

VICTIMS RIGHTS WORKING GROUP

ADVOCATING FOR THE RIGHTS OF VICTIMS AT THE INTERNATIONAL CRIMINAL COURT

Application forms for legal aid for victims

28 April 2006

The Victims Rights Working Group (VRWG) welcomes the consultation process conducted by the International Criminal Court (Court) on the preparation of the Application for Victims to Request Legal Aid from the International Criminal Court and the Financial Information Form. Further to a meeting organized by the Court's Victims Participation and Reparations Section (VPRS) on 11 April 2006, which was attended by a number of VRWG members, the VRWG submits these detailed written comments and recommendations developed in consultation with the VRWG membership. The VRWG hopes the comments and recommendations contained in this paper will be useful to the Court in finalizing these important forms.

I. General Comments on the legal aid system for victims reflected in the forms and the Explanatory Memorandum.

Members of the VRWG welcomed Rule 90(5) of the Rules of Procedure and Evidence, which provides for legal aid for victims who lack means. However, we were disappointed that the Rule states that it is merely discretionary for the Registry to provide legal aid, contrary to the practice of a number of national jurisdictions that give automatic legal aid for victims participating in criminal proceedings for serious offences¹. The VRWG, appreciates the Court's consideration of how to implement the Rule, recognizing that in most cases victims of genocide, crimes against humanity and war crimes will be indigent. In particular, we welcome the approach reflected in the Explanatory Memorandum of addressing separately legal aid for victims' representation from legal aid for defence. The activities of the legal representatives for victims are significantly different from those for defence counsel and the systems should be established independently of each other taking into account the potentially large number of clients victims counsel will represent and the unique needs and circumstances of victims.

Concerns about the explanation of the legal aid system in the draft Application for Victims to Request Legal Aid from the International Criminal Court. The VRWG is concerned about some aspects of the explanation of the legal aid system set out in the draft Application for Victims to Request Legal Aid from the International Criminal Court. First, the explanatory text could be read as limiting legal aid to representatives appointed by the Court to represent groups of victims. The form states:

¹ Nordic countries such as Sweden afford victims with the right to a state paid lawyer. In Sweden this right was first introduced in 1988 and was initially only for victims of sexual offences, but later amendments increased its scope to other serious offences. See Brienen and Hoegen (2000), Victims of Crime in 22 European Criminal Justice Systems, Chapter 22, Sweden.

“So far as victims are concerned, the legal aid scheme will normally be available only for a common legal representative or representatives who are appointed by the Court to represent a group of victims.”

The VRWG believes it is important to state explicitly that victims who appoint their own legal representatives may apply to the Court for legal aid. Although Rule 90 (5) states “a victim or a group of victims who lack the necessary means to pay for a common legal representative chosen by the Court, may receive assistance...” the provision does not exclude the ability of victims who have organized their legal representation independently of the Court from applying for legal aid. In fact, it should be expected that victims will, in some cases, organize themselves in a group and chose a legal representative from their situation or from the Court’s list of counsel. These victims should be able to apply for legal aid to pay their legal representative.

Second, we are particularly concerned by the limitations placed on the scope of the legal scheme. The form states:

“The legal aid scheme will normally be available only for actual representation before the ICC and not, for example, for providing preliminary advice or assistance to potential applicants, preparing an application to the Court, or representing a victim in relation to enforcement of reparations orders before a national court.”

It should be foreseen that victims will require legal assistance at all stages of the Court proceedings. No adequate explanation has been provided for excluding legal aid in the circumstances listed. Indeed, legal representation at these stages may be necessary. Prospective victims may require legal representation during the application stage (in particular the process set out in Rule 89). The VRWG believes it would be both unfair to victims and illogical to provide victims with legal aid to seek reparations before the Court but not to enforce a reparations order of the Court before a national court.

The need for an integrated outreach strategy to facilitate victims’ participation. The VRWG recognizes that the forms prepared by the Court are designed to be consistent with the Rules of Procedure and Evidence and to satisfy proper oversight requirements. It is equally important that the forms can be understood by victims and that they contribute to the development of a positive relationship between victims and the Court. In this regard, it is crucial to ensure that a pro-active strategy to encourage participation of victims in the proceedings of the Court - which may provide an excellent indicator of the Court’s success - incorporates victim-sensitive forms translated in the main languages that victims might speak².

Sufficient coordination should be guaranteed between the VPRS and the Office of Public Counsel for Victims (OPCV) to avoid any gaps in the legal representation of victims. In this respect, victims who are applying for participation and/or reparation should be

² See for instance the website of the UK ‘Victim Support’ which contains a variety of information in a multitude of languages: <http://www.victimsupport.org/>

informed of at least the possibility to apply for legal aid and given proper access to the legal aid application forms in due process.

II. Specific comments on the forms

The content and length of the current forms. The VRWG is concerned that the length and content of the forms will be daunting to victims and even to those outside the Court who may be willing to help victims complete the forms. We note, in particular, the need for additional material that explains, in an accessible format and in relevant languages a number of issues, including:

- victims' right to participate;
- what the legal aid system is;
- why victims may want a legal representative;
- why victims have to complete the forms;
- what criteria the Court will apply in reviewing the applications;
- what victims can expect to happen after they have submitted their forms.

The need to provide for confidential handling of the forms. Prospective applicants may be discouraged by the detail and extent of information requested in the forms which may put their security at risk if not handled appropriately. This concern may be addressed by including a statement in the form informing the applicant that the information given will be treated confidentially and to the highest professional standards. It may be useful to insert the word 'Confidential' on the cover page.

The forms must not discourage applications. The VRWG is concerned that the note on the cover page on filling out the form correctly and the declaration at the end may overwhelm victims wishing to participate and deter them from applying. As the Explanatory Note establishes, the situations of victims is often very complex and the information requested may not easily apply to their circumstances. It should therefore be expected that, in some cases, victims will provide incorrect information or will not be able to answer many of the questions. In particular, the VRWG is concerned by the statement

“The consequences of inaccuracy of the information may be the reimbursement of the legal assistance paid by the Court.”

The VRWG is concerned that imposing financial consequences on victims who fail to complete the forms correctly would be unfair and would discourage applications. Even though the VPRS has recommended wording so that reimbursement would not be an absolute consequence, we believe that the possibility of being penalized for participating in Court proceedings would still discourage applications and ultimately participation. Less severe measures would be more appropriate if a deterrent against deliberately supplying incorrect information is required. For example, withdrawing legal aid for continued representation, if the Court is satisfied that incorrect information has been provided deliberately.

The need to adopt an effective strategy to identify other victims. Applicants are requested to provide the names of other victims in their group. The victims, however, may not supply

such information out of fear or because they are not aware of the identities of other victims. If this question is to be included in the form, it should state that the Court may use the information to contact the other victims. An alternative approach to directly asking victims for this information should be to ask intermediaries of legal representatives.

The need to provide appropriate feedback. The form should guarantee appropriate feedback to the applicant on the progress of the application. Victims should also be informed of the possibility to withdraw their application to participate in the proceedings, particularly in cases where the requested legal aid is not granted.

III. Important considerations for determining indigence that should be included in the forms

The need for a streamlined system that considers a presumption of indigence. The VRWG believes that the system could be streamlined in a number of ways through the forms themselves and the application process. Below are some recommendations for consideration in conceptualising the system.

a) Establishing categories of victims that should be presumed to be indigent. We welcome and support the proposal in the Explanatory Memorandum to assume that persons under the age of 18 will always be indigent and exempt from completing the complex sections on assets and living expenses. Consideration should also be given to broadening this approach to other categories of persons. For example, persons who are living in Internally Displaced Persons or refugee camps are there because they either have no funds to support themselves or no access to funds that they may have left behind. In some situations women will have no substantive equality which impacts on their economic status to the extent that they should also be presumed to be indigent.

b) Establishing a procedure of retrospective verification. It is our view that in cases of individuals (this would not apply to organisations) it may be useful to consider a system that departs from a presumption of indigence and establishes a simple procedure for retrospective verification undertaken by victims' representatives.

This approach is analogous to the procedure used for the accused whereby counsel is assigned immediately, on the basis of a simple 'declaration of indigence and request for counsel'. The lengthier form filling and eventual verification of the contents of the form are done subsequently so as to avoid delays. The situation of the victim is clearly different from that of the accused. Nonetheless, it appears that in practice, like with the granting of legal aid to the accused, the VPRS may not be able to process or verify the contents of the forms in pace with applications and the right to participate as granted by the Court (particularly in the case of large groups). A victim who is determined not to be indigent should not be charged for any services provided up to the determination.

c) Establishing a threshold of automatic indigence. Consideration should be given to whether all victims seeking legal representation who do not fall within particular categories recommended in paragraph (a) above should be required to complete the substantive financial sections of the form. In particular, the forms could require that a person who earns more than a fixed sum per annum (to be decided by a Chamber for each situation) will have

to complete the detailed information on the form. Those who earn less will simply have to tick one box. The systems could be subject to checks and safeguards, for example, by requiring a certain percentage of those who state they earn less than to subsequently complete the substantive information with the assistance of their legal representatives. This may also take into account that verification of the substantive information will be an on-going process, as the situation of victims may change.

The need for fair consideration of groups of victims and indigent members. The size of a group of victims should not affect the status of indigence of each member of the group. Introducing the size of the group as a criterion for determining indigence would result in an inconsistent and unfair application of legal aid

As to the question of what share a victim should pay if legal aid is partially granted, we are of the opinion that partial legal aid should be avoided: not only would this leave the victim in uncertainty on what s/he will finally have to pay, but it would keep victims from applying for legal aid, and it would also be very difficult, if not impossible, to decide on the level of the contribution since it is uncertain how long a trial will take. If one person out of a group of victims is not indigent while the others are, they should only be requested to reimburse the cost of the additional work required by the legal representatives to add their application for participation or reparation to the lot of applications, regardless of the number of victims in the group. Fixing a pro rata rate would still create uncertainty, since the size of the group can grow over time.

Assets over which victims have no control should not be considered in determining the status of indigence. As identified in the Explanatory Memorandum, it would be inappropriate for the Court to count property and other assets over which the victims no longer has any control, cannot gain income from or cannot dispose of.

Reparation awards should not be considered in evaluating the status of indigence. It is important that reparations awarded to victims, be it by the ICC, the Trust Fund for Victims, a domestic court or any other body, should not be considered in determining whether a person is indigent or remains indigent. These awards are made expressly to address the suffering of victims and should not be used to pay for legal representation before the Court.