

Eighth session

The Hague

18-26 November 2009

**Report of the Bureau
on legal aid for victims' legal representation**

Note by the Secretariat

Pursuant to paragraph 16 of resolution ICC-ASP/7/Res.3, of 21 November 2008, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on legal aid for victims' legal representation. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court.

Report of the Bureau on legal aid for victims' legal representation

A. Introduction

1. The present report is submitted pursuant to the mandate given to the facilitator, Ms Yolande Dwarika (South Africa), on the issue of legal aid for victims' legal representation.

2. It will be recalled that the seventh session of the Assembly of States Parties ("the Assembly"), in its resolution ICC-ASP/7/Res.3, "Strengthening the International Criminal Court and the Assembly of States Parties", the Assembly invited the Court, taking into account the comments of the Committee on Budget and Finance ("the Committee"), 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. The Assembly also invited the Court to, "engage in 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".¹

3. At its eleventh session, the Committee drew attention to a range of issues pertaining to legal aid. In relation to legal aid for victims' legal representation the Committee recommended that the Court and the Assembly consider the possibility of having one legal team for victims per case. The Committee recognized that these questions involved important legal principles and practical considerations. However, given the likelihood that legal aid for victims' participation would be a long-term and significant cost driver for the Court, the Committee strongly recommended that the Assembly enter into a detailed dialogue with the Court on the legal and financial aspects of victims' participation. The Committee indicated its willingness to continue to assist the Assembly on the financial aspects of the full range of legal aid matters.²

4. The Committee, at its twelfth session, welcomed the information provided by the facilitator and the Court. While noting that the discussions in The Hague Working Group of the Bureau ("the Working Group") were still at a preliminary stage, the Committee suggested that the Working Group integrate the cost implications of the different options as part of its consideration. In this regard, the Committee also suggested that the Working Group continue to consider the possible uses of the Office of Public Counsel for Victims (OPCV). Furthermore, the Committee also suggested that consideration be given to whether the salary range of a P-5 was really appropriate in order to ensure competent legal counsel for victims participation given the different role that such counsel play in the proceedings. The Committee looked forward to the outcome of the discussion in the Working Group and encouraged the Court and the Working Group to further identify and analyze the budgetary implications of the system. The Committee agreed to continue its consideration of the issue at its thirteenth session. The Committee noted that the full budget impact of legal aid for victims was only beginning to emerge. The proceedings of the Court had yet to reach the final reparations stage where victims would play a leading role. Moreover, the case law of the Court defining the scope of legal protection was still evolving. Future policy should be developed in parallel with a full costing of the measures proposed. The Court should also develop scenarios showing the possible budgetary impact for the full cycle of the proceedings through to the final reparations stage.

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. I, part III, resolution ICC-ASP/7/Res.3, para. 16.

² *Ibid.*, vol. II, part B.2, para. 129.

B. Organisation of work

5. The Working Group held four meetings, on 30 March, 10 June, 8 July and 9 September 2009, respectively, during which the facilitator conducted discussions in accordance with her discussion papers, dated 25 March and 9 June 2009.

6. In addition, the facilitator held informal discussions outside the Working Group with Court officials, members of the Committee, legal counsel and with NGOs. The facilitator briefed the Committee during its twelfth and thirteenth sessions. The facilitator also attended the seventh seminar of counsel that was held from 11-12 May 2009 and the Working Group received a short briefing on issues pertaining to the topic of victims' legal representation that arose during the seminar. The facilitator also informed the Working Group that she sat in as an observer during a meeting of the Court with legal representatives and NGOs, held from 6 - 7 July 2009.

7. Upon enquiry of the facilitator on the existence of judicial reviews by the Presidency concerning the issue of victims' legal representation, the Working Group was briefed by the Court during the meeting of 10 June 2009 on a decision pertaining to the determination of indigence for victims taken by the Presidency on 18 February 2009 pertaining to the Democratic Republic of Congo situation.³

8. At the meeting held on 8 July 2009, the Working Group heard the views of the Coalition for the International Criminal Court (CICC).

C. Approaching the issue of legal aid for victims' legal representation

9. In approaching the issue of legal aid for victims' legal representation, the method of the Working Group has been to engage in a constructive dialogue with the Court in the preparation of its report to the Assembly, bearing in mind the Assembly mandate as well as the detailed comments by the Committee at its eleventh, twelfth and thirteenth sessions.

10. In order to fulfill the mandate provided by the Assembly, the following core elements were included by the facilitator in her discussion paper dated 25 March 2009:

- a) An analysis of the legal basis and policy framework for the funding of legal representatives for indigent victims by the Court, as well as a thorough consideration of the Court's interpretation of the existing legal framework and how this influences the policy adopted by the Court in dealing with legal aid for victims' legal representation;
- b) A consideration of the principles underlying legal aid for victims' legal representation, as well as a consideration of the practical considerations and implications;
- c) An analysis of the current structure of legal aid for victims' legal representation and the appointment of common legal representatives;
- d) A consideration of factors which influence the number of teams representing victims in a particular case, as well as the factors that influence the grouping of victims together;

³ ICC-01/04-559, dated 18 February 2009, Reasons for the Decision of the Presidency.

- e) A consideration of the participation of victims at different stages;
 - f) An analysis of the indigence criteria for victims receiving legal aid; and
 - g) An analysis of the financial and budgetary implications of the legal aid system, bearing in mind the characterization of legal aid being a major cost driver, together with an exploration of measures that can be taken to find efficiencies and savings in the legal representation of victims.
11. In her facilitation of 9 June 2009 the facilitator raised, *inter alia*, the following issues:
- a) The possible uses of the OPCV and the legal framework underpinning it.
 - b) A consideration of the advantages and disadvantages of having external and internal counsel, as well as a comparative analysis of the budgetary implications in the utilization of external counsel and the cost implications of maintaining internal capacity to act as counsel for victims.
 - c) The legal basis for victims' representation being at the P-5 level.
 - d) A further analysis of the indigence criteria for victims receiving legal aid.

D. Substantive areas of discussion

Legal basis

12. At the outset of consideration of the issue of legal aid for victims' legal representation the Court noted that while Rule 90 of the Rules of Procedure and Evidence⁴ contained permissive language in relation to the funding of victims' legal representation, the funding of victims' legal representation before the Court was also necessary in order to give effect to the right of victims to participate in proceedings before the Court. The Working Group was of the view that the funding of legal aid for indigent victims' legal representation was necessary in order to give effect to the right of victims' participation enshrined in the Rome Statute and recognized the inherent discretion of the Registrar to manage the financing of legal aid. The Working Group noted that the nature and scope of funding legal representation of victims continue to be monitored in light of the evolving practice of the Court and other relevant developments.

13. The Working Group endorsed the conclusion contained in the Court's report that while the legal basis for funding legal representation of victims is not the same as that for the defence, legal representation of victims before the Court must be funded through the legal aid scheme of the Court if the rights afforded to victims in the Statute are to be exercised effectively. The Working Group further endorsed the view that while the principles that underlie the legal aid scheme for victims are broadly the same as those for the defence, there are certain differences that need to be taken into account in conceptualizing and implementing the legal aid system for victims. These differences arise from the particular role played by victims in the proceedings, the greater number and distant geographical location of the victims and the need to enable legal representatives to maintain regular contact with them.

⁴ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (International Criminal Court publication, ICC-ASP/1/3), part II.A, Rule 90.

External and internal counsel

14. At its meeting of 10 June 2009, the Working Group was briefed by the Office of Public Counsel for Victims on the two areas in which the OPCV provides assistance to victims, i.e. the provision of legal advice and assistance, upon request, to external counsel representing victims, as well as where the OPCV had been directly appointed by Chambers as victims' legal representative. The Working Group engaged in a discussion around the role, functions and activities of the OPCV.

15. The Court expressed its views on the advantages and disadvantages of the utilisation of in-house counsel, as well as the advantages and disadvantages of the utilisation of external counsel in the legal representation for victims. As regards the financial implications of representation by external counsel as opposed to in-house counsel, the Working Group requested the Court to include in its final report comparative cost tables for external counsel and internal counsel.

16. In general, the Working Group was of the view that the Court was yet to experience a full judicial cycle and that additional information was necessary to determine the long term consequences of the utilization of external and/or internal counsel, in accordance with the Committee's suggestion. The Working Group also expressed the need for more detailed information including a common baseline for the calculation of the different costs to enable a thorough budgetary comparison between the uses of external and/or internal counsel.

17. The Working Group endorsed the Court's conclusion that the relationship between the role of external counsel representing victims and that of the OPCV and the corresponding level of resources to be allocated to the OPCV requires further consideration and should be kept under review. Furthermore, the Working Group concurred with the view of the Court that there are sound policy reasons to provide resources for external counsel experienced in criminal proceedings to represent victims participating in Court proceedings or seeking reparations, so long as there is no duplication with the role played by in-house counsel.

Number of teams

18. The Working Group noted the conclusion drawn by the Court that the number of legal teams is a more important cost driver for legal aid for victims than the number of victims. The Working Group also welcomed the conclusion of the Court that as far as possible, resources from the legal aid scheme would be provided to one team of legal representatives per case in the trial phase, bearing in mind that there may be occasions where it is necessary to have more than one team such as where a conflict of interest arises.

Level of P-5

19. At its twelfth session, the Committee suggested that consideration be given to whether the salary range of a P-5 was appropriate in order to ensure competent legal counsel for victims' participation given the different role that such counsel play in the proceedings.

20. There were differences of views expressed in the Working Group. While the importance of victims' participation was recognized, some delegations were of the view that the principle of equality of arms had been established to ensure equality for the defence and the prosecution in dealing with evidentiary matters, but noted that it did not apply in the context of victims' participation. It was however also noted that the equality of arms principle did not constitute a basis for the Court's practice to appoint counsel for victims at the P-5 level, but that external counsel needed this level of experience for their role. The Working Group also took into consideration that external counsel were usually appointed from the same list of counsel and that there was a possibility of negative signals being sent should

victims' legal counsel be remunerated at a lower level. General support was expressed for the position that a counsel representing a group of victims should participate in the proceedings on the same footing as the defence and should continue to be remunerated at the P-5 level, to reflect the level of experience required and in order to ensure a quality legal representation for victims before the Court.

Indigence

21. As regards the method for determining the indigence of victims, the Working Group had no objections to the approach set out in the Court's report and endorsed the conclusion that, as is the current practice, the assessment of indigence of victims for the purposes of determining their entitlement to legal aid should be made on the basis of a prima facie financial assessment based on individual means and that a member of a group of victims should be assessed on the basis of ability of that member to meet the relevant proportion of the cost of representing the group.

22. The Working Group noted the Court's conclusion that the question of whether or not to adopt a different approach to calculating indigence, such as establishing a threshold of asset holdings, should be monitored in conjunction with the consideration of the same question in relation to the defence.

Budgetary and financial aspects

23. The Working Group was mindful of the Committee's suggestion to include the implications of the different options as part of its consideration. The Working Group was mindful that a full judicial cycle had not taken place, in particular the final reparations stage where victims would play a leading role. The Working Group discussed issues that would influence the cost of legal representation for victims and noted the Court's conclusion that the number of legal teams is a more important cost driver for legal aid for victims than the number of victims. In comparing the costs of having internal and external counsel, the Working Group was mindful that the Court had not yet gone through a full cycle of proceedings and that the information provided by the Court did not allow for a full comparison between the OPCV and external counsel costs. The Hague Working Group consequently decided to keep this aspect under review. The Working Group welcomed the comments of the Committee that, "in the absence of a common baseline for the calculation; the figures provided in annex II were highly unreliable and could lead an unwary reader to conclude that choosing the OPCV was automatically the most economical option without proper justification"⁵. Furthermore, the Working Group welcomed the recommendation in the report of the Committee's work of the thirteenth session, "that the Court revise the annex and the report once it will have established common parameters for comparison and that it report back to Committee at its fourteenth session"⁶.

E. Conclusion

24. The Working Group welcomed the constructive dialogue with the Court on this issue and the efforts made by the Court to evaluate and consider the financial and legal aspects of legal aid for victims' legal representation.

25. Bearing in mind that the Court had not completed a full judicial cycle, the Working Group welcomed the substantial progress made on the issue, the Court's report to the Assembly, as well as the conclusions contained therein.

⁵ Report of the Committee on Budget and Finance on the work of its thirteenth session (ICC-ASP/8/15), para. 126.

⁶ *Ibid.*, para. 126.

26. The Working Group noted the Court's interpretation of the legal basis to fund legal aid for victims' legal representation and agreed that it was necessary to fund legal aid for indigent victims in order to give effect to their right to participate.

27. The Working Group encouraged the Court to find efficiencies and savings in the legal aid scheme and, in this regard, encouraged the appointment of one legal team per case in the trial phase as far as possible and bearing in mind the issue of conflict of interest.

28. The Working Group noted the Court's conclusion that the relationship between the role of external counsel representing victims and that of the OPCV, and the corresponding level of resources to be allocated to the OPCV, requires further consideration and should be kept under review. Furthermore, the Working Group observed that additional information was required by the Court on the budgetary analysis of internal counsel and therefore welcomed the Committee's observations at its thirteenth session.

29. Furthermore, the Working Group noted the Court's conclusion that on the question of whether or not to adopt a different approach to calculating indigence, including the possibility of establishing a threshold of asset holdings, should be monitored in conjunction with consideration of the same question in relation to the legal aid for defence.

30. This report represents the views and recommendations of the Bureau to the eighth session of the Assembly on the issue of the legal aid system for victims.

F. Recommendations

31. The Working Group recommends the inclusion in the resolution on "Strengthening the International Criminal Court and the Assembly of States Parties" of the text contained in the annex.

Annex

The Assembly of States Parties

Recalling that at its seventh session the Assembly invited the Court, taking into account the comments of the Committee on Budget and Finance, 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;¹

Noting the views of the Committee of Budget and Finance on the issue of legal aid for victims' legal representation;²

Welcomes the constructive dialogue between the Court and States Parties on the issue of legal aid for victims' legal representation; and *welcomes* the "Report of the Court on legal aid: Legal and financial aspects of funding victims' legal representation before the Court", submitted by the Court to the Assembly of States Parties, and the conclusions drawn therein³; *Mindful* that a full judicial cycle, including the reparations phase, is yet to be completed and that the development of policy toward legal aid for victims' legal representation before the Court is ongoing;

Notes the Court's interpretation of the legal basis for funding legal representation of victims, and *agrees* that it is necessary to fund legal representation for indigent victims in order to give effect to their rights to participate and *endorses* the current assessment of indigence for victims;

Affirms the position taken in the Court's report to as far as possible appoint one legal team per case in the trial phase;

Invites the Court to engage in a dialogue with States Parties on the utilization of internal and external counsel and the revised costs analysis of the two options, taking into consideration the comments of the Committee on Budget and Finance at its thirteenth session, and *requests* the Court to present to the Assembly at its ninth session an updated report on the comparison between internal and external counsel, including the revised cost analysis.

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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. I, part III, resolution ICC-ASP/7/Res.3, para. 16.

² Report of the Committee on Budget and Finance on the work of its thirteenth session (ICC-ASP/8/15), para. 126.

³ Report of the Court on legal aid: Legal and financial aspects of funding victims' legal representation before the Court (ICC-ASP/8/25).