



## COMMENTS ON THE DEVELOPMENT OF AN EFFECTIVE LEGAL AID POLICY FOR VICTIMS AT THE ICC

June 2017

### I. Introduction

REDRESS welcomes the opportunity to provide written comments and observations on the Registry's consultations on the Court's Legal Aid System (LAS). We hope that this submission will assist the Registry in the ongoing review of the LAS.

This submission focuses on legal aid for victims before the ICC. It builds on and complements REDRESS' recommendations during the previous LAS review at the ICC in 2012<sup>1</sup> and on the administration of LAS during the ReVision process.<sup>2</sup>

In preparing the current review of the LAS, the Registry developed a 'Concept Paper on the Review of the International Criminal Court Legal Aid System' (Concept Paper). The Concept Paper aims to "give stakeholders an overview of the current concerns as well as the solutions being considered." It highlights that it should be read in conjunction with the Registry's Single Policy Document on the Court's Legal Aid System (Single Policy Document), and the report on the "Assessment of the ICC's Legal Aid System" prepared by Richard J. Rogers (Expert Report) and in annex the International Criminal Justice Consortium report.

Our submission as set out below therefore takes into consideration the various documents prepared by the Registry in the framework of the current review, and in particular the Concept Paper, Expert Report and Single Policy Document. It was developed on the basis of REDRESS' experience in working with and for victims before the ICC and takes into account interviews with

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<sup>1</sup> REDRESS, Comments and proposals on the Legal aid consultation, June 2012, available at: [http://www.redress.org/downloads/publications/1207review\\_of\\_legal\\_aid\\_consultation.pdf](http://www.redress.org/downloads/publications/1207review_of_legal_aid_consultation.pdf).

<sup>2</sup> REDRESS, Comments to the Registrar in relation to the ReVision project as it relates to victims' rights before the ICC, February 2015, available at: <http://www.redress.org/downloads/publications/2015-feb-redress-comments-on-revision.pdf>; it also takes into account REDRESS' Report "Representing Victims before the ICC: Recommendations on the Legal Representation System," April 2015, available at <http://www.redress.org/downloads/publications/1504representingvictims.pdf>.

legal representatives of victims as well as exchanges with civil society in the margins of the Victims' Rights Working Group.<sup>3</sup>

## II. The Review of the LAS: a need for further discussion on legal aid for victims

Effective participation of victims in criminal proceedings before the ICC and as parties during the reparations proceedings,<sup>4</sup> is a cornerstone of the system of justice before the ICC. The LAS for victims is essential to ensure that victims' access to the Court is meaningful and effective. The Registry for instance considered that "[I]t has become evident through the experience of the first four situations before the Court that, while the language of rule 90 (5) may be permissive rather than mandatory, the rights afforded to victims by the Statute can only be exercised effectively if financial assistance is made available for legal representation of victims by the Court through the legal aid scheme."<sup>5</sup>

The current review of the LAS therefore should strive to fully recognise the importance of victims' representation under the LAS.

We submit, and set out further below, that the current review of the LAS does not reflect that important role. The Concept Paper notes that "the system for victims' representation is still developing" and in identifying proposals for legal aid for victims, appears to rely to a large extent on the findings and recommendations of the Expert Report. This reliance is problematic as the Expert Report does not appear to have been aimed at providing a thorough analysis of legal aid for victims. This is also reflected in the Report's recognition that further discussions are needed on legal aid for victims and the Report's suggestion that CSS should draft a "Legal Aid Policy for Victims' Participation" that touches, among other things, "on controversial issues, including the role of field assistants" and "circulate it for comments."<sup>6</sup>

Such discussions are yet to be held and a draft policy has not been developed. Until and unless further consultations take place with experts in the representation of victims and with other stakeholders, including on whether such a policy should be developed, we submit that any review of the LAS will be incomplete as far as legal aid for victims is concerned. This risk is exacerbated by a concern voiced by some legal representatives of victims to REDRESS that they had not been consulted, and not been aware of, the ongoing LAS.

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<sup>3</sup> See for further information on the Victims' Rights Working Group: <http://www.vrwg.org/>.

<sup>4</sup> "La Chambre souligne par ailleurs qu'au stade des réparations, les victimes sont parties à la procédure aux côtés de la personne reconnue coupable": *The Prosecutor v. German Katanga*, Ordonnance de réparation en vertu de l'article 75 du Statut, ICC-01/04-01/07, 24 mars 2017, para 15.

<sup>5</sup> Report of the Court on legal aid: Legal and financial aspects of funding victims' legal representation before the Court, ICC-ASP/8/25, 5 October 2009, para. 6.

<sup>6</sup> Expert Report, B. Recommendations, p. 106.

Without providing an exhaustive list of issues, we set out below a number of issues that should be included in such a consultation on legal aid for victims.

### **III. General principles on the representation of victims in the context of the LAS**

The Single Policy Document enunciated guiding principles that govern the application of the LAS system at the ICC. The Concept Paper reiterated those principles: equality of arms between the Defense and the Office of the Prosecutor; objectivity; transparency; continuity and flexibility; and economy.

REDRESS supports these five principles. In addition, we submit that a LAS policy for victims before the ICC should be guided by principles relevant specifically to the representation of victims, and therefore also include the principle of victims' rights to choose counsel and a principle on procedural fairness.

#### ***Victims' right to choose counsel***<sup>7</sup>

Victims have a right to appoint counsel of their own choosing; or, in instances when the Court imposes common legal representation, victims should be assisted and consulted with a view to choosing a common legal representative. Different models have been applied in past/ current cases regarding victim participation and REDRESS has previously expressed its concern that "insufficient attention has been paid to [victims' rights to chose counsel and to be consulted] and victims' choice has become the exception rather than the rule."<sup>8</sup>

The current LAS review acknowledges that there are no "sufficiently established principles that would enable one to predict which model will be mandated in a given case" yet does little to identify "the right system."<sup>9</sup> This, according to the Expert Report, is because the review focuses on LAS' efficiency and effectiveness, rather than on "providing specific recommendations on all aspects of the LAS for victims."<sup>10</sup> As a result, the LAS- as far as victims' representation is concerned- simply recommends that a "more stable and predictable model for victims' representation (whatever that may be)" is required to "facilitate greater efficiency for the LAS."<sup>11</sup>

This very limited approach to what victim representation before the ICC should entail, and how legal aid for victims impacts on their right to chose counsel, is regrettable. It does not address concerns regarding the inability of victims to exercise their right to choose counsel because they are

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<sup>7</sup> See on this point, REDRESS, *Representing Victims before the ICC: Recommendations on the Legal Representation System*, April 2015, at <http://www.redress.org/downloads/publications/1504representingvictims.pdf>.

<sup>8</sup> *Ibid.*, p. 2.

<sup>9</sup> Expert Report, para. 274.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, para. 277.

not benefiting from legal aid.<sup>12</sup> It underlines that further discussions are needed for the current LAS review to also result in an effective LAS for victims before the ICC.

### ***Recognising the particular roles of victims***

Counsel represents victims in ICC proceedings by presenting “their views and concerns” where their “personal interests” are affected. Such participation of victims takes place independently of any potential reparations proceedings.<sup>13</sup> Victims are participants in the criminal proceedings and *parties*, just like the defence, in their own right during the reparations proceedings at the ICC.<sup>14</sup>

The genuine and meaningful participation of victims in proceedings at all stages before the ICC is essential to fulfill the reparative aims of the ICC’s mandate and will enable victims to positively contribute to the ascertainment of the truth in the proceedings. The representation work of victims’ legal representatives in relation to reparations is not restricted to the period of the reparations proceedings *per se*. Rather, counsel representing victims in ICC proceedings will have to assist victims throughout proceedings and victims, with the assistance of their legal representatives, can apply for reparations at any time during the proceedings before the ICC. Counsel often consult with victims on issues relevant to reparations even before the start of the reparations proceedings and sometimes as early as their admission as victim participants in the proceedings. Furthermore, the filing of observations on reparations, at the request of the court, by victims’ counsel can take place even before the conclusion of criminal proceedings.<sup>15</sup>

The Expert Report has not addressed how a future LAS can meet the particularities of victims’ representation during the different stages of the proceedings and how it can take into account the differences from one case to another. Instead, as will be outlined further below, the Expert Report has recommended one single and uniform LAS for victims throughout the proceedings.<sup>16</sup> In contrast, the recommended system for Defense counsel incorporates different systems that account for the workload and takes into account the needs of the Defense according to the stage of procedure and the complexity of the case.

We submit that the LAS should follow this approach also for the representation of victims (both in The Hague and in the field), as it would contribute to ensuring that legal representatives have sufficient human and financial resources to carry out the tasks expected of them at the different

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<sup>12</sup> See for example letter sent by REDRESS, FIDH, IBA, No Peace Without Justice, Parliamentarians for Global Action to the Registrar regarding legal aid for victims in the Ongwen case, 17 November 2016, at <http://www.redress.org/downloads/publications/1611letter%20registrar.pdf>.

<sup>13</sup> Article 68.3 of the Rome Statute.

<sup>14</sup> “La Chambre souligne par ailleurs qu’au stade des réparations, les victimes sont parties à la procédure aux côtés de la personne reconnue coupable”: The Prosecutor v. German Katanga, Ordonnance de réparation en vertu de l’article 75 du Statut, ICC-01/04-01/07, 24 mars 2017, para 15.

<sup>15</sup> For example in the Bemba case LRVs were requested to make submissions on reparations before the conclusion of Bemba’s appeal proceedings.

<sup>16</sup> Expert Report, p. 101-102.

stages of the proceedings. The required resources will vary according to the stage of the proceedings and the particularities of the case and the LAS should be flexible to reasonably account for such variations.

#### **IV. Overall Budget and Action Plan**

In cases where the common legal representative is an external counsel, and the LAS pays the victims' team, the Expert Report recommends using one overall budget. This is to be set for each case by the CSS for administering the LAS for victims at all stages of the procedure. The lead victims' representative should develop a detailed action plan for each stage of the proceedings for CSS<sup>17</sup> with CSS being able to modify the action plans submitted by victim counsel upon written justification.<sup>18</sup>

We submit that this proposal is problematic for the following reasons:

##### ***Calculating the overall budget***

The Expert Report suggests to calculate the overall budget of the victims' team on the basis of the OPCV's normal team composition and projected expenses.<sup>19</sup> The Expert Report assumes that this is the appropriate level (for most cases).<sup>20</sup> The Expert Report has not, however, verified whether this is actually the case, and whether this does indeed provide appropriate human and financial resources to ensure effective representation of victims. This is in stark contrast to the very detailed budget calculations for defense in the Expert Report.

It would therefore be important to first verify to what extent OPCV's normal team composition and budget are appropriate to ensure effective representation. This will require future discussions on LAS specifically for victims with relevant stakeholders (in particular current and former members of victims' teams and the OPCV) on whether the OPCV's normal team composition and budget are appropriate to guarantee effective representation.

##### ***Submission of Action Plans: balancing the need for accountability and flexibility***

The Expert Report acknowledges that "consistent with the view of defence lawyers, victims' lawyers found their dealings with the CSS to be frustrating and timewasting."<sup>21</sup> It proposes that defence counsel should not be required any longer to regularly submit action plans to CSS at all stages, for example during stages when it is expected that the defense team would be working full-time such

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<sup>17</sup> Expert Report, paras 287 to 297.

<sup>18</sup> Expert Report, para 297.

<sup>19</sup> Expert Report, para 290-294.

<sup>20</sup> "Assuming that the OPCV's normal team composition combined with projected expenses is the appropriate level (for most cases), the CSS could use the latter as a basis for establishing the overall budget for cases where the common legal representative is an external counsel" Expert Report, para 293.

<sup>21</sup> Expert Report, para. 281.

as the trial stage.<sup>22</sup> Such a system would be “an unnecessary burden...[and] not help the CSS to manage the LAS.”<sup>23</sup> Instead, the Expert Report recommends that defence team members be paid a monthly fee according to the agreed monthly lump sum rate.<sup>24</sup>

However, it recommends maintaining the requirement for detailed action plans with regards to victims’ teams at all stages of the proceedings and irrespective of the significantly different workload and expenditure of the relevant stages. While the Expert Report has noted that the system of action plans can be administratively burdensome in situations when teams are working full-time it has not explained how maintaining such a system in those situations would be practical for victims but not for defense.

We submit that similar considerations should apply to victims’ teams as for the defense. The type of system in place for monitoring expenditure should be adapted to the workload reasonably expected to be carried out by team members depending on the stage of the proceedings and the particularities of the case. Accordingly, the accounting system for victims should be guided by accountability, flexibility and adaptability.

## **VI. CSS and Victims’ Rights**

CSS is in charge of managing the LAS, including for victims’ counsel, and including approving additional costs. The Expert Report notes that the CSS’ role in managing the allocations of resources to victims’ representatives “presupposes that the CSS has the substantive knowledge of victims’ representation to provide meaningful input.”<sup>25</sup> The Expert Report has also noted that some lawyers “were concerned that the CSS failed to appreciate fully the role of victims’ teams, especially the fieldwork necessary to keep victims properly informed.”<sup>26</sup>

Given its key role in approving the legal aid budget for victims’ teams, it is crucial that CSS has knowledge and experience in the role and work of victims’ teams. This is particularly important as the workload of victims’ teams does not always mirror that of their counterparts in the defense. For example, during periods of reduced activities during the trial, the Expert Report suggests that the payment system for the defense shifts from monthly fee claim to hourly timesheets, being paid on the basis of hours actually worked. The rationale for such shift is that in times of reduced court activity the defense team might not work on a full-time basis as is the case before the reduction of activities. In contrast, the victims’ team might witness an increase in its workload in times of reduced court activity, when counsel will need to meet with victims, explain the proceedings

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<sup>22</sup> Expert Report, para 241.

<sup>23</sup> Ibid.

<sup>24</sup> Expert Report, para 84.

<sup>25</sup> Expert Report, footnote 41, p. 101.

<sup>26</sup> Expert Report, para 281.

(including what the reduction of activities imply) and take instructions.<sup>27</sup> This impacts directly on the budget as for instance expenses of field assistants and generally field work will increase during these stages.

The Expert Report recommends that “key staff of CSS involved in assessing resource needs of a legal team should include substantive experience working on international crimes (or other complex criminal) cases.”<sup>28</sup>

We concur that such substantive experience is fundamentally important. In addition, we recommend that CSS’ staff experience should have particular experience and understanding of the composition and resources required to ensure effective representation of victims. The Expert Report has made a similar recommendation specifically with regards to CSS knowledge of defense issues.<sup>29</sup>

In order for CSS to gain such experience and knowledge, the Expert Report notes that specific trainings have taken place and suggests moving the responsibility for training to “OPCV in conjunction with ICCBA.”<sup>30</sup> We recommend that any training should include specific trainings on the representation of victims in international criminal proceedings.

In addition to developing and ensuring requisite knowledge and experience, we recommend that key staff from VPRS should play a formal role and assist CSS in the management of legal aid for victims.

## **VII. Field budget**

The Concept Paper notes that “[v]ictims’ teams should have sufficient resources to communicate effectively with victims and to gather necessary information, particularly for the reparations stage.”<sup>31</sup> The overall field budget should therefore take into account criteria such as “applicable Court orders, number and geographical distribution of victims, organization of victim groups, languages spoken, means of transport, security concerns, whether the team can use the Court’s field office, and the cost of office space.”<sup>32</sup>

REDRESS welcomes this emphasis on the need for sufficient resources for victims’ representatives to engage with their clients. We suggest that in addition to the criteria mentioned, field budget

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<sup>27</sup> Court decisions that result in reduction of activities have been in some circumstances misunderstood by victims to mean that the case has stopped.

<sup>28</sup> Expert Report, para.190.

<sup>29</sup> “A concrete understanding of what resources a defence team requires (and does not require), would help ensure that legitimate resource requests are processed speedily and—importantly—that unreasonable requests / claims are rejected swiftly.” Expert Report, para 189.

<sup>30</sup> Expert Report, para 190.

<sup>31</sup> Concept Note, p.16.

<sup>32</sup> Expert Report, para 303 and Concept Paper, p.16.

resource allocation should take into account the actual activities to be carried out by victims' teams in communicating effectively with victims and gathering information.<sup>33</sup> The following tasks of victims' counsel have been identified by ICC case-law and could be useful additional indicators to assess field budgets:

- a. Keeping 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;
- b. Responding to a reasonable number of specific legal inquiries from individual victims;
- c. Receiving general guidelines or instructions from his or her clients as a group and particular requests from individual victims;
- d. Maintaining up to date files of all participating victims and their whereabouts;
- e. Obtaining qualified legal support on a need basis;
- f. Storing and processing any confidential filings or other information, including the identity of his or her clients, in a safe and secure manner;
- g. Communicating with victims in a language they understand.<sup>34</sup>

#### **VIII. Field Assistant:**

We further note the field assistant's crucial role in carrying out the above-mentioned activities. The field assistant is an essential bridge between the victims' communities and the Court in The Hague. He/she is expected to be familiar with the work of the ICC but also engage with victims, including by providing support, in a language they understand. Such contact with clients was described by the Single Policy document as an element that "goes to the very core of the participation of victims in proceedings."<sup>35</sup>

The current review of the LAS seems to suggest that the financing of the position of field assistant should come from the field budget allocated to the team.<sup>36</sup>

REDRESS submits that the position of field assistant should be accounted for when establishing a standard victim composition team and that the resources for such a position should therefore not be drawn from the field budget, which should be used for specific field activities (as outlined above), but from the budget for team composition.

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<sup>33</sup> The Single Policy document has provided more detail on those tasks, and listed for example "keeping [victims] informed of developments, taking instructions, and ascertaining their interests in order to be able to represent them effectively before the Court," see para.51.

<sup>34</sup> *Prosecutor v. Bemba*, Trial Chamber III, "Decision on common legal representation of victims for the purpose of trial", ICC- 01/05-01/08-1005, para. 25; *Prosecutor v. Katanga & Ngudjolo*, Trial Chamber II, "Order on the organisation of common legal representation of victims", ICC-01/04-01/07-1328, para. 17 ICC-01/09-01/11-243, para. 32; *Prosecutor v. Ruto et. Al*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 august 2011, ICC-01/09-01/11-249.

<sup>35</sup> Registry's single policy document on the Court's legal aid system, para.51.

<sup>36</sup> *Ibid*, para 63; Concept Note, p.16.

In light of the important role of the field assistant as explained above, the position of at least one field assistant should be the standard in any victim team for the entire process, i.e. during pre-trial, trial, appeal and reparations phases. The number of field assistants required in a given case (and at a given stage) should depend on objective factors similarly to those determining case complexity (see below).

#### **IX. The concept of ‘case complexity’**

In addition to the above standard overall and the field /investigation budget, victims’ representative should have the possibility to apply for additional means if the workload so requires. The Concept Paper contemplates the possibility of introducing the concept of case complexity to determine the appropriate resource levels and circumstances when such additional means might be required.<sup>37</sup>

The Concept Paper gives, as an example, the criteria of the ICTY at the pre-trial, trial and appeal to assess the complexity of the case. Understandably, the ICTY’s criteria do not take into account aspects of victim participation and reparations. As such, the relevance of the ICTY’s criteria for determining the case complexity for victims is limited.

We submit that criteria for the assessment of the complexity of cases before the ICC as far as victims’ teams are concerned should take into account issues that impact on victims’ teams and also take into account reparation proceedings. These issues could include similar issues to those used to calculate the field/ investigation budget (as outlined above, Section VII).<sup>38</sup> The Single Policy Document provides that additional criteria could include: reparation proceedings involving the need to request protective measures pursuant to Article 93(1) of the Statute; when the Chamber has decided that it will determine the extent of any damage; costs associated with consulting their clients during the trial with a view to keeping them informed and seeking their instructions.<sup>39</sup>

These criteria should also be used for the assessment of the complexity of a case before the ICC so as to ensure that the assessment takes into account the impact of case complexity on victims’ teams.

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<sup>37</sup> Concept Paper, p.5.

<sup>38</sup> Concept Paper, p.16.

<sup>39</sup> Single Policy Document, p.16.