

Coalition for the International Criminal Court
Legal Representation Team
Comments on the Proposed Adjustments to the Legal Aid System
-18 April 07-

PREFACE

While the work of the CICC Legal Representation Team reflects the positions of those Coalition members most active on particular issues and this paper has been prepared in consultation with other Coalition teams, this paper cannot be construed to represent the views of all organizations/members of the CICC. Since the Rome Diplomatic Conference, Coalition members have organized themselves into teams, one to follow each working group or theme of the intergovernmental process. Coalition teams now follow issues addressed by the Assembly of States Parties or its subsidiary mechanisms and by the International Criminal Court. Teams provide a forum within which interested members discuss issues, follow developments, elaborate relevant research and positions in response to developments, and elaborate and implement advocacy strategies in relation to those positions. All Coalition members are welcome to join any teams and all Coalition members are regularly apprised of the work of the teams

The Legal Representation Team of the Coalition for the International Criminal Court (Team) is a group of non-governmental organisations with expertise in issues related to the legal representation of suspects, accused and victims. The Team has been following the development and implementation of the current legal aid system. Some of its members have been involved in the consultation process conducted by the International Criminal Court (Court) on the Proposed Adjustment to the Legal Aid System (the Proposal).

The Team respectfully submits the following comments on the Proposal to the Committee of Budget and Finance (CBF)¹. While the Proposal raises an important number of issues, the Team has decided to focus its comments on a limited number of primary concerns.²

A. Specific adjustments regarding the Defence

1. Associate Counsel (P-4) and the “core defence team”

Registry proposals relating to the composition of a Core Defence Team:

The Registry’s current proposal on legal aid “envisages a core team, which will be active throughout the proceedings, with the exception of the two periods in which counsel acts alone.” (The two periods where counsel acts alone are (1) prior to the initial appearance, and (2) the period between closing arguments at trial and the trial judgment).

The core defence team proposed by the Registry would consist of a Lead Counsel (P-5), a Legal Assistant (P-2), a Case Manager (P-1) and a Counsel position (P-4).

The latter is added only when the decision on the confirmation of charges becomes final.

¹ The comments in this paper were made on the basis of an earlier version of the Proposal (dated 26 March 2007). The Team did not have access to the latest version of the Report presented to the Committee of Budget and Finance.

² Please note that some members of the Team have provided more detailed comments, available at <http://www.iccnw.org/?mod=legalrep>

Comments :

The Lubanga case has exposed the need for more staffing for the Pre-Trial phase. Hundreds of motions and applications were filed which required responses, and the electronic disclosure of documents by the Prosecution required substantial commitment of defence resources before the documents could be accessed. These factors, along with the complexity of the issues raised and the need to investigate and prepare for a timely trial, demonstrate that an associate counsel would have been crucial at a vital phase of the proceedings, that is the preparation for and holding of the confirmation hearing in the Pre-Trial phase. Furthermore, taking into account the experience of the ad Hoc Tribunals, the departure of a single counsel at any stage of the proceedings will result in a lack of continuity in the defence's strategy and in delays that will affect the overall conduct of the proceedings and ultimately cause serious additional financial burdens for the Court. For these reasons, the Team considers that the allocation of a second "high-level" counsel from the very initial stages of the proceedings on will prevent such serious consequences from arising.

The Team recommends that the CBF:

→**Requests from the Registry a report setting out :**

- a. the basis for its reasoning in determining the composition of the core defence team proposed for each phase, including an analysis of the workload experienced in the Lubanga case during the pre-trial phase and of the expected workload of the proposed team.**
- b. the financial consequences of a withdrawal of counsel compared with the provision of co-counsel (P4) beginning in the pre-trial phase**

2. Modular Additional Resources

Registry proposal: The Registry proposes mathematical formulae for determining if and how many additional resources beyond the core team are needed in a particular case. The calculation is centered on the accrual of "full time equivalents" or FTE, as follows:

- (i) For every charge presented by the Prosecutor: 0,025 FTE (1 FTE = 40 charges)
- (ii) For each person applying to participate in the proceedings:: 0,005 FTE (1 FTE = 200 persons)
- (iii) For each victim or group of victims whose application to participate has been accepted by the Chamber: 0,02 FTE (1 FTE = 50 victims)
- (iv) For each 3000 pages filed by other participants: 0,1 FTE (1 FTE = 30.000 pages)
- (v) For each 3000 pages disclosed by the Prosecutor: 0,1 FTE (1 FTE = 30.000 pages)

Defence teams would be limited to no more than one additional counsel and one additional legal assistant, regardless of the number of FTE's accumulated.

Comments: Although there is no objection in principle to the creation of a modular system to assess the need for additional resources, the basis on which the factors and limits contained in the Registry's proposal were established does not seem clear. We are concerned about the implication of the proposed FTE's that there must be a significant overload of work (at least 40 charges, at least 200 applications to participate by victims, at least 50 victims granted the right to participate, or at least 30 000 pages of pleadings filed) before the Registry begins considering the demand of one more person to the staff.

It should also be noted that the proposed modular system has not yet been submitted for consultations to the recently appointed Legal Aid Commission, which was created for the purpose of allowing independent expertise to inform the proper evaluation of such proposals. We understand that the Legal Aid Commission was appointed only days before the Court started its consultations and was therefore not yet fully operational at the time. However, given the broad concerns (raised by Counsel groups, by the Office of Public Counsel for the Defence and by legal aid administrators from the ad hoc Tribunals) in relation to the proposed FTEs, the team believes that the Legal Aid Commission should be given the opportunity to comment upon the Registry's proposal at this stage and should also be involved in any future consultations regarding changes of the legal aid scheme.

The Team recommends that the CBF:

→**Requests from the Registry a detailed analysis of the basis for the proposed FTE equivalencies, as well as a report by the Legal Aid Commission commenting upon the Registry's proposal.**

B. Specific adjustments regarding victims

Victims' participation is a unique feature of the Rome Statute. Resources for victims' legal representation must be provided for victims to exercise their rights.

1. Pre-Trial Phase

The Team is concerned that the Proposal does not establish a legal aid system for the pre-trial phase, starting from the filing of the request for participation. Some victims have already seen their request for participation rejected by the Court, without having benefited from the assistance of a legal representative³, while the proposal of adjustment of the Registry provides for additional legal aid for the defence to enable them to reply to the requests of participation. As most victims who wish to participate in the Court's proceedings will likely be indigent, the absence of a complete legal aid system in the pre-trial phase will deny most victims their right to participate in the proceedings. This will disproportionately impact upon the most vulnerable victims, such as victims/survivors of gender based crimes and children.

According to the Rome Statute and the jurisprudence of the Court, a victim can participate in the proceedings in the pre-trial phase and, therefore, has the right to be represented at this early stage.

The Proposal states that "while there is, on one side, no established and confirmed jurisprudence on the modalities of participation of victims under the legal aid system and, on the other, there are no criteria which are reliable enough on the issue, it seems more appropriate, for the time being, not to set up a complete legal aid system for victims during the pre-trial phase."

The Team believes that both the legal texts and the jurisprudence of the Chambers provide sufficient information to develop a more complete and reliable system:

- Pre-Trial Chamber I found in January 2006⁴ that the victims have a right to participate in the

³ ICC-Decision of 20 October 2006 (see ICC-01/04-01/06-601)

⁴ ICC-Decision of 17 January 2006 (see ICC-01/04-101)

proceedings as from the investigation stage, ie. before a suspect is identified and warrants of arrests are issued.

- Pre-Trial Chamber I has also rendered decisions on the participation of victims in the case “The Prosecutor v. Thomas Lubanga Dyilo”, including on the modalities of their participation⁵. These modalities were expanded with the practice around the first confirmation of charges hearing.
- The Appeals Chamber has rendered decisions on the conditions for victims to participate in the proceedings before that Chamber.⁶

In regards to the lack of reliable **criteria**, the Team agrees that the legal aid system will have to take into consideration several factors, including the modalities for victims’ participation, the size of the group of victims bearing a common legal representative, the distinct interests of victims, in particular the interests of victims of sexual violence and children, the location of victims, the complexity of the case, etc. The Team notes that the Proposal fails to acknowledge that some of these criteria will depend largely on the Registrar's own decisions in the management of the legal aid system.

The Team is concerned that the lack of a complete legal aid system is leading to lack of clarity and transparency. Even though a decision granting legal aid to a victim during the Pre-Trial phase has already been taken⁷, it was clear that the presence of only one counsel (P5) was insufficient during the confirmation hearing and that the counsel largely depended on the assistance of the Office of Public Counsel for Victims. The OPCV has now indicated that it will, most probably, not be able to provide such assistance in the future.⁸

The Team recommends that the CBF:

→Requests the Registry to develop a more complete system for the legal aid at the pre-trial stage, including an assessment of the different criteria that might impact the resources that should be allotted to a legal representation team and the way in which those should be weighed.

2. Trial phase

The Proposal states that “[r]egarding the trial phase, it is proposed to foresee, in principle, a basic team which might be, where so decided by the Registrar, decreased or reinforced by additional resources, depending on the modalities of participation actually determined by the Chambers and other relevant criteria”.

The Team observes that the system proposed relies largely on ad hoc decisions rendered by the Registrar (which is reinforced by the wording “in principle”). Although a basic team is, in principle, foreseen for the trial stage, its size is subject to a decision by the Registrar, based on the

⁵ ICC-Decision of 28 July 2006 (see ICC-01-04-01-06-228) and 22 September 2006 (see ICC-01-04-01-06-462)

⁶ ICC-Decision of 12 December 2006 (see ICC-01-04-01-06-769) and 13 February 2007 (see ICC-01-04-01-06-824)

⁷ ICC Registry's Decision of 3 November 2006 granting legal aid to victim a/0105/06 at the pre-trial stage (see ICC-01-04/01-06-/650)

⁸ Observations du Bureau du conseil public pour le victimes sur le projet d’ajustement du système d’aide judiciaire aux frais de la Cour, p.2.

modalities of participation and “other relevant criteria”. The Team notes that the Proposal does not provide information on how the Registrar will assess the modalities of participation, on what these other criteria may be or on how their impact on resources will be weighed. The Team recommends that similar criteria as those outlined above be taken into consideration.

The team is concerned about the unpredictability of the system:

* **for victims** who must make an informed decision about whether or not to participate in the proceedings, based, inter alia, on the possibility to obtain legal aid from the Court; and

* **for States** who need to foresee what is the budgetary reserve that will be necessary for the Court to provide legal representatives with adequate resources.

Finally, the Team notes that in order for the Chambers to develop more detailed jurisprudence on the modalities for the participation of victims, it is indeed necessary that the victims are heard. Lack of representation will affect their ability to be heard and might thus result in the establishment of a system that disregards the role of victims and their rights.

The Team recommends that the CBF:

→Requests the Registry to develop clear guidelines on the criteria that will be relied upon to grant legal aid and to decide to decrease or increase the funds allocated.

3. Reparations stage

The Team is satisfied that a core team is foreseen for the reparations stage. During this stage, victims will play a prominent role and therefore, sufficient resources must be available to the victims' legal representatives. The Team believes that, as indicated in the Proposal, allocation of additional resources might indeed be necessary at this stage. Therefore, the Team considers that it is advisable that the system be reviewed in the light of the Court's experience, once the Chambers start dealing with the issue of reparations and a more information becomes available on the extent of the role that victims will play at this stage.

The Team recommends that the CBF:

→Recommends that the funds requested by the Court for legal aid at the reparations stage be allocated.

→Requests the Registry to evaluate the performance of the legal aid system at the reparations stage in the future, in the light of the Court's jurisprudence and experience.

4. Budget for investigations

The Team welcomes the allocation of a budget for investigations, a feature left out in the current system. Provision of funds for this purpose recognises the independent role that victims play in the proceedings, and the consequent need to allocate funds for them to conduct investigations in order to support their arguments and findings

The Team recommends that the CBF:

→Recommends that the funds requested by the Court for the purpose of investigations be allocated.

Some organisations/ team members have also proposed a budget to provide for the assistance of a psychologist, a medical doctor and later on for the reparations other experts to establish the harm suffered, as well as witness experts. The provision of such expertise is crucial to adequately address traumatised victims (including victims/ survivors of gender based crimes).