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**Interim report of the Court on legal aid:
Legal and financial aspects for funding victims' legal representation
before the Court***

A. Introduction

1. In its resolution ICC-ASP/7/Res.3, "Strengthening the International Criminal Court and the Assembly of States Parties", the Assembly of States Parties ("the Assembly") invited the Court, in paragraph 16, to "present to the Assembly at its eighth session, an updated report on the legal and financial aspects for funding victims' legal representation before the Court". In preparing such a report, the Assembly asked the Court to take into account the comments of the Committee on Budget and Finance ("the Committee") in the report on the work of its eleventh session.¹ Further, the Assembly invited the Court to "engage in a constructive dialogue with States Parties on this issue in a timely manner, allowing for a proper review by the Committee on Budget and Finance at its twelfth and thirteenth sessions."

2. The present interim report will take stock of the experience so far, identify matters that merit particular consideration, highlighting legal and practical factors, and propose the elements that a comprehensive framework for legal aid for victims will need to include. This report does not seek to deal directly with the long-term financial aspects, which the Registry considers can only be dealt with in conjunction with the more detailed consideration of the various issues outlined hereunder, and will be addressed in the final report. The Registry intends to continue to reflect internally and to consult on these issues during the coming months, with a view to presenting a final report to the Assembly at its eighth session.

B. Legal framework

3. The participation of victims in the proceedings and their right to request reparations is established in the Statute and the Rules of Procedure and Evidence.² Article 68, paragraph 3, of the Rome Statute provides that views and concerns of victims may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence. The Rules of Procedure and Evidence accordingly provide, in rule 90, for the common legal representation of victims where there are a number of victims, whilst calling for reasonable steps to ensure that the distinct interests of the victims

* Previously issued as ICC-ASP/8/CBF.1/2.

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. II, part B.2, paras. 128-129.

² See in particular articles 68, paragraph 3, and 75 of the Statute and rules 85 to 99 of the Rules of Procedure and Evidence.

are represented and any conflict of interest is avoided. Rule 90, paragraph 5, provides that “a victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance”.

4. The legal aid scheme of the Court is further elaborated in the Regulations of the Court. As regards the determination of means, no distinction is made in regulation 84 between the defence and victims when it comes to the types of means to be taken into account and the nature of the assessment. As regards the scope of legal aid, however, regulation 83 provides simply that “the scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate.”

C. Differences between legal aid for victims and legal aid for the defence

5. On the basis of this legal framework, the Registry has developed and proposed to the Assembly a legal aid system to apply to legal representation both for accused persons and for victims.³ From the outset, the Registry recognized that, as the scheme developed, there would be a need for certain differences to emerge between the nature of the scheme for the defence and that for victims.⁴ There are many reasons for this, including the following:

- a) The role of victims as participants in the proceedings is different from that played by the defence, leading to differences in the volume and nature of their intervention. The role of victims will depend on decisions taken by the relevant Chamber on modalities of participation, and differ according to the stage of the proceedings. For instance, while the legal representatives of victims will play a much more limited role than the defence during the pre-trial and trial phases, they would be expected to play a more prominent role during any reparations stage;
- b) In addition to representing the interests of their clients in the Court proceedings themselves, through personal appearance at hearings and the filing of written observations, submissions etc., legal representatives of victims have a second duty that is a fundamental part of the participation of victims, which is to keep their clients informed of developments in the proceedings and take their instructions. This dual aspect of their role has a number of implications which will be discussed below;
- c) Legal representatives of victims will likely find themselves representing a group of victims, potentially numbering several tens or even hundreds. One legal team in the Lubanga trial currently represents 74 victims. For the defence, even in a joint case, it is likely that a legal team will represent only one accused;
- d) Whereas an accused will be in detention in The Hague and a suspect being interviewed by the Office of the Prosecutor would be in one defined location, a group of victims may be scattered over a wide geographical area, including in locations that are difficult to access either for logistical or security reasons;
- e) The determination of indigence may require a different approach given the collective nature of representation of victims, the conditions in which the vast majority of victims in the situations currently before the Court live, as well as other factors. This will be further discussed below; and

³ See, for example, Report on the operation of the Court’s legal aid system and proposals for its amendment (ICC-ASP/6/4).

⁴ For instance, the Registry informed the Presidency that a separate financial information form would need to be developed for victims, different from that for the defence.

- f) Whereas an accused has the right to legal assistance without payment if he or she lacks sufficient means to pay for it,⁵ the legal framework of the Court does not clearly delineate the circumstances in which victims may receive legal assistance paid by the Court.⁶

6. The legal framework of the Court left many issues relating to the participation of victims to be determined by the judges through the case law, and was itself an innovation in international criminal law, so there were no obvious international precedents to look to. Several fundamental aspects of the participation of victims went to appeal. The nature of the legal aid necessarily follows from the manner of participation and from the actual needs of the legal teams. The first application for legal aid to represent victims was made in November 2006.⁷ The first trial of the Court started in January 2009, and as the trial started, significant aspects relating to the modalities of the participation of victims remained unresolved or were resolved only in the weeks immediately preceding the trial. The Registry is therefore now in a position to develop detailed proposals relating to all parts of the proceedings on the basis of actual experience, other than for reparations, since there have as yet been no reparations proceedings before the Court.

7. Where specificities are not mentioned, the elements of the legal aid scheme are the same as for the defence, such as the monthly ceiling of €4,000 for travel and other costs, the payment of up to 40 per cent compensation of charges to counsel where justified, the remuneration levels of the different members of the team and the payment procedures. The management of the legal aid for victims (carried out within the Registry by the Victims Participation and Reparations Section) and for the defence (carried out by the Defence Support Section) are closely coordinated in order to ensure consistency in implementation, where appropriate. The same approach is pursued, seeking to manage the resources of the Court responsibly, transparently and economically, whilst enabling the legal teams to work effectively.

8. It is proposed that, as was done for the defence, underlying principles of the legal aid scheme for victims should be identified. To flesh out these principles, internal and external consultations will continue to be held over the coming months, but it is envisaged that some of the principles adopted in relation to legal aid for the defence (equality of arms, objectivity, transparency, continuity and economy)⁸ may need to be adapted. In particular, the principle of “equality of arms” would need to be adapted in order to reflect the role played by victims in the proceedings.

9. Further, the Registry believes that the principles underlying legal aid for victims will need to take account of the fact that legal representation of victims involves two equally important elements. One is the representation of the clients’ interests before the Court, through personal appearance at hearings and the filing of written documents. The second is the contact with the clients, including keeping them informed of developments, taking instructions, and ascertaining their interests in order to be able to represent them effectively before the Court. The second element goes to the very purpose of the participation of victims in proceedings, which, if it is to be meaningful, requires the victims to maintain regular communication with their lawyers. The different Chambers of the Court have also underlined

⁵ Article 67, paragraph 1, sub-paragraph d, of the Statute and rule 21 of the Rules of Procedure and Evidence.

⁶ Rule 90, paragraph 5, simply provides that: “A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.”

⁷ ICC-01/04-01/06-650, Decision of the Registrar, dated 3 November 2006, in relation to legal aid for victim a/0105/06.

⁸ Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16), p. 3.

in their decisions the importance of keeping victims informed of judicial developments before the Court. Given the importance of the second aspect, ways of giving it due recognition will be proposed in the final report.

D. Common legal representation

10. The impact of the number of legal teams, as well as of the composition of the legal teams representing victims, will be further considered in the final report, together with an evaluation of other cost drivers, and practical factors such as cultural, social, logistical and security considerations that have an impact on the legal representation of victims.

11. Some victims approach the Court having already appointed a lawyer of their choice. Others do not yet have a lawyer at that stage and the Registry, in accordance with rule 16 of the Rules of Procedure and Evidence, assists them in choosing a lawyer. The Chamber has the power to appoint legal representatives of victims, which may be the Office of Public Counsel for Victims, where the interests of justice so require, in accordance with regulation 80 of the Regulations of the Court.

12. Rule 90 envisages that where there are “a number” of victims, they would be grouped so as to be represented by a common legal representative or representatives, if necessary with the assistance of the Court, and ultimately that the Court might itself appoint legal representatives if the victims are unable to do so. Experience to date has shown that there are likely to be victims numbering in the tens, or potentially more, participating in proceedings. The factors influencing the numbers of victims participating at any given stage or case include:

- a) The level of outreach activities of the Court;
- b) The prevailing security situation affecting victim communities;
- c) The capacity of the Court to reach out to victims and distribute standard application forms and other appropriate documentation;
- d) The availability of capable and informed intermediaries to assist victims to make their applications; and
- e) Political factors.

Experience has also shown that there are likely to be fewer victims participating during the pre-trial phase, and that efforts to organise common legal representation at that stage are also more difficult due to the short period of time between the detention of a suspect and the confirmation hearing.

13. As regards common legal representation at the trial stage, a precedent has been set in the Lubanga case, which may be followed in the Katanga/Ngudjolo case. In the Lubanga case, there were a total of 7 lawyers representing 93 victims accepted to participate at the start of the trial in January 2009. Anticipating a ruling under rule 90 to limit the number of legal teams during the trial, the Registry initiated consultations with the legal representatives who then made a proposal. Instead of some lawyers withdrawing and their clients being represented by other lawyers, they proposed to form themselves into two teams, so that each of the lawyers would remain involved, even though there would only normally be one lawyer appearing before the Court on behalf of each team at any one time. This ensured that the fees of only one legal representative at the seat of the Court for each team would need to be covered at any one time.⁹ This would have the important benefit of not asking victims, who

⁹ The proposal of the legal representatives is contained in document ICC-01/04-01/06-1602, and Trial Chamber I confirmed this in an oral decision (ICC-01/04-01/06-T-105-ENG, p. 13).

had already an established relationship of trust with their lawyer, to change lawyers, respecting the principle that the victim has the right to choose his or her lawyer.¹⁰ The proposal was accepted by Trial Chamber I and a similar proposal is currently pending before Trial Chamber II for the Katanga/Ngudjolo trial.

E. Indigence criteria

14. The question of how to establish the eligibility of victims for legal aid is one that will require detailed consideration over the coming months. Up until now, the same system has been applied in relation to victims as for the defence, though in practice it has been applied flexibly, in order to take into account the different circumstances of the victims. The Presidency has endorsed, in the context of a request for review of a decision of the Registrar, the Registry's approach, finding it to be in accordance with the current law governing the legal assistance scheme.¹¹ In particular, the Presidency found that in submitting victims to a financial assessment based upon their individual means whilst taking into account their specific situation, rather than acting upon a presumption of indigence, the Registrar acted in accordance with the legal framework. The Registry now intends to build on this and will present its recommendations in the final report. These recommendations will include, *inter alia*, the possibility of a presumption of indigence for certain categories of victims (such as minors), and a formula for assessing the indigence of victims.

F. Operation of the legal aid system for victims

15. The practice of the Court in relation to legal aid for victims to date has developed through reports to the Assembly, the decisions of the Chambers, the Registrar's decisions on legal aid and appeals to the Presidency.

16. As regards the number of teams representing victims in relation to a particular case, the approach of the Chambers has varied as regards the number of legal teams recognized to represent victims at different stages of the proceedings. At the confirmation stage, Pre-Trial Chamber I recognized four teams of legal representatives of victims in the Katanga/Ngudjolo case, while Pre-Trial Chamber III in the Bemba case ruled that only one team of legal representatives should appear. In the only case to proceed to trial to date, the Trial Chamber has recognized two teams of common legal representatives in the Lubanga case.

17. For the last two budget years, the Court has adopted the assumption that, in relation to a case, whether at the pre-trial or the trial stage, there would be two teams of victims' legal representatives per accused.¹² The Registry would like to focus in particular on this aspect in its final report, examining the options and making recommendations, given the Committee's suggestion in its report on its eleventh session that the Registry consider the potential to have one legal team for victims per case. At this stage, the Registry would simply raise the issue that conflicts of interest may and indeed do arise between victims or groups of victims, making separate legal representation necessary. This is an issue that the Court is obliged to consider under the Rules of Procedure and Evidence,¹³ and all counsel have a duty under the Code of Professional Conduct for Counsel to exercise all care to ensure that no conflict of

¹⁰ Rules of Procedure and Evidence, rule 90, paragraph 1.

¹¹ Reasons for the Decision of the Presidency, ICC-01/04-559 dated 18 February 2009.

¹² For the 2009 budget, the Court nevertheless assumed that for the joint case of Katanga and Ngudjolo, there would be three, and not four, teams of legal representatives for victims. At the time of this interim report, the Trial Chamber had not yet decided how many legal teams would be permitted to participate in the trial.

¹³ Rule 90, paragraph 4, provides: "The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided."

interest arises and, should it arise, to take the appropriate steps.¹⁴ A conflict of interest might arise, for instance, where victims of a case might include both child soldiers participating in an attack and the civilian victims of that attack, and it should be borne in mind that conflicts may arise during the course of the proceedings, even if not apparent from the outset.

18. Both the number of legal teams and the composition of legal teams representing victims will be considered below in relation to the different phases of the proceedings. In the final report, the legal and financial implications of the factors mentioned here will be considered, together with proposed solutions to address them.

a) Participation of victims in relation to a situation

19. As regards legal aid in the context of a situation (as opposed to a particular case), following a decision of Pre-Trial Chamber I in the situation in the Democratic Republic of the Congo (“the DRC”) in January 2006 and subsequent decisions of that Chamber and of Pre-Trial Chamber II, victims were accepted to participate in proceedings in relation to the situations in the DRC, Uganda and Darfur. To date, legal aid granted in relation to a situation has been limited to participation in interlocutory appeals relating to the nature of participation in relation to a situation and to missions of legal representatives to inform and take instructions from their clients in that regard, in relation to the DRC and Darfur situations. A decision of the Appeals Chamber of 19 December 2008 in relation to victim participation in the investigation stage of proceedings has had the effect of restricting the participation of victims in the investigations of the Prosecutor.¹⁵ The decision did not, however, rule out the participation of victims in relation to a situation, or even in relation to an investigation, where their personal interests are affected. It is therefore necessary for the legal aid scheme to envisage requests for legal aid to cover participation in relation to a situation, including their communication with the clients. Were external counsel to be appointed, their intervention would likely be defined by the relevant Chamber and limited to specific oral and/or written interventions in relation to a specific issue.

b) The pre-trial stage of a case

20. In its Report on the operation of the Court’s legal aid system and proposals for its amendment,¹⁶ the Registry indicated that, at that time, it was not in a position to propose a framework for legal aid for victims at the pre-trial phase, due to the absence of established and confirmed jurisprudence on the modalities of participation by victims during that phase and of sufficiently reliable parameters. For the time being, therefore, the Registry had proposed to deliver ad hoc decisions, with the aim of responding effectively to the needs of the legal representatives flowing from decisions of the Chambers.

21. Developments since that time have provided a greater degree of predictability regarding the scope of legal aid that would be required during the pre-trial stage of a case. Where a suspect is brought before the Court, the main procedural activity in which victims would expect to participate would be the confirmation of charges hearing and any status conferences that may precede it. Three confirmation of charges hearings have been held to date, with victims participating covered by the legal aid scheme in each case.¹⁷

22. As regards the composition of the teams representing victims at the pre-trial stage of a case, the experience of the Registry to date, based on the nature and scope of participation permitted by the Chambers to date, has been that the inclusion of a case manager in a legal

¹⁴ Code of Professional Conduct for Counsel, article 16.

¹⁵ ICC-01/04-556.

¹⁶ ICC-ASP/6/4.

¹⁷ Confirmation of charges hearing in the Lubanga case in November 2006, in the Katanga and Ngudjolo case in June to July 2008 and in the Bemba case in January 2009.

team will normally be reasonably necessary only during the actual confirmation of charges hearing. The anticipated costs of legal aid during the pre-trial stage of a case would therefore, for the most part, cover the costs of one counsel to attend status conferences, to conduct missions for the purpose of consulting with his/her clients, and prepare for and attend the confirmation of charges hearing, with the addition of a case manager during the period immediately surrounding the confirmation of charges hearing itself.

23. Where a warrant of arrest has been issued but not executed, the opportunity for victims to participate in proceedings can be expected to be limited. In relation to Uganda, a number of victims were accepted to participate in relation to the case of Kony *et al*, and the Office of Public Counsel for Victims has been appointed to represent them. The Office of Public Counsel for Victims represented those victims, and others, in relation to the proceedings on admissibility under article 19 of the Statute initiated by Pre-Trial Chamber II in October 2008. Were external counsel to be appointed, their intervention would likely be defined by the relevant Chamber and limited to specific oral and/or written interventions in relation to a specific issue.

c) *The trial stage of a case*

24. The trial stage of a case involves not only the trial itself, but also the preparation for trial, which normally involves a series of status conference hearings held over a period of several months, together with opportunities for legal representatives to present written observations on a range of matters.¹⁸ During the preparation for trial stage, it is to be expected that legal representatives would need to consult with their clients in order to keep them informed and to take their instructions.

25. During the trial itself, legal representatives would be expected to continue to consult with their clients as well as to represent their interests in person before the Chamber, as well as through written submissions.

26. As described above, legal representatives in the Lubanga case proposed, and the Trial Chamber accepted, an arrangement whereby the legal representatives already representing victims accepted in the case would continue to represent their clients within the framework of common legal representation, organized in two teams.

27. As regards the composition of teams, the Registry recommended to the Assembly in its report¹⁹ that during the trial phase, legal aid during should cover a core team present at the seat of the Court comprising:

- a) One counsel (P-5) (as described above, this may involve several counsel in rotation); and
- b) One case manager (P-1).

28. The core team would be reduced or increased at the Registrar's discretion, in light of modalities of participation as decided by the Trial Chamber and other relevant factors, and to take into account the other aspects of victim participation and in particular the need to maintain communication with the victims in the field. This recommendation will be reviewed in the final report, and in particular, in light of the particularities of representing victims at trial, factors such as the following will be considered:

¹⁸ For example, approximately ten status conferences were held between March 2008 and January 2009 by Trial Chamber I for the preparation of the Lubanga trial.

¹⁹ Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4).

- a) At particular moments, such as during opening or closing statements, the presence of more than one counsel at the seat of the Court may be covered at a time;
- b) Work carried out by legal representatives in a team of common legal representatives whilst not present at the seat of the Court, such as drafting submissions or communicating with the victims, would be remunerated on an hourly basis. Consideration will be given to what parameters could be established in relation to this; and
- c) A resource person may be required in the field to facilitate the communication of legal representatives with their clients.

29. The Registry may receive requests for additional means from legal representatives, in accordance with regulation 83 of the Regulations of the Court, including costs associated with the practical aspects that impact their representation of victims. This may include, for example, costs associated with consulting their clients during the trial with a view to keeping them informed and seeking their instructions.

30. A sum of money for investigations for an entire case was recommended in the report to the Assembly²⁰ and included in the budget for 2009. This represents a sum for 60 days' fees for one investigator, and travel costs. This was said to cover, in particular issues arising in respect of reparations. In view of the decision of Trial Chamber I, confirmed by the Appeals Chamber, that did not exclude the possibility that victims may present and challenge evidence during the trial. This may trigger requests for additional resources from the legal teams representing victims, which would need to be considered in accordance with regulation 83 of the Regulations of the Court.

d) *Reparations Phase*

31. For the reparations phase, it was envisaged in the Registry's report²¹ to the Assembly that the resources available to the legal teams representing victims would need to be supplemented by additional resources at the Registrar's discretion and subject to the oversight of the relevant Chamber. During this phase, it is likely that the legal representatives of the victims will play a leading role in the proceedings, presenting the requests of their clients in accordance with article 75 of the Statute. Given that, to date, no case before the Court has proceeded to the reparations phase, the Registry's proposals will necessarily be based, at this stage, largely on the legal texts of the Court as opposed to actual practice.

32. Since a Chamber has a number of options under the framework established by article 75 of the Statute, it is difficult to establish a uniform and detailed system that would apply in every case. For instance, a Chamber may decide to make a determination on the scope and extent of any damage, loss or injury, and may make an order of reparations against a convicted person, or seek measures of cooperation under article 93, but equally may choose not to do so. In other words, the extent and scope of any reparations proceedings will be determined by a Chamber on a case by case basis. Therefore the Registry proposes that the best approach is to envisage a core team, with the provision of additional resources as necessary.

²⁰ Ibid.

²¹ Ibid.

33. Accordingly, the Registry has proposed, in its report to the Assembly,²² that during the reparations phase, a core team comprised as follows would be necessary:

- a) One counsel (P-5);
- b) One legal assistant (P-2); and
- c) One case manager (P-1).

34. This will be reviewed in the final report. Depending on the approach taken by a Chamber and by the legal representatives of the victims, there may be a need to consider, *inter alia*, the following:

- a) At particular moments, such as where a Chamber is dealing with specific details of reparations requests of specific victims, the presence of more than one counsel at the seat of the Court may be requested at a time;
- b) Remuneration for work carried out by legal representatives in a team of common legal representatives whilst not present at the seat of the Court, such as drafting submissions or communicating with their clients, may be requested. Consideration will be given to establishing parameters for this; and
- c) An investigator or resource person may be required in the field to carry out investigations regarding the scope and extent of any damage, loss or injury with a view to formulating claims and obtaining relevant supporting documentation, identify witnesses or interested persons, or facilitate the communication of legal representatives with their clients.

G. Additional elements

35. Legal representatives and others have, on a number of occasions, proposed additional elements that in their view should be covered by the Court's legal aid scheme for victims. To date, in seeking to set limits on the scope of what will be covered, the Registry has not foreseen the possibility, within the scope of the legal aid budget, to authorize such costs. Such costs include the following:

- a) The costs of health insurance for counsel when they come to the seat of the Court;
- b) The costs incurred by victims in travelling to meet with their legal representatives; and
- c) Costs relating to assisting victims in filling in application forms for participation or reparations.

H. Efficient use of resources

36. In applying the legal aid scheme in relation to victims, the Registry has implemented a number of measures aimed at ensuring cost-effectiveness and efficiency. Examples include applying the monthly ceiling for fees a counsel can receive, even where a legal representative acts in more than one case, and asking legal representatives to consider appointing other legal representatives or the Office of Public Counsel for Victims to represent them at certain status conferences where their presence may not be absolutely necessary.

²² Ibid.

I. The role of the Office of Public Counsel for Victims

37. The role of the Office of Public Counsel for Victims has an impact on the legal aid scheme for victims, and the Registry proposes to consider this question in detail in its final report. Such consideration will include the advantages and disadvantages of in-house as opposed to external legal representation for victims at different stages of the proceedings, and consideration of the implications of decisions made by Chambers of the Court regarding the circumstances in which the Office would be appointed to represent victims.

J. Concluding remarks

38. In its management of the legal aid scheme for victims to date, the Registry has sought to manage the available funds responsibly, transparently and in such a way as to enable the effective participation of victims before the Court. With the benefit of greater certainty on the role of victims before the Court and some experience in how the legal aid system has worked in practice, it is now time to take a step back and develop a comprehensive framework for legal aid for victims before the Court. During the coming months before the next meeting of the Committee, with the assistance of The Hague Working Group, the Registry proposes to elaborate its thinking further, referring to comparative practice where relevant comparisons can be found, and to consulting externally, with a view to presenting a final report for the eighth session of the Assembly.