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Report of the Bureau on legal aid

Note by the Secretariat

Pursuant to paragraph 3, Section J of resolution ICC-ASP/10/Res.4 of 21 December 2011, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on legal aid. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court and other stakeholders.

I. Introduction

1. The Assembly of States Parties (ASP), at its tenth session, requested the Court and the Bureau to continue reviewing the legal aid system, including its application, and to report the findings to the Assembly at its eleventh session¹.
2. The Assembly also requested the Registrar to finalize ongoing consultations and to present a proposal for a review of the legal aid system to the Bureau before 15 February 2012. The Registrar presented the requested report in due time (the proposal paper).
3. The Assembly further mandated Bureau to decide on the implementation of the revised legal aid system before 1 March 2012 with a view to implement it as of 1 April 2012. At the Bureau meeting of 17 January 2012, the issue of legal aid was assigned to The Hague Working Group and Mr Irvin Høyland (Norway) was appointed Coordinator for legal aid on 3 February 2012. Following a series of informal consultations, a report on legal aid was adopted by The Hague Working Group on 21 March 2012, together with a draft decision for the consideration of the Bureau. The Bureau adopted the report at its ninth meeting, on 23 March 2012, and conveyed the decision to the Court, so that the Court could proceed to implement it as of 1 April 2012. The decision requested the Court to continue the elaboration of the legal aid system including on three specific aspects, namely: remuneration in the case of several mandates; legal aid travel policy; remuneration during phases of reduced activity. In addition, the Bureau requested the Court "to present proposals for an enhanced role of the Office of Public Counsel for Victims (OPCV)". Moreover, the Bureau referred to "a comprehensive review of the legal aid system and victims' participation".
4. On 15 May 2012, The Hague Working Group recommended to the Bureau the appointment of Ambassador Leon Marc (Slovenia) as the focal point for legal aid within the Budget facilitation. At its twelfth meeting on 29 May 2012, the Bureau took note of this appointment.

II. Consultation process

5. The Hague Working Group ("working group") held four informal consultations on this topic, respectively on 5 July, 29 August, 28 September 2012 and 5 October 2012.
6. The focal point also held informal meetings bilaterally (or in correspondence) with the following stakeholders: Registrar and staff in the Counsel Support Section; members of the Chambers; the Heads of Office for Public Counsel for Victims (OPCV) and the Office for Public Counsel for Defence (OPCD); the Chair of the Committee on Budget and Finance; representatives of States Parties; representatives of other international courts (International Criminal Tribunal for former Yugoslavia - Head, Office for Legal Aid and Detention Matters; Special Tribunal for Lebanon - Chief of the Cabinet, Defence Office and Victim's Participation Unit); non-governmental organizations (Coalition for the ICC, FIDH, Redress (in writing)); Counsels' representatives (International Bar Association, Legal Representative of Victims in the Kenya case).
7. At the 5 July 2012 informal consultations, the Registry presented the state of play of the implementation of the Bureau decision on the revised remuneration scheme. During the discussion it was confirmed that, largely due to the phase-in approach taken by the Bureau, those decisions would in 2012 result only in limited savings. In addition, the Registry gave a very preliminary outline of the proposals to be made in four additional areas of the legal aid system (remuneration in the case of several mandates; legal aid travel policy; remuneration during phases of reduced activity;² enhanced role of the OPCV). In the discussion that followed, support was expressed by most delegations for the intended proposals, including, in principle, for the proposal to give an enhanced role to the OPCV in representing victims.

¹ ICC-ASP/10/Res.4/Section J, para.3.

² As defined in paragraph 40 of the Supplementary report of the Registry on four aspects of the legal aid system (ICC-ASP/11/43)

8. On 17 August 2012, the Registry circulated its report, entitled "Supplementary Report of the Registry on four aspects of the Court's legal aid system"³. This report was also submitted to the Committee on Budget and Finance in advance of its nineteenth session, pursuant to the 23 March 2012 decision of the Bureau.

9. The Supplementary Report was discussed by the working group on 29 August 2012. At this meeting, most of the States Parties expressed support for the proposals in all four areas, though it became evident that the OPCV-related proposals would require further clarification, and that all proposals should be quantified as for their budgetary impact. One delegation and some other stakeholders expressed concerns in particular in regards to the OPCV-related proposals, and requested to be reassured that the proposed changes would not raise any independence or conflict of interest issues.

10. It is to be noted that the Registry has demonstrated a considerable effort in producing the Supplementary Report, and has shown the awareness of the cost issue, as requested by the Assembly and the Bureau. It has engaged in an extensive consultation process with a large number of stakeholders and has been attentive to the founding principles of the legal aid system. The Registry also welcomed the advice offered by the focal point in preparation of the Supplementary Report and its follow-up, and worked closely with the focal point. In addition, the Registry announced the preparation of a single policy document on legal aid, which should increase the transparency of the system.

11. At the informal consultations on 28 September 2012, the working group was presented with two documents by the Registry, namely "Financial implications of the review of the legal aid system of the Court"⁴ and "Financial implications of the Court's proposed legal aid system relating to reduced periods of activity and an enhanced role for OPCV". In the discussion that followed, delegations have reiterated their support to the measures proposed on three out of the four areas identified for review, i.e. a) remuneration in the case of several mandates; b) legal aid travel policy (expenses policy); and c) remuneration during phases of reduced activity. However, some delegations expressed concerns with regard to possible consequences of the enhanced role of the OPCV, in particular concerning the accountability of the OPCV officials. The OPCV also noted that the so-called Option 2 of the proposal for the enhanced role of the OPCV could "give[s] rise to both legal and practical impediments"⁵.

12. The Registry produced estimates of the possible savings in the 2013 legal aid budget, should the measures contained in the Supplementary Report be adopted by the Assembly and implemented. The far most prominent item is the estimate for the elimination of the daily subsistence allowance (DSA) payments to counsel and associate counsel for the duration of their stay at the seat of the Court. Proposed savings would amount to approximately €0.9 million. Moreover, the revised remuneration fees (as adopted by the Bureau on 23 March 2012) are expected to present an additional €170.000 saving, which would result in the 2013 legal aid budget being below the 2012 level. Although these are only estimates, the Registry's proposals are a step in the right direction in fulfilling the 23 March 2012 Bureau decisions, as well as the mandate set out in the Assembly at its tenth session, in resolution ICC-ASP/10/Res.4.

13. The above estimates do not take account of the proposed changes on multiple-mandate policy and reduced activity policy, where informed estimates are much more difficult to make. It is expected that these changes to the legal aid system will bring some additional, though not major savings. Nor do these estimates take into account eventual financial impact of measures proposed with regard to the enhanced role of the OPCV.

14. The Committee on Budget and Finance at its nineteenth session reiterated that the legal aid continues to be one of the major cost drivers. The Committee expressed itself favourably with regard to the proposal to limit the number of counsel's mandate to two and to introduce a reduced fee for the second mandate; with regard to the DSA, and with regard to the payments for the periods of reduced activity. Regarding the issue of the enhanced role of the Office of the Public Council for Victims, it noted potential current obstacles to its implementation, and requested the Registry to provide a supplementary report on this

³ ICC-ASP/11/43

⁴ ICC-ASP/11/43, annex.

⁵ OPCV paper titled "Paper on the review of the legal aid scheme", 27 September 2012 (CBF19/28PM03).

issue for the next session of the Committee. Consequently, the Committee recommended that the Assembly adopt the above proposals, and that the amount for the legal aid in the proposed budget be reduced by € 1.1 million. The Committee further stated that further review of the position and role of the Office of Public Council for the Defence was required.

III. Conclusions

15. The working group welcomes the efforts by the Registry. Specifically, it endorses the proposals on DSA, the multiple-mandate policy and reduced-activity policy, leading to savings in the 2013 legal aid budget, as directed by the Bureau decision and the Assembly in resolution ICC-ASP/10/Res.4. The working group found that there was no legal impediment to the Registry's proposals and they should be implemented immediately, their impact monitored on a regular basis by the Court, and report on the impact quarterly provided to the working group.

16. Proposals concerning the enhanced role of the OPCV could signify an increased use of resources available within the Court itself, i.e. of the OPCV staff, given its considerable institutional know-how and its ability to be effectively appointed with immediate effect. The value of such proposal has already been supported by the current jurisprudence of the Court. Regulation 80(1) of the Regulations of the Court, as recently amended, already provides for the possibility of appointing a counsel from the OPCV. As noted by the OPCV, this Office has been to date appointed legal representative in 65 different instances.

17. It is also to be noted that Trial Chamber II in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* expressed "that although victims are free to choose a legal representative this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court"⁶ and that Trial Chamber IV ruled that "Rule 90 of the Rules does not guarantee to victims an absolute right to be represented by a legal representative of their choosing."⁷

18. Notwithstanding the above, during the informal meetings and consultation process, some States Parties and other stakeholders voiced concerns that the proposed enhanced role of the OPCV could have an impact on the quality of legal representation or on the fairness of the judicial process, or, regarding the OPCV-related measures, that issues of independence, accountability, unnecessary competition, overlap or conflict of interests could arise. A consensus on an enhanced role of the OPCV could not be found at this point in time.

19. It is important to reiterate the fundamental importance of the legal aid system to ensure the fairness of judicial proceedings, and the rights of the defendants and victims to quality legal representation and high degree of professionalism. It should also be noted that any revision of the legal aid system has to uphold and strengthen the founding principles of the legal aid,⁸ including the principle of fair trial, which, as far as adequate resources are concerned, should not be understood as an arithmetic equality of financial and other material means available for the defence and the prosecution, also because of their operational differences.

20. During the informal consultations in the working group, as well as during the bilateral meetings, it became obvious that many legal aid aspects were cross-cutting, some of which being also subject to (other) Hague Working Group facilitations. These aspects are not necessarily budget related. Some delegations also expressed their criticism on what they considered a "piecemeal" approach to the review of the legal aid system. Consequently, it was proposed to mandate The Hague Working Group – in cooperation with the Court, the Committee on Budget and Finance and/or eventual assistance of external experts – with conducting a "comprehensive" review of the legal aid system, elaborating and proposing systemic (structural) changes to the legal aid system, to be, if necessary, adopted at the twelfth session of the Assembly, in line with the March 2012 Bureau decision, which referred to comprehensive review of legal aid. Simultaneously, a single legal aid policy document of the existing legal aid policy (including amendments that may be adopted by

⁶ "Order on the organisation of common legal representation of victims", ICC-01/04-01/07-1328, 22 July 2009.

⁷ "Decision on common legal representation" (Trial Chamber IV), No. ICC-02/05-03/09-337, 25 May 2012.

⁸ ICC-ASP/3/16.

the Assembly at its eleventh session), together with a report on a comprehensive review (as detailed out below) should be prepared by the Court as soon as possible to accompany that exercise, and submitted to the Bureau for consideration. The Bureau will thereafter discuss the matter with the view of finalizing proposals to submit to the twelfth session of the Assembly.

21. The main task of such a comprehensive review should be to propose amendments to the legal aid system that would uphold the principles of fair trial, including efficiency, efficacy, and quality and professionalism of legal representation, as well as ensure the financial viability of the scheme.

22. Based on the outcome of the informal consultations held, such comprehensive or systemic review of the legal aid system should, among others, look at the impact of the following issues and aspects, while being cognisant of the respective mandates of other facilitations:

(a) To study whether ways can be found to implement the option of the enhanced role of the OPCV, as indicated in the Supplementary Report and tasked by the Bureau, without legal and practical impediments, and with particular concern towards issues of accountability, independence, conflict of interests and quality of legal representation in general.

(b) Cooperation related aspects:

Ways to enhance cooperation of States Parties (including establishing or reinforcing the role of an appropriate national focal point for cooperation with the Court) with the Court in identifying, freezing and confiscating assets directly or indirectly under the control of suspects, accused and convicted persons, and making them available to cover the expenses of their defence (as well as for other purposes, such as reparation of victims), while ensuring that the Court's requests for cooperation are adequately prepared and appropriately specific.

(c) Trial management related aspects:

(i) Consider ranking cases according to their complexity and awarding lump-sum payments for the legal aid accordingly (thereby ensuring better time and expenditure planning).

(ii) Consider limiting the length of individual trial phases (process deadlines).

(d) Indigence related aspects:

(i) Reducing the indigence threshold.

(ii) Taking into account the assets of family members and associates when determining indigence.

(iii) Consider ways to further strengthening the process of establishing proof of indigence of accused.

(e) Counsel related aspects:

Consider the usefulness and financial implications of establishing an independent performance-monitoring mechanism.

(f) Analyze further the role of the OPCV and the OPCD, with particular focus on quality and professionalism of legal representation, and issues of independence, unnecessary overlap with external counsels, possible conflict of interest, and economy, respectful of the rights of both defendants and victims.

Annex

Draft paragraphs for inclusion in the budget resolution

Recalling the fundamental importance of the legal aid system to ensure the fairness of proceedings and the rights of the defendants and victims to quality and professional legal representation,

Stressing the need for a revision of the legal aid system to uphold and strengthen the principles of the legal aid, namely fair trial, objectivity, transparency, continuity and economy¹,

Considering that such revision of the legal aid system is intended to further strengthen the authority and standing of the Court as an effective and efficient international judicial criminal organ,

Recalling its resolution ICC-ASP/10/Res.4 requesting the Court and the Bureau to continue reviewing the legal aid system;

1. *Notes* the Supplementary Report by the Registry on four aspects of the Court's legal aid system²;
2. *Calls* on the Court to continue implementing the revised remuneration policy as adopted by the Bureau on 23 March 2012;
3. *Decides* to adopt the proposals as contained in the Supplementary Report with regard to a) remuneration in the case of multiple mandates; b) legal aid travel (expense) policy; and c) remuneration during phases of reduced activity³, and *requests* the Court to take all the necessary steps with a view to implementing these proposals as expeditiously as possible, and to report to the Committee on Budget and Finance in advance of its twentieth session;
4. *Invites* the Court to monitor and assess the implementation performance of the proposals mentioned in paragraph 2 and 3, and to quarterly report on it to the Bureau;
5. *Requests* the Court to prepare by 1 March 2013 a single policy document on the legal aid system, and to report by 1 April 2013 on the comprehensive review of the legal aid system;⁴
6. *Mandates* the Bureau to - on the basis of such single policy document and report of the Court on comprehensive review of the legal aid system - elaborate and propose systemic (structural) changes to the legal aid system, to be, if necessary, adopted at the twelfth session of the Assembly, including proposing measures to further enhance the efficiency of the legal aid system, as appropriate.
7. *Requests* the Court and the Bureau to keep the legal aid system under review.

¹ *Official Records... Third Session... 2004* (ICC-ASP/3/18), para. 16.

² ICC-ASP/11/43.

³ As defined in paragraph 40 of the Supplementary report of the Registry on four aspects of the legal aid system (ICC-ASP/11/43).

⁴ As outlined in paragraphs 20 to 22 of the report of Bureau on legal aid (ICC-ASP/11/2).