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Report of the Bureau on legal aid

I. Background

1. This report is submitted pursuant to the mandate given to the facilitator, Ambassador Sabine Nölke (Canada),¹ on legal aid. The mandate is based on resolution ICC-ASP/17/Res.5, in which the Assembly requested the Court to “continue its review of the functioning of the legal aid system and to present, in early 2019, as appropriate, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly, through the Committee, at its eighteenth session” and, further, requested the Bureau “to establish a facilitation on legal aid to discuss the proposals from the Court and report to the Assembly thereon.”²

II. Discussions in The Hague Working Group

2. The facilitator held two meetings, open to States Parties. In the first meeting, the Registry’s Director of Judicial Support Services introduced the proposed amendments to the Court’s legal aid policy. He informed the working group regarding what is the legal aid policy; the legal basis for the current reform; and the rationale for the reform. He outlined the five principles that underpinned legal aid policy, i.e. equality of arms, objectivity, transparency, continuity and flexibility, and economy. Further, he introduced the main changes, namely, redistribution of resources, simplification of the payment system for travel expenses to The Hague, and creation of service contracts, and noted that the question relating to taxation of the members of legal teams was pending.

3. The facilitator undertook to hold consultations with a broad range of stakeholders on the Court’s revised legal aid policy.

4. At the second meeting, on 18 September 2019, the facilitator briefed the working group on her broad consultations with a range of stakeholders, with a representative of the host State, and her 29 August 2019 briefing to the Committee on Budget and Finance (the Committee). The facilitator also gave her assessment of the status of the issue of legal aid.

III. Conclusions and recommendations

5. The facilitator’s briefing to the 18 September 2019 meeting, including her recommendations on the way forward for the consideration by the Court and the Assembly of the reform of the legal aid system, are contained in the annex. The facilitator’s recommendations for language to be included in the omnibus resolution to be adopted at the eighteenth session are set out in the appendix.

¹ On 15 February 2019, the Bureau appointed Ambassador Sabine Nölke (Canada) as the facilitator for legal aid.

² Resolution ICC-ASP/17/Res.5, annex I, para. 8.

Annex

Facilitator's report: Consultations on the Court's revised legal aid policy

1. In 2016 the Registry of the Court engaged the services of an independent expert to assess the Court's legal aid system. These findings were presented to the Assembly of States Parties in the 'Rogers Report', dated 5 January 2017. Following this report and its findings, the Registry aimed to finalize the draft policy in 2019 for presentation to the eighteenth session of the Assembly. To that end, per resolution ICC-ASP/17/Res.5, adopted at plenary on 12 December 2018, the mandate of the Court was renewed as follows:

With regard to **legal aid**,

(a) mindful of the recommendation of the Committee on Budget and Finance that the Court make every effort to present a reform that can be achieved within existing resources by exploring opportunities to contain the administrative burden without jeopardizing the need for accountability and by setting priorities accordingly, requests the Court to continue its review of the functioning of the legal aid system and to present, in early 2019, as appropriate, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly, through the Committee, at its eighteenth session; and

(b) requests the Bureau to establish a facilitation on legal aid to discuss the proposals from the Court and report to the Assembly thereon;

2. Following the completion of the draft legal aid policy by the Court in early summer 2019, Ambassador Sabine Nölke (Canada), as facilitator of The Hague Working Group for legal aid, conducted extensive consultations with the Registry, States Parties (including the host State), civil society groups, the Office of Public Counsel for the Defence (OPCD) and the International Criminal Court Bar Association (ICCBA).

3. Based on these consultations, it is the opinion of the facilitator that the draft legal aid policy in its current form is **not yet ready for the consideration of the Assembly at the eighteenth session**. Furthermore, as the concerns raised regarding the draft policy are based on fundamental policy considerations, it is the opinion of the facilitator that it would be premature to perform a financial assessment of the draft policy in its current form. The facilitator communicated this assessment to the Committee on Budget and Finance (the Committee) in an oral briefing on 29 August 2019 in the presence of representatives of the Court. Based on her briefing and responses by Court officials, the Committee concurred with her assessment.

4. It is recommended, therefore, that the working group on legal aid continue its work and for States Parties to consider and address specific issues requiring substantive discussion, before the cost implications of the Policy can be submitted to the Committee for consideration, and ultimately to the Assembly for possible adoption.

A. Remuneration

1. Taxation

5. Concerns were widely raised regarding the taxation situation arising as a result of the relationship between legal aid counsel, the Court, and the host State. As legal aid counsel and their supporting staff are not employed by the Court, but rather are compensated by legal aid certificates as essentially independent contractors, Host State taxation authorities apply income tax to their earnings. As such, it was reported that take-home compensation of counsel and support staff resident in the host State is effectively lowered by approximately 30-40 per cent. By contrast, as employees of the Court, counsel and support staff of the Office of the Prosecutor (OTP) are not liable to pay income tax to the host State, creating considerable inequity in remuneration between prosecution and defence counsel, with resulting difficulties in attracting and retaining talent.

6. This taxation arrangement raises a number of issues, including the burden on lower-paid junior counsel and support staff facing the relatively high cost of living in The Hague, resulting in financial stress and frequent turnover. Suggestions were made that the remuneration be increased to reflect taxation. A number of States Parties and civil society actors expressed concern, however, that either way, continued taxation of defence staff would effectively redirect State contributions made to the Court for legal aid (including those made by developing States) to domestic host State tax authorities.

2. Diminished compensation for multiple cases

7. Concerns were also raised over the de-escalating pay scale for counsel, which includes a 50 per cent drop in compensation per certificate for counsel taking on more than one case. It was reported that this practice discourages the development of an experienced ICC criminal bar outside of the OTP. Some interlocutors emphasized that virtually no domestic criminal bar operates with counsel taking on only one case at a time, with most domestic counsel taking on multiple cases in order to maintain an experienced, ongoing staff and practice capable of managing multiple pending files.

3. Diminished compensation for periods of reduced activity

8. Concerns were raised that the policy does not address the importance of work done during periods of supposedly “reduced activity”, such as preparing paper-testimony, archiving, research, and other necessary preparations. Practitioners and civil society raised that “reduced activity” is often a period of intense back-office work, requiring the use of paralegals, assistants, and other staff. However, the funding necessary to engage this support staff is reduced precisely when this back-office work is needed most. Further, concerns were raised at the misconception that victims and victims’ counsel are mostly active at the reparations stage; by contrast, these interlocutors noted that it is important for victims’ representation to have the resources to be active in other stages of proceedings.

4. Impact of the above remuneration issues

9. Concerns were raised that as a result of the above issues, there is a de factor economic barrier to legal aid counsel building an effective, experienced criminal law practice based in the host State: rather than building an experienced permanent staff working on multiple cases, the process instead encourages non-local counsel with already established practices in other fields commuting to the host State for brief periods, and quickly hiring and dismissing staff per the status of their single pending case.

10. This was said to raise a number of additional negative impacts, including on geographic diversity. The current system relies on counsel with existing practices to commute to the host State for individual cases, resulting in an economic barrier to counsel not based in Western Europe to represent legal aid clients. The high costs associated with short-term relocation from regions such as Africa, Asia, and North and South America discourages geographic diversity of counsel.

11. In addition, as there is a financial discouragement to counsel taking on multiple cases, clients are effectively prevented from retaining the counsel of their choosing should that counsel already be engaged in another matter before the Court.

B. Junior counsel, support staff, and gender issues

12. Under the current legal aid system, there is a great deal of flexibility for counsel to independently determine the compensation and working conditions of junior counsel, case managers, paralegals, and other support staff, as they are effectively hired as contractors, vulnerable to being hired and fired on an ad-hoc basis. Employment insecurity and economic vulnerability impose considerable stress and reduce the effectiveness of the work provided.

13. In addition, due to their status as contractors junior counsel and support staff do not have access to essential social benefits, including maternity/parental leave, sick leave, vacation and other employee protections (including harassment protections or institutional codes of conduct).

14. It was also reported that the flexibility provided to counsel to determine compensation for junior counsel - including hiring several counsel based on a budget conceived for two - can often result in chronic underpayment and exploitative work hours, with junior counsel and support staff reportedly receiving less than the necessary cost of living in the host State, or being 'paid with prestige' rather than fair wages for work rendered.

15. As was addressed in the Court's recent report on Gender Diversity, junior counsel and support staff roles are disproportionately filled by women. Concerns were raised that faced with these issues, women occupying junior counsel or support roles may simply move to other work rather than advance beyond a junior level, worsening gender inequality in higher levels of ICC practice.

C. Budget implications of discretionary spending

16. Concern was raised by a State Party that although the draft policy does not contain a potential budget increase, paragraphs 71, 74, and 78 give the Registrar discretion to allow additional expenses for counsel's travel, investigation, and a field budget for victim teams. As such, it was raised that it would be helpful for States to receive further information on

- (a) The criteria the Registrar will use to exercise this discretion;
- (b) Whether there are financial ceilings on the amount that may be provided under this discretion; and
- (c) The anticipated budget impact of these discretionary costs, if it is possible to predict

D. Incorporation of other reports and practices

17. One State Party expressed a desire for further detailed information from the Registry regarding to what extent the draft policy took into account the findings of the above-mentioned 2017 'Rogers Report', in particular in relation to the best practices of other international courts and tribunals, as well as the operation of legal aid systems in domestic courts and tribunals.

E. Recommendations and next steps

18. The facilitator recommends that:

- (a) The draft legal aid policy in its current form not be submitted for consideration at the eighteenth session of the Assembly;
- (b) The facilitation on legal aid continue its work, and for States Parties to consider and address the above substantive policy issues, possible resolutions and budgetary implications thereof. In order to focus these discussions and to maximize their effectiveness, it is recommended that future facilitation sessions separately consider a maximum of two of the above policy issues, in an order the next facilitator considers appropriate; and
- (c) One of these further facilitation sessions could include presentations from representatives of the other courts and tribunals concerning their approach to defence funding and legal aid.

19. The facilitator further recommends that:

- (a) Since these policy issues and their potential resolutions reach beyond the realm of budgetary or administrative considerations, the Court's approach to defence funding and legal aid would usefully be included as a topic in overall discussions on ways

to strengthen the Court, as detailed by the President of the Assembly in the draft non-paper, dated 15 July 2019, entitled “Matrix over possible areas of strengthening the Court and the Rome Statute system”. For example, States Parties might wish to explore the effectiveness of creating an independent unit within the Registry that would include a limited pool of junior counsel, paralegals, investigators and support staff with the status of employees of the Court, who would be available to support independently-retained senior counsel for a number of cases. Such a unit could be funded from savings coming from the legal aid envelope currently applied to such staff when engaged by senior counsel; and

(b) A gender-based analysis should be applied to the draft policy in order to more fully consider its potentially disproportionate impact on female counsel.

Appendix

Proposed text for the omnibus resolution

The facilitator recommends that States Parties renew the mandate to the Court and the Bureau to consider the legal aid policy at the nineteenth session, with the following omnibus language:

With regard to **legal aid**,

(a) mindful of the recommendation of the Committee on Budget and Finance that the Court make every effort to present a reform that can be achieved within existing resources by exploring opportunities to contain the administrative burden without jeopardizing the need for accountability and by setting priorities accordingly, requests the Court to continue its review of the functioning of the legal aid system and to present, following further consultation with States Parties, early 2019, as appropriate, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly, through the Committee, at its ~~eighteenth~~ nineteenth session; ~~and~~

(b) requests the Bureau to ~~establish a facilitation~~ continue its work on legal aid to discuss the proposals from the Court and, as appropriate, recommendations arising from the integral review process surrounding the legal aid policy, and report to the Assembly thereon at its nineteenth session; and

(c) encourages further consultations between the Court and the host State regarding issues related to the taxation of legal aid counsel and support staff.