



## Joint Letter to ICC States Parties and the Registry

17 October 2023

### Re. Safeguarding Victims' Rights at the ICC: Ensuring Effective Participation and Representation through Inclusive Legal Aid Reform for LRVs

Excellencies, dear colleagues,

While we fully endorse and welcome reforming the International Criminal Court's (ICC) legal aid policy (LAP), we are deeply concerned about the impact of some of the proposed reforms on victims' Rome Statute rights to meaningful participation and representation.<sup>1</sup> Meaningful victim participation is after all contingent upon having proper legal representation.<sup>2</sup> Legal Representatives of Victims (LRVs) play an essential role in ensuring victims' views and concerns are heard and their rights protected, and inadequate legal aid fundamentally undermines the Court's mandate to deliver justice and accountability. Nonetheless, LRVs have not been sufficiently consulted in the LAP reform process. In an attempt to fill that gap, in October 2023 FIDH consulted with seven LRVs (who have worked on at least eight cases and situations during all stages of ICC proceedings). They shared their critical concerns as well as practical recommendations on ways to make the LAP fair and effective for ICC victims and their counsel. Their feedback informed this letter and our joint recommendations around the three following key issues.<sup>3</sup>

#### 1. Ensuring Meaningful Participation During all Stages of the Proceedings

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##### 1.1 'Early Stages of Proceedings': the Proposed €30,000 Cap for Victims' Legal Aid<sup>4</sup>

Early-stage resource allocation is a critical improvement, but a fixed €30,000 cap appears arbitrary and insufficient, as LRVs find it "problematic," "absurd," and even "unfeasible" for most situations.<sup>5</sup> The proposed 'early stages of proceedings' exclude

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<sup>1</sup> Registry of the International Criminal Court, *Second Draft Proposal on the Reform of the Court's Legal Aid System* ("Second Draft Proposal").

<sup>2</sup> FIDH, *Whose Court is this? Judicial Handbook on Victims' Rights at the International Criminal Court*, April 2021, Chapter 2.

<sup>3</sup> FIDH's research was also informed by the ICC Bar Association's paper: *ICCBA observations on the Registry's Explanatory Report to Second Reform Proposal dated 26 July 2023*, 4 September 2023, ("ICCBA Observations").

<sup>4</sup> *Second Draft Proposal*, paras 62-64.

<sup>5</sup> Confidential consultations with LRVs conducted by FIDH in October 2023.

preliminary, pre-authorisation, and investigation stages and thus fails to recognize the full scope of victims' interests throughout the ICC's work as well as the complexity of the work undertaken by LRVs at this stage, and misconstrues the very meaning of 'proceedings'. Additionally, given that 'early stages' can extend over years, this sum becomes inadequate to cover basic expenses. The one-size-fits-all lump sum approach disregards the unique characteristics of each situation, such as the number and geographical spread of victims, security concerns, political complexities, and the potential for delays or prolonged proceedings. Furthermore, the reform suggests that a single legal team per situation would receive these funds, which is untenable when multiple victim teams with significant conflicting interests are involved. A lump sum payment, rather than an annual or biannual arrangement, poses significant challenges for financial planning when the duration of the situation is uncertain. Consequently, the arbitrary lump sum threatens effective participation and representation.

### **Recommendations:**

- **Flexibility in funding** should be introduced to take into account the specificity of each case and situation, such as the number of victims, geographical spread, security and political complexities, to adjust the allocated funds, and there should be the possibility to allocate funds to different victims' groups when justified and required.
- **Regular Instalments:** It is also imperative that funds for this stage be disbursed in regular instalments, whether annually or biennially, to enable counsel to effectively plan the allocation of funds over that period.
- **Transparency:** The Registry should ensure transparency by explaining the methodology used to determine the €30,000 figure.

### **1.2 Reparations Implementation Phase: Proposed €60,000 Cap for Victims' Legal Aid<sup>6</sup>**

While the division of the reparation phase into two stages ("litigation" and "implementation" stages) can be supported, LRVs expressed significant concerns about the arbitrary €60,000 cap for legal aid for the entire duration of the proposed 'implementation' period of the reparations phase, regardless of the complexity of the case (levels 1, 2 and 3) under the proposed LAP. LRVs emphasise that the 'final reparations implementation plan approved by the Trial Chamber' should mark the end of the 'litigation' phase, not the 'final reparations order,' as proposed. LRVs assert that the issuance of the Reparations Order, as a matter of practice at the ICC, is not the end of litigation before the Trial Chamber, nor the end of complex and intensive work by LRVs and their team. One LRV warns, that without the presence of an active LRV during this

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<sup>6</sup> *Second Draft Proposal*, paras 66 and 69.

final stage, who acts “as a bridge between the [Trust Fund for Victims], its partners and the victims, reparations would not have been possible.”<sup>7</sup>

LRVs moreover assert that a lump sum approach is not suitable for the diverse range of ICC situations, and could compromise victims' participation and representation. While the proposed €60,000 cap may be justified, the LAP must also allow for additional resources based on objective criteria and needs in order for victims to be properly represented, and have their views and concerns fully considered during this phase of the reparations process. Victims may otherwise be deprived of essential representation, especially in lengthy or complex cases, and a reassessment of funding modalities must be available to uphold victims' rights to counsel and participation during this complex phase.

### **Recommendations:**

- **Definition of End of Litigation Phase:** LRVs recommend that the final reparations implementation plan approved by the Trial Chamber should mark the end of the ‘litigation’ phase, not the ‘final reparations order,’ as proposed.
- **Flexibility in Funding:** The Registry should refrain from utilising rigid lump sums for legal aid distribution. Flexibility should be incorporated in the new LAP to reflect specific characteristics of cases and variations between them, including potential delays during the implementation stage. The possibility of providing additional budget for unforeseen situations, as included in the current LAP, must remain.

### **1.3 New Complexity Assessment of Cases: Need for a More Specific Assessment to the Needs of Victims<sup>8</sup>**

The new assessment of the complexity level of cases will have a “huge impact” on LRV teams.<sup>9</sup> The complexity criteria should be specific to the unique needs of victims and more distinct from the criteria used for the defence. It should include victim-centred objective elements, such as whether the representation of the victims requires missions to multiple sites; victims' ability to access telecommunications and transport, in the country or countries where they are located or where missions are planned; environmental factors (such as lengthy rainy / monsoon or planting / harvesting seasons); and the nature of the charges, particularly where the allegations involve sexual or gender-based crimes or crimes against children.

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<sup>7</sup> Confidential consultations with LRVs conducted by FIDH in October 2023.

<sup>8</sup> *Second Draft Proposal*, paras 43-54.

<sup>9</sup> Confidential consultations with LRVs conducted by FIDH in October 2023.

## Recommendation:

- **Victim-Centred Complexity Assessment of Cases:** in relation to LRVs, the criteria to determine the complexity levels of each case should be victim-centred and specific, and differ more clearly from those applicable to the defence.

## 2. Victims' Right to Choice of Counsel and Appointment of External Legal Counsel

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Under the second LAP proposal, the Court's legal aid system is triggered upon appointment of a LRV by the Chambers.<sup>10</sup> However, while it has been recognised that victims can participate during the investigation stage,<sup>11</sup> the practice of the Court appears not to support victims' access to the Court's legal aid during this phase. Indeed, Chambers have been reluctant to allow victims' participation prior to the formal appointment of counsel, and therefore should this proposal be adopted it would effectively prevent victims from accessing financial support during the investigation phase. Counsel of their choosing may engage with victims prior to the formal appointment, thus whether or not victims have the formal status of victims, legal aid should not be dependent on the Chamber itself appointing LRVs. Moreover, the late appointment of a legal representative significantly undermines victims' rights at trial as LRVs join the proceedings at a later stage and therefore have less time to familiarise themselves with the case than defence and the prosecution. One LRV also highlights the discrepancy this proposal creates as "creat[ing] asymmetry between victims and their counsel" and warns that "[t]he legal aid scheme should align with the right to victim's choice of counsel. It does not, if only counsel appointed by Chambers receives legal aid."<sup>12</sup>

## Recommendations:

- **Early Legal Aid Access:** Legal aid should be triggered by the start of the investigations to ensure that victims' voices are heard from the outset of the proceedings, even when they appoint counsel themselves.
- **Expanded Counsel Eligibility:** Legal aid should be available to any counsel meeting the criteria to practise before the Court<sup>13</sup> who has been chosen by the victims, and who was duly appointed through a power of attorney provided to the Victims Participation and Reparations Section (VPRS).

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<sup>10</sup> *Second Draft Proposal*, para 11.

<sup>11</sup> FIDH, *Whose Court is this? Judicial Handbook on Victims' Rights at the International Criminal Court*, April 2021, Chapter 4.

<sup>12</sup> Confidential consultations with LRVs conducted by FIDH in October 2023.

<sup>13</sup> Rule 22, Rules of Procedure and Evidence; Regulation 67, Regulations of the Court.

### 3. Ensuring the Court Adapts to Victims' Interests, Not the Other Way Around

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#### 3.1 Overall Victims' Budget Reduction

The LAP reform, in scenario A and B, proposes a severe decrease in the budget for victims' legal aid (between 42% and 43% decrease). While part of it may be attributed to the estimated savings in the reparations' implementation phase,<sup>14</sup> it is not clear what other parts of victims' budget will be reduced in these scenarios. In any case, this significant decrease in the budget for victims' legal aid does not reflect the concerns of LRVs nor the interests and needs of victims for more meaningful participation and legal representation at all stages of ICC proceedings.

#### Recommendations:

- **Transparency:** The Registry should openly explain the budget reductions for victims' legal aid in scenarios A and B, with clear reasoning and justifications that the reductions will not negatively impact victims' rights to participation and reparation.
- **Budget Commitment for Victims:** States Parties should commit to a budget that does not significantly and arbitrarily decrease funding for victims' legal aid, aligning with victims' interests and needs for comprehensive legal representation and participation in ICC proceedings.

#### 3.2 Travel and Accommodation Expenses for LRVs in The Hague: Proposed €800 Monthly Cap<sup>15</sup>

LRVs strongly oppose the proposed €800 monthly cap for counsel's travel expenses, deeming it completely inadequate. They argue that this cap, unrealistic given the cost of living in The Hague and especially disadvantageous for non-European lawyers, is discriminatory and threatens to deter dedicated and competent legal representatives from representing ICC victims. It would undermine fair geographical representation, potentially reducing the diversity and expertise of lawyers willing to take on these crucial roles. For one LRV, "[t]hese measures are not only discouraging, but even more so, are driving away competent lawyers dedicated to working on behalf of victims."<sup>16</sup>

LRVs underscore that the proposed amount falls significantly short of covering the actual expenses incurred in maintaining consistent contact with victims, and it could potentially curtail the continuous presence of counsel in situation countries. According to one LRV, "[t]he proposed total elimination of travel support for counsel at the trial

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<sup>14</sup> *ICCBA Observations*.

<sup>15</sup> *Second Draft Proposal*, para 88.

<sup>16</sup> Confidential consultations with LRVs conducted by FIDH in October 2023.

stage will effectively bar counsel who must maintain domestic practices, or who otherwise do not wish to move their families and live permanently in The Hague.”<sup>17</sup>

#### Recommendations:

- **Increase Travel Expense Cap:** Increase the €800 monthly cap for travel expenses to align with the actual costs incurred. This would enable legal representatives to maintain effective and consistent contact with victims and contribute more effectively to the proceedings.
- **Consider Fair Geographic Representation:** The Court emphasises the importance of maintaining a diverse representation of lawyers, including those from outside Europe, to ensure fair geographic representation. Therefore, any cost-related measures should consider the potential impact on the availability of competent lawyers from diverse geographical backgrounds.

While consultations have taken place, the voice of LRVs has yet to be reflected in the LAP reform process. LRVs’ direct experiences, insights, and recommendations should be acknowledged, and integrated into the ongoing discussions on LAP reform. Upholding the victims’ rights and the integrity of the ICC's proceedings are essential for securing justice and accountability for core international crimes – with LRVs playing a pivotal role as representatives and advocates, with civil society organisations, for the rights of victims.

Thank you for your attention to this matter, and we look forward to a constructive dialogue on this important issue.

Yours Sincerely,

FIDH - International Federation for Human Rights

REDRESS

Women’s Initiatives for Gender Justice

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<sup>17</sup> *Ibid.*