims. It is only "where appropriate" that the OPCV may appear before the Chamber, and solely "in respect of specific issues". This restrictive wording supports the interpretation according to which the OPCV should not act, in principle, on behalf of individual victims. In addition, while Regulation 80(2) of the Regulations of the Court mentions that the Chamber has the possibility to appoint counsel of the OPCV, such appointment is to be considered on an exceptional basis when the particular circumstances of an individual victim so require and, in any event, not as a rule for appointing, for instance, as common legal representative for an important number of victims in a case. The Chamber underlines that, in any event, it is for the Chamber to appoint counsel from the OPCV as legal representative of victims pursuant to Regulation 80(2) of the Regulations of the Court and therefore, victims cannot directly choose such a counsel from the OPCV to represent them.”²⁵

85. In the Kenya cases, the Single Judge also issued a reminder that OPCV is under the obligation to provide assistance to legal representatives of victims.²⁶

86. While the OPCV does not receive instructions from the Registrar nor is part of the Registry structure, being an office at the Court it cannot enjoy the level of independence external counsel do. The presence of external counsel also ensures that groups of victims having conflicting interests are effectively represented in accordance with the Code of Conduct.

87. It must also be recalled that the OPCV does not have field staff nor the capacity to liaise with clients across all situations on an ongoing basis, without resorting to intermediaries. As explained above, that ongoing communication goes to the core of victim representation.

88. The reason for the creation of the OPCV was the need to support victims' representatives on legal issues related to the ICC case law.

²⁴ ICC-01/04-01/07-1328, *Prosecutor v. Katanga*, Order on Common Legal Representation, 22 July 2009.

²⁵ ICC-01/05-01-08-1005, *Prosecutor v. Bemba*, Decision on Common legal representation of victims for the purpose of trial, 10 November 2010, para. 29.

²⁶ ICC-01/09-01/11-249, para. 82; ICC-01/09-02/11-267, para. 96.

89. Having OPCV as the single victim representative would require a deep restructuring of the Office and considerable expansion to hire new members in The Hague and different countries where the Court operates, to carry out all the functions currently carried out by several legal representation teams. This would involve creating permanent positions. On the contrary, legal teams are funded only for the duration of the specific cases.

F. Concluding observations

90. The fact that there is a world-wide financial crisis at the moment does not escape us. The Court is undoubtedly under financial strain and the Assembly of States Parties' desire to reduce portions of the Court's budget is a reality that poses many challenges. However, as indicated above, ways may be found to make the legal aid system more cost effective, without reducing the level or quality of the legal representation that it provides. In addition to the specific ways referred to above, there are other practical proposals already being made to group victims into logical categories (such as by similar interests, needs and concerns, and geographic areas, etc.) to reduce associated costs in consulting and liaising with them. The manner in which information is disseminated to victims could also benefit from technology in certain instances, such as by use of SMS to send out certain types of information about their cases before the Court. It is submitted that it is these kind of practical initiatives that should be further explored, rather than simply applying standardised reductions to levels of resources to be provided to victims' representatives.

91. It is hoped that this response will be taken into account by the Registry in relation to its Discussion Paper. It is well known that various groups and victims themselves have voiced concerns in the past that the Court does not engage with affected communities in an effective and sustained manner. Indeed, concerns have been repeatedly raised about the lack of field presence of the Court in the relevant situation countries. In relation to victim participation, the Registry has taken bold steps to rectify this problem in recent proposals on common legal representation. In the past, efforts to fund meaningful victim participation at the Court have been disappointing. It would be a major step backwards if the Registry were to renege on the positive steps that they have taken to ensure victim participation is no longer a purely notional idea.

Sureta Chana, Legal Representative of Victims in the *Ruto (Kenya I)* case

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The following Counsel have endorsed this commentary:

Carine Bapita, Legal Representative of Victims in the *Lubanga* case

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