



FIDH Submission on the Registry's Proposal for the Amendment of the Court's Legal Aid Policy

I. Introduction

The International Federation for Human Rights (FIDH) welcomes the opportunity to comment on the amendment proposal to the Legal aid policy of the International Criminal Court. Furthermore, FIDH welcomes the consultation conducted at the International Criminal Court on 3 December 2018 and underscores the need for further consultations to improve the current draft policy,¹ circulated in mid-October 2018, involving key stakeholders including in particular legal representatives of victims and civil society organisations.

FIDH has followed the implementation of victims' rights since the establishment of the Court, and in particular victim participation and legal representation. In this instance, FIDH's submission will focus solely on the legal representation of victims. The observations and recommendations are provided in a spirit of constructive dialogue and with a view to further contribute to the Court's process of setting out a legal aid system that is fully respectful to the rights of victims under international law and the ICC Statute, and one that seeks to ensure victims' meaningful participation at the ICC. It must be recalled that Victims' participation at the ICC is heralded as one of the most innovative features of the ICC Statute and as an unprecedented achievement to victims' rights in international criminal proceedings.

Due to the limited time available for submitting commentaries on the amendment proposal to the Legal aid policy, FIDH submits in this instance observations and recommendations on four key points: Determination of indigence, Victims' Choice of Counsel, Field Budget for Victims' Legal Representation Teams, and Team Composition. FIDH is at liberty to make additional or further detailed commentary on the Court's Legal Aid Policy at a later point and as the consultations continue. The

¹ Legal aid policy of the International Criminal Court (Amendment Proposal), available at: https://www.icc-cpi.int/itemsDocuments/css/Draft_LAP-1.2_ENG.pdf

observations and recommendations in the submission will focus and build on the “Assessment of the ICC’s Legal Aid System” prepared by Richard J. Rogers (Expert Report)² and the Draft Concept Paper on Review of the International Criminal Court Legal Aid System (Concept Paper)³ published by the Office of the Registrar. The submission also draws on the exchanges during the consultations conducted at the International Criminal Court on 17 June 2017 and on 3 December 2018.

Before addressing these points, FIDH wishes to convey, once more, its disappointment in observing that the discussions on legal aid, and more significantly the drafting of the proposed amendments, were heavily influenced by the quest to avoid any budgetary impact of the new ICC legal aid policy. FIDH shares the view of many that legal aid is an operational and technical matter that should not be reduced to its budgetary aspect. Nevertheless, legal aid has never been a cost driver, and it never will be. The budget for legal aid and victim-specific staffing in 2015 amounted to only around 4% of the Court’s overall.⁴ In 2016, a rough calculation provides that the budget for legal aid for victims is less than half of that. Finally, it should not be surprising nor worrying that as the number of ICC proceedings increases, the costs of legal aid for victims also increase.⁵ What this demonstrates is that while some sections of the Court could be seen as a “cost-driver”, legal aid for victims is evidently not one of them.

II. Observations and recommendations

1. Determination of indigence

Section 2 of the ICC Draft Legal Aid Policy maintains that victims are to undergo a process in which their indigence is determined by the Court for the purposes of benefiting from the Court’s legal aid. FIDH regrets that this position is maintained in the amendment proposal despite clear recommendations made in the Expert Report,

² Rogers, Richard, “Assessment of the ICC’s Legal Aid System” (Expert Report), 5 January 2017, available at: <https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>

³ Concept Paper on the Review of the International Criminal Court Legal Aid System (Concept Paper), Office of the Registrar, 9 May 2017 available at: <https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-CP-ENG.pdf>

⁴ Based on 2015 budget figures, FIDH calculated that the VPRS, OPCV and victims’ legal aid costs came to 4.15% of the Court’s budget: FIDH, [Five myths about victim participation in ICC proceedings](#), December 2014, p12. Current budgets do not enable an equivalent calculation to be made because the Registry no longer publicly reports on the budgets of individual units within its judicial services division, see for more information M. Hirst, Valuing victim participation: why we need better systems to evaluate victims’ participation at the ICC, available in FIDH journal on victim participation: https://www.fidh.org/IMG/pdf/droitsdesvictimes730a_final.pdf, December 2018.

⁵ FIDH “Cutting the Weakest Link” available at: <https://www.fidh.org/IMG/pdf/cpiasp598ang2012.pdf>, October 2012, p. 11.

the Concept Paper, and the consultations to presume victims indigent. Such position disregards the fact that not a single victim has been found to have sufficient independent financial means to engage counsel since victims started participating at the ICC in 2006. It also disregards the concerns raised over the appropriateness of asking victims of mass atrocity crimes to submit information over their income and assets, and the risks of submitting victims to retraumatisation or even security risks as a result of such process.

It remains unclear why a process described in the expert report as “a waste of time and resources”⁶ is maintained. The process of determining indigence requires significant time and resources, both to assist in the completion of such forms and to process the information collected. Given the recommendations made, the experience before the Court in which all victims thus far have been found indigent, and practices adopted in other international tribunals such as the Special Tribunal for Lebanon where victims have for the same reasons been presumed indigent, FIDH urges the registry to abolish this costly and laborious process and move to a presumption of indigence for victims.

2. *Victims’ Choice of Counsel*

Paragraphs 14 and 44 of The draft Legal Aid Policy appear to rely on Rule 90(5) of RPE in restricting eligibility for legal aid to counsel appointed by the Court or a Chamber, respectively. In doing so, the registry argues that rule 90(5) of RPE contains the only reference to legal aid for victims in the texts of the Court. Notwithstanding this argument’s inaccuracy, given that regulation 83 of the Regulations of the Court and the regulations of the Registry do contain references to legal aid for victims, this argument is a departure from the Court’s practice of providing legal assistance to victims participating at the ICC since 2006, including to legal representatives chosen by victims under rule 90(1) not as common legal representatives. To date the only departure from this practice has been that of Judge Tarfusser, sitting as Single Judge of Pre-Trial Chamber II in the Ongwen case, which in any case has been viewed as deeply problematic, was widely criticised⁷ and not seen as representative of the Court’s practice. In any case, even if such approach is favoured, the Registry must not discharge itself from the discretion to grant recourse

⁶ Supra note 2, paras 282-286.

⁷ See Open Letter to the ICC Registrar on Legal Aid for Victims in the Ongwen Case by by FIDH, IBA, NPWJ, PGA and REDRESS, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/open-letter-to-the-icc-registrar-on-legal-aid-for-victims-in-the>, 17 November 2018.

to legal aid to lawyers appointed by victims by enshrining that interpretation in its legal aid policy as the draft appears to do.

While Rule 90(5) of the RPE provides clarity in stipulating that the Registrar may provide legal aid to lawyers appointed as “common legal representative” pursuant to rule 90(3), FIDH finds that it should not be viewed as the only condition to the provision of legal aid to victims whose lawyers are appointed under rule 90(1), or chosen by victims collectively as a “common legal representative” under rule 90(2). If interpreted restrictively, the Court will be at odds with its practice of empowering victims in discouraging victims’ choices of legal representation. The Court’s support to such choice is a pre-condition for victims’ genuine and meaningful participation in ICC proceedings.

FIDH urges revision of the Legal Aid Policy in order not to limit the possibility of affording victims who choose their counsel or common legal representative access to legal aid.

3. Field Budget for Victims’ Legal Representation Teams

FIDH welcomes the positive change in the relabelling of the investigations budget as a field budget, which better reflects this item’s nature. FIDH further welcomes the move to an annual amount for the field budget as opposed to a one-off lump sum budget, taking into account the length of proceedings when considering the amount of field work required by the victim legal representation teams.

Victims’ legal representation activities primarily take place in the field, within the victim communities in affected areas, in order to guarantee effective and meaningful victims’ participation in the courtroom. When considering the amount proposed in the draft legal aid policy for victims’ field work, FIDH is concerned that such amount may be insufficient to maintain the close link between victims and the ICC and to contribute to victims’ understanding and ownership of ICC proceedings. This is particularly so at a time when misinformation about the ICC and its cases circulate through different channels, which only increases the need for regular contact between legal representatives and victims for first-hand information about the case.⁸ As such, a balance needs to be found between an efficient legal aid system and meaningful

⁸ FIDH, *Five Myths about Victim Participation in ICC Proceedings*, p. 17. interview with Fergal Gaynor., legal representative for victims in the Kenyatta case, 28 October 2014, available at: <https://www.fidh.org/IMG/pdf/cpi649a.pdf>

victim participation entailing regular consultation between victims and their representatives.

4. *Composition of the Victims' Legal Representation Team*

Paragraph 46 of the ICC Draft Legal Aid Policy indicates an assumption that a victims' legal representation team will be significantly more active at the reparations phase in comparison to any other phase of proceedings. As such, it stipulates that a victims' legal representation team will be one member short until the commencement of the reparations phase where it will be joined by a trial attorney.

FIDH disagrees with the portrayal of victims' interest in participating at the ICC from the perspective that victims participate to receive reparations, or that their contribution will only be heightened in that phase. Victims have a multitude of reasons for participating at the ICC, including the right to truth as one of the components of the right to justice⁹. As such, victims' interests in participating before the ICC entail the establishment of the facts, the identification of the perpetrators, questioning evidence and sometimes witnesses, the sharing of events that happened to them, the recognition of the harms they suffered from, as well as of the crimes which generated said harms¹⁰. All of these interests and concerns of victims need to be presented, and indeed communicated by victims' legal representatives, prior to the reparations phase.

Additionally, work on reparations does not begin from the pronouncement of a judgement, and should rather be tracked throughout the proceedings when evidence relating to reparations is heard during the trial, such as questions relating to harm. As such, the legal representation teams must be engaged from the very beginning of its work in laying the groundwork for reparations proceedings. Reparations proceedings before the ICC are complex, and the expectation of a team member to join and begin working on such proceedings after the pronouncement of a judgement and before being familiarised with the case is unrealistic.

Finally, FIDH disagrees with the rigid limit placed in Paragraph 47 which provides that: "Following the end of a case or the order of the Chamber establishing the principles and procedures to be followed in the phase of reparations, the common

⁹ P. Massidda, Retributive and restorative justice for victims: considerations on the *Lubanga* proceedings before the ICC, available in FIDH journal on victim participation: https://www.fidh.org/IMG/pdf/droitsdesvictimes730a_final.pdf, December 2018.

¹⁰ *Supra*

legal representative shall be allowed to work for an additional period to be determined by the Registry depending on the number of victims, their geographical location, etc. This period shall in no case be longer than six months”. FIDH opines that the length of reparation proceedings before the Court is a demonstration that victims’ legal representation teams should be engaged, in some cases, for periods longer than six months. Placing such rigid time limitation is at odds with the principle of flexibility that governs the application of the Court’s legal aid system.

III. Conclusion

FIDH welcomes once more the Registry’s efforts in devising the ICC legal aid policy and the consultation held on 3 December 2018 with a diverse set of stakeholders. FIDH firmly believes that legal representatives for victims (LRVs) must be adequately consulted in the process. As such, FIDH welcomes the participation of some LRVs in said consultation but calls on the Registry to hold additional consultations in 2019 prior to the finalisation of the new ICC legal aid policy. A larger pool of LRVs must be invited to any future consultation, particularly those currently working on cases before the Court. Not only can they make significant contributions as has been the case during the consultations, they are also able to provide concrete ‘lessons learned’ about the legal aid policy and its functioning so far. As a result, we welcome the participation of LRVs during the consultations and urge them to be consulted in the upcoming phases of the review.