

**Twentieth session**

The Hague, 6-11 December 2021

Report of the Bureau on legal aid**I. Background**

1. This report is submitted pursuant to the mandate to the Bureau on legal aid at the nineteenth session of the Assembly,¹ In that resolution, the Assembly requested the Bureau “to continue its work on legal aid to discuss the proposals from the Court and the recommendations of the Group of Independent Experts regarding the legal aid policy, and to report to the Assembly thereon at its twentieth session.” The Assembly also requested the Court to “continue its review of the functioning of the legal aid system and to present, following further consultation with States Parties, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly, through the Committee, at its twentieth session, taking into account the recommendations of the Group of Independent Experts² on legal aid, without prejudice to any decision of the Assembly on the broader review process”.

2. In addition, by resolution ICC-ASP/19/Res.7,³ the Assembly had requested that “[...] relevant Assembly Mandates designated as responsible for assessing and taking possible further action as appropriate on relevant recommendations to commence implementation in 2021 and to submit to the Bureau the outcome of its consideration, including on action already taken and proposals for next steps, by 1 November 2021.”

3. On 6 April 2021, the Bureau appointed Ambassador Carmen Maria Gallardo (El Salvador) as the facilitator for legal aid.

4. The facilitation held six meetings⁴ in order to continue its consideration of the mandate to the Bureau after a hiatus of one year, i.e. 2020, during which no facilitator had been appointed for legal aid. The discussions on the reform of the legal aid policy took into account the proposals from the Court and the recommendations of the Group of Independent Experts regarding the legal aid policy, and were based on the recommendations allocated to the legal aid facilitation as the platform for discussion in the comprehensive action plan. The recommendations allocated to the legal aid facilitation were found in Chapter XVI,⁵ Defence and legal aid, section A- Institutional representation⁶ and section B- Legal aid.⁷

¹ ICC-ASP/18/Res.6, annex I, para. 8 (b).

² ICC-ASP/19/16.

³ Para. 7.

⁴ On 27 May, 15 July, 22 September, 14 October, 27 October and 10 November 2021.

⁵ Final Report of the Group of Independent Experts (ICC-ASP/19/16).

⁶ Recommendations 320-327.

⁷ Recommendations 328-335.

II. Discussions in The Hague Working Group

1. Introductory meetings

5. In the first meeting,⁸ on 27 May 2021, the Registry presented an overview of the Court's efforts in regards to a review of the legal aid policy. The Registry noted that the policy needed to be streamlined and updated and the Court had made various attempts to that end, including requesting two studies by independent experts. Upon a request by the Assembly, in 2019 the Registry submitted for the Assembly consideration an updated legal aid policy within the financial envelope.

6. The Registry recalled that the previous facilitator, Ambassador Sabine Nölke (Canada), had indicated, *inter alia*, in her report to the eighteenth session of the Assembly that the "draft legal aid policy in its current form is not yet ready for the consideration of the Assembly at the eighteenth session" and that the financial envelope was a constraint on the policy. It was noted that because the revised draft policy was not adopted by the Assembly, the Court continues to apply the existing policy.

7. The Registry further noted that the report of the Group of Independent Experts (the IER report) recommended in R328⁹ that renewed efforts should be made to finalise the reform of the legal aid policy. The Registry indicated that a new review of the policy build on the progress made on the previous exercise.

8. Upon request by the facilitator, the Registry presented a paper, titled "IER Recommendations (328-335) - Legal Aid",¹⁰ which set out the procedural steps that the Court proposed taking in considering a reform of the legal aid policy, including suggested timelines. The process envisages the engagement of States Parties and of the Committee on Budget and Finance as well as other relevant stakeholders.

9. The Registry indicated that the mandate of the Assembly at its upcoming session requesting the Court to produce a revised legal aid policy should provide clarity on whether the consideration of a new policy should take into account any financial restrictions, as well as any other specific standards or parameters that should guide the review. On this basis, the Registry would then proceed according to the timeline indicated in its paper..

10. At the second meeting,¹¹ on 15 July 2021, the Registry recalled the importance of beginning negotiations on the legal aid policy based on a mandate from the Assembly with clear parameters.

11. Some States noted that the IER Experts had been clear regarding the importance of legal aid and had highlighted the need to fill a gap. It was noted that the Court needed a legal aid policy that was fit for purpose, especially in the light of the expected increase in cases. General support was also expressed for the IER recommendation that consultations on a revised legal aid policy should involve other relevant stakeholders.

12. The representative of the host State explained their position regarding the taxation of counsel.

2. Discussions on the reform of the legal aid policy and related IER recommendations

13. The facilitation considered the mandate of the Assembly¹² and the recommendations of the Group of Independent Experts on the reform of the legal aid policy, and noted that synergies could be achieved in discussing them jointly. The facilitation focused on those

⁸ Open to States Parties only.

⁹ R328. Renewed efforts, taking into account past assessments and consultations already carried out, should take place to finalise the reform of the legal aid policy. It should be accessible, effective, sustainable, and credible, including ensuring equality of arms with the Prosecution and adequate facilities to Defence teams to prepare and conduct an effective defence. A full reform of the Policy is recommended, rather than only updating numbers. Otherwise, the topic will return to the ASP agenda in the coming years. The reform should be carried out and finalised with the help of a working group composed of individuals with specific experience working with defence and victims and legal aid policies before international courts, nominated by the Registrar, OPCD, OPCV and ICCBA. The working group should not begin its work within confined limits (e.g. budgetary limitations).

¹⁰ Prepared by the Registry.

¹¹ Open to States Parties only.

¹² ICC-ASP/19/Res.6, annex I, para. 8.

recommendations that had been allocated to the legal aid facilitation with a timeline of the second half of 2021.

14. States Parties, the Court, the ICCBA¹³ and some civil society organizations recognized the importance of reforming the legal aid policy with a view to making it accessible, effective, sustainable and credible, including by ensuring equality of arms with the Prosecution, as well as adequate facilities to Defence teams to prepare and conduct an effective defence.¹⁴ An efficient and effective legal aid system was deemed essential to a fair trial, and to safeguard the legitimacy of the Court. To this end, it was noted that an understanding of the different tasks performed by the Prosecution and the Defence was important in designing any legal aid policy.

15. Further, the importance of ensuring the welfare of junior counsel for defence and for victims was recognized by all stakeholders, and it was stated that efforts should be made to ensure a safe workplace for junior counsel, as well as to ensure that they received an adequate remuneration and had access to social benefits, as well as access to the Court's internal processes established by its Administrative Instructions, e.g. on harassment, including sexual harassment, as mentioned in R335. The importance of ensuring geographical and gender representation among counsel and support staff was also highlighted.

16. As regards recommendation 329, the Court was not opposed to it and noted that there would be a need for agreement on the fact that the decisions on interpretation and application of legal aid could be made public and available to other team members, with the necessary redactions. The Court would need to ensure the confidentiality of the information and would, as appropriate, also request the Defence to be involved in any potential redactions of the decisions. The recommendation would be further considered within the Court.

17. Regarding recommendation 330 on the review of the current framework and operation of the functions regarding the financial investigations of suspects and accused persons, States Parties took note that the timeline for this recommendation was the first half of 2022. Nevertheless, it was indicated that the Registry and the Office of the Prosecutor were conducting an internal review of the framework, taking into account the sensitivities concerning the nature and scope of the work of the financial investigations carried out by the respective organs.

18. As regards recommendation 331 on optimizing the capacity of the Court regarding the sole Financial Investigator, the Registry had assessed this recommendation positively and was taking measures to this effect. Such measures include the development, jointly with France, of a network of experts on asset recovery. Further, the Court was exploring the use of gratis personnel and pro bono firms, and was looking into modalities for accessing the databases of States Parties. In addition, the co-facilitators¹⁵ for cooperation highlighted the creation of a database on cooperation.

19. As regards recommendation 332, States Parties took note of the importance of ensuring that assets, including the property of suspects and accused persons are secured pending the result of the trial.

20. The Registry had assessed recommendations 333 and 334, and noted that their consideration and proposals to this end would be included in the context of the reform of the legal aid policy.

3. Discussions on institutional representation

21. Pursuant to the Comprehensive Action Plan adopted by the Bureau,¹⁶ the facilitation also focused on IER recommendations R320 to R327.

22. Regarding recommendation 320, States Parties took note that the Court agreed that the possibility for the Office of Public Counsel for Defence (OPCD) to be appointed as public defence counsel (duty counsel) should be maintained.

¹³ International Criminal Court Bar Association.

¹⁴ IER recommendation 328.

¹⁵ Ambassador Luis Vassy (France) and Ambassador Momar Gueye (Senegal).

¹⁶ On 28 July 2021.

23. As regards recommendation 321, the Court expressed a preference for retaining the composition envisaged in regulation 4 of the Regulations of the Court, i.e. that a member from the list of counsel should be elected to the Advisory Committee on Legal Texts (ACLT). In that regard, it was noted that limiting the election of the Counsel representative in the ACLT to the members of the ICCBA would mean, at this stage, that a smaller pool of counsel would be available since not all counsel were members of the ICCBA.

24. Recommendations 322, 323 and 324 concern the proposed creation of a Defence Office. In considering these recommendations, the Registry indicated that a consultative process could be put in place to further assess these issues, which could run in parallel with the review of the legal aid policy, including by identifying the potential impact of such recommendations on the legal aid system. The Registry clarified that the IER recommendations did not envisage the establishment of a separate independent Defence organ.

25. Some States noted that it has not been the practice of international tribunals to have members of defence teams as staff. It was also indicated that there could also be possible disadvantages when the Court had fewer cases but staff costs could not be flexibly scaled down. Some States saw some merit in the establishment of a Defence Office while others indicated that additional information would be required to assess this recommendation, including budgetary considerations.

26. As regards recommendations 325 and 326, the Court indicated that their consideration would be integrated as part of the overall consultations on a revised communication strategy (R163). Regarding R325, the Registry recalled that it was a neutral organ and had a neutral role regarding institutional communications and, while it was possible and desirable to enhance the Court's communications, it had to avoid the situation where parties used the communications of the Court to air case-related issues. The Registry noted the importance of preserving its neutrality in the consideration of R325. Similarly, on R326, there was value in consulting appropriate interlocutors, and the Registry would continue to explore ways to ensure improving and expanding its messaging while maintaining neutrality.

III. Recommendations

27. The facilitation recommends that the Assembly request the Bureau to continue its work on legal aid and to report thereon to the twenty-first session. It proposes the following text for inclusion in the omnibus resolution:

Preambular paragraphs

- a) *Mindful* of the recommendations of the Group of Independent Experts related to legal aid and noting that the assessment process of these recommendations, including in relation to the possible establishment of a Defence Office, are still ongoing and at an early stage;
- b) *Noting* that it is the responsibility of the Court to present proposals to the Assembly for reform of the legal policy and calling on the Court to continuously consult with States Parties and other relevant stakeholders using existing structures in the course of drawing up these proposals;
- c) *Recalling* the commitment of the Court and its States Parties to ensuring equality of arms in proceedings before the Court;

Operative paragraphs

1. *Requests* the Court to continue its review of the functioning of the legal aid system and to present, following further consultation with States Parties and all relevant stakeholders, a range of fully-costed proposals for reform of the legal aid policy for external defence and victims' teams, with full respect for the applicable principles of legal aid, for the consideration of the Assembly, through the Committee on Budget and Finance, at its twenty-first session;
2. *Requests* the Court, in producing these proposals to take account of costs constraints and ensure that all options presented can be funded within existing resources, and within that

context, to continue to explore constructive options conducive to a viable way forward to improve the conditions of service of external defence and victims' teams members;

3. *Requests* the Court to ensure appropriate representation of counsel in the Advisory Committee on Legal Texts;

4. *Requests* the Court to finalize its review of the current framework and operation of the functions regarding financial investigations on suspects and accused persons across all organs in order to make proposals to the Assembly through its relevant facilitations (legal aid and cooperation) with a view to strengthen the Registry capacity to trace, freeze and seize assets of the accused in the context of legal aid requests, while paying due respect to the rights of the accused and to ensure increased efficiency of that global framework; and

5. *Requests* the Bureau to continue its work on legal aid and to report to the Assembly at its twenty-first session.
