

**Twenty-first session**

The Hague, 5-10 December 2022

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 twentieth 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 21 February 2022, the Bureau appointed Ambassador Carmen Maria Gallardo (El Salvador) as the facilitator for legal aid.

4. The facilitation held five meetings⁴ in order to continue its consideration of the mandate to the Bureau. 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 which the Assembly had agreed to follow in 2023, and were based on the recommendations allocated to the legal aid facilitation as the platform for discussion in the Review Mechanism’s comprehensive action plan.⁵

II. Consideration of the issues by the Legal aid facilitation**1. Meetings**

5. In the first meeting, on 24 February 2022, the facilitator recalled that in 2021 the Registrar had briefed States Parties on the status of the work of the Court on the review of the legal aid policy, and indicated that the mandate of the Assembly 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

¹ ICC-ASP/20/Res.5, annex I, para. 8.

² ICC-ASP/19/16.

³ Para. 7.

⁴ On 24 February, 29 March, 22 June, 21 October, 27 October and 18 November 2022.

⁵ Recommendations 328-335.

review. She noted that the Assembly considered the recommendations of the Independent Experts, and the assessment of these recommendations, the Assembly had decided to allocate the specific mandates on Legal aid set out in the omnibus resolution and that the scope of the work of the facilitation in 2022 would therefore be based on these mandates of the twentieth session of the Assembly. The working group would have 24 hours to consider the programme of work and submit comments thereon, following which the facilitator would submit it to the Coordinator of the working group, Ambassador Kateřina Sequensová (Czech Republic).

6. The representative of the Registry presented a paper with timelines for the process concerning the LAP reform for 2022, titled “Continued Efforts Towards the Review of the Functioning of the Legal Aid System and the Proposal for a Reform of the Legal Aid Policy for External Defence and Victims’ Teams”, dated 22 February 2022, prepared by the Registry. He noted that the mandate regarding the IER recommendation on a Defence Office had not been included in the Assembly’s mandates, so the focus would be on Legal aid, for the time being.

7. In early March, the Registry would circulate an on-line questionnaire focusing on key elements, i.e. the improvement of working conditions of support staff, the applicability of Legal aid during phases of reduced activity, and the reparations phase. These had to be reflected in the revised Legal aid policy, including in relation to field representatives for the representation of victims. The consultation process would be held between mid-March and mid-April. As part of the consultation process, the questionnaire would be sent to States Parties, staff of Defence teams, Bar associations, and the International Criminal Court Bar Association. The Registry would do so with full transparency. The Registry would produce a report on the outcome of the on-line consultation. In mid-May to early June, the Registry would organise a consultation seminar/workshop to discuss the outcome of the survey. Participants would have the proposal of a new Legal aid policy.

8. In mid-July, the Registry would refer the new Legal aid policy to the Committee on Budget and Finance for a technical evaluation of cost estimates. The main goal would be to stay within the envelope and to respect the five principles of Legal aid. Following the recommendations of the Committee on Budget and Finance, the Registry would have further discussions with States Parties, in the context of the facilitation, regarding the revised Legal aid policy and resolution language for the Assembly resolution. In 2023, the new policy would be reflected in the budget for 2024, so that the new policy could be implemented as of 1 January 2024.

9. The representative of the Registry clarified that the Court did not intend to present one draft policy but would present options for each thematic issue. The Court would give priority to some issues, e.g. on the basis of costs, or the status of persons. As regards the survey, the Court would hold broad consultations, with the goal being for all stakeholders to follow the consultations and reach an agreement on the process, which was key to success.

10. In response to queries, the representative of the Registry clarified that the Court would at the same time develop the Legal aid policy and also develop a document for the presentation of budget. As regards the process, he clarified that it was a new process and the Court did not intend to send a skeleton draft but would address thematic issues, with specific questions for each issue. On the basis of the response received, the Registry would prepare a draft policy. He clarified that the existing policy would continue to be applied. States Parties would have the opportunity to be fully involved in the process.

11. The ICCBA voiced its support for the Registry’s survey and noted that the ICCBA was also working on surveys with the Counsel Support staff Committee and the Defence and Victims Committee.

12. At its second meeting, on 29 March 2022, the facilitation considered the Draft questionnaire prepared by the Registry, which the representative of the Registry introduced. States Parties took note that the first step indicated in the paper was the preparation of an online consultation (survey or questionnaire) by the Registry “on issues pertaining to a fully-costed reform of the current LAP on the basis, *inter alia*, of available information, including: possibilities to improve the working conditions of support staff and related issues; the

applicability of legal aid during phases of reduced activity and the reparations phase; and the field budget for legal representative of victims' teams."

13. The representative of the Registry recalled that the Registry's 23 March message indicated that the draft questionnaire had been prepared for feedback on the following points regarding the draft questionnaire:

- (i) Whether the present draft questionnaire reflects the relevant topics of the Legal aid policy for which reform, as mandated by the Assembly, is needed; and
- (ii) Whether the questions provide for sufficient options to provide detailed and reasoned feedback on the relevant topic(s).

14. The representative of the Registry briefed the working group on the current stage of the process and, in response to queries, provided additional details on the questionnaire that was under preparation. The facilitator noted that the current stage of the reform process was a consultative stage, and would be followed by the Registry's circulation of the questionnaire.

15. The facilitator hoped that the discussion had provided the clarity needed to enable all stakeholders to complete their responses to the questions posed. As the period for responding to the two questions was still open and would expire on the following day, 30 March 2022, the facilitator encouraged all States Parties and other stakeholders that had not yet done so, to make every effort to respond to the two questions posed in the 23 March message by the deadline. She noted that, on the basis of the inputs received, the questionnaire would be finalized and then circulated, with a period for responses tentatively until 30 April 2022.

16. In addition, she also encouraged States Parties and all stakeholders to respond to the questionnaire, once it had been finalized and circulated, and she noted that the Registry would very much appreciate their views, which would be helpful in its mandate 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;"

17. At the 22 June 2022 meeting, the facilitator referred to the Assembly's mandate to the Court in resolution ICC-ASP/20/Res.5, "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".

18. The representative of the Registry recalled that, in April, as part of the Registry's consultations with States Parties and stakeholders, it had sent a questionnaire on the review and reform of the Legal aid policy, containing both general and specific/technical questions. On the basis of the responses received, the Registry prepared the "Report on the Responses to the Questionnaire on the Review and Reform of Legal Aid Policy of the International Criminal Court", dated 25 May 2022. The report served as a basis for discussions during the seminar, which was held on 30 and 31 May, on the subject "Review of the Functioning of the ICC's Legal Aid System and the Reform of the Legal Aid Policy for External Defence and Victims' Teams". The seminar was part of a consultation process with a wide range of stakeholders, including with other international tribunals based in The Hague, and focused on key topics such as:

- (i) Improvement of the working conditions of team members of defence and victims' teams
- (ii) Remuneration of external defence and victims' team members
- (iii) Re-structuring of legal aid resources
- (iv) Oversight and administrative matters

19. The representative of the Registry presented the report of the Registry titled "Report of the Registry on proposed concepts of a draft legal aid policy", dated 21 June 2022. He

indicated that the proposed concepts had been prepared further to the Assembly's mandate mentioned above.

20. States Parties welcomed the progress made by the Registry at the current stage of the process. The facilitator noted that the Court's report highlighted the key points which States Parties would need to consider. She also noted that some States had requested additional time to consider the Registry's report.

21. In order to allow the Registry to have the full benefit of the reactions of States and other stakeholders on that very important report which was a key step in the process of the reform of the Legal aid policy, the facilitator invited States that wished to do so, to submit comments or questions on the report until the end of Friday, 24 June.

22. According to the proposed timelines for 2022 which the Registry had presented at the 24 February meeting, the process was on schedule. The next step would be the submission by the Registry of the proposals on the reform of the Legal aid policy to the Committee on Budget and Finance at its September session. After States had received the report of the Committee, they would be in a position to continue their consideration of the Court's proposal on reform, taking into account the recommendations of the Committee.

23. The facilitator recalled the IER Experts' recommendation R328 on Legal aid: "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." In that regard, she encouraged States Parties to make every effort to adopt a full reform of the Legal aid policy that would adequately address all elements of Legal aid at the twenty-first session of the ASP, and avoid having to return to further reforms in the years ahead.

24. At the fourth meeting, on 21 October 2022, the facilitator recalled that the Registry had initiated an online consultation in April and, on the basis of its outcome, had held a seminar on 30-31 May, which focused on the "Review of the functioning of the ICC's Legal aid system and Reform of the Legal aid policy for external Defence and Victims' teams", at which proposals for reform of the Legal aid policy were discussed.

25. Taking into account the views expressed by all stakeholders, as well as the practice of other international criminal tribunals in The Hague, the Registry had prepared proposals for the reform of the Legal aid policy, and had invited States Parties to submit comments on the draft Legal aid reform package. The reform package prepared included the following documents:

- (i) the draft Legal aid policy of the Court, including four annexes,
- (ii) Registry Guidelines on Implementation of the Legal Aid Policy of the International Criminal Court,
- (iii) the proposed annual budget for Legal aid, including a comparison of costs between the 2013 Legal aid system and the proposed system of the Draft Legal aid policy, which States Parties had requested; and
- (iv) provisions that require reform in the Court's statutory framework.

The Registry invited States Parties to submit comments on the draft Legal aid reform package.

26. The Registry has received comments from the legal profession as well as joint comments from a group of States Parties. The facilitator thanked States and other stakeholders for submitting their comments, which would help the Registry to identify the key points that required further discussion.

27. The facilitator noted that the Committee on Budget and Finance had issued the Advance version of its report on the work of its thirty-ninth session, which contained the comments of the Committee on the draft policy.

28. The Representative of the Registry introduced the draft reform and explained the contents of the “Reform package”. The Registry’s presentation addressed: the structure of the reform package (which documents are part of the legal aid reform and which documents are supplementary information); the aimed improvements of the proposed legal aid system discussed among stakeholders during the online consultation and the seminar; the key concepts of the proposed legal aid system (with a focus on the most discussed topics: complexity levels and contract types for persons assisting counsel); and the budgetary impact of the proposed legal aid system by comparing the current average annual budget on legal aid (“envelope”) with the estimated average annual legal aid budget of the proposed system

29. Regarding the structure, the Registry representative explained that the documents forming part of the proposed reform of the Court’s legal aid system are the proposed legal aid policy and its guidelines on implementation. The remaining documents are supplementary documents that aim to assist States Parties and stakeholders in understanding the context and scope of the proposed reform. The legal aid policy itself includes four annexes. Annex I (indigence assessment and financial information form) and annex II (remuneration of counsel) are an inherent part of the proposed legal aid policy and only annexed to make the document more readable. Annexes III and IV include amendment proposals to the legal aid policy regarding the providing of lump-sums for the reparations phase and the early stage of the proceedings, and depend on a separate approval by the Assembly of States Parties. The amendment proposals are based on requests by the Trust Fund for Victims, the Legal representatives for victims and civil society that highlighted the importance of an engagement of the legal representation at the early stages (during an investigation) as well as in the assistance of the Trust Fund at the implementation phase. The guidelines on implementation would aim to give background information on the review process and guidance on the interpretation of the proposed legal aid policy and facilitate its implementation. At the heart of the draft policy, proposed improvements of the Legal aid system referred to the providing of social security for persons assisting counsel (P1-P3 level) by providing them with new contract types; the reduction of bureaucracy through, inter alia, the abolishment of time-sheets as well as to the introduction of three complexity levels and three different programmes.

30. In response to a query, the representative of the Registry indicated that Registry staff determined the complexity level based on objective criteria. He noted the possibility of having “Friends of the Court”, i.e. senior counsel who would assist in determining the complexity level. In the Court’s Counsel Support Section, the Acting Head looked at the criteria, including the stage of the proceedings and the type of evidence disclosed. This gave the Court the ability to determine whether there was a need for additional persons.

31. In response to the query whether the judges had any impact on determining the complexity level, the representative of the Registry indicated that they did not *per se*, but that they were involved at the appeals stage in case of the initiation of a review request on a decision taken by the Registrar.

32. In reference to the determination of the complexity levels, he explained that, criteria included, for example, the number of charges, the number of victims participating, the number and type of witnesses and the evidence they would present. Often, when the Registry allocated resources to a team, it was important to look into all the statements indicating why the team members were qualified. The resources a team received would depend on the complexity level of the case. The Registry representative also indicated that the qualifications of lead counsel were based on the number of years of experience in national and international criminal law.

33. The Registry representative referred to the new contracts proposed for persons assisting counsel. He presented four options, of which three contract type proposals could be continued to be further assessed as viable options: a) employment under existing short-term appointments (“STA”)⁶; b) the option of a new form of short-term staff contracts, provisionally called “Temporary Assistance to Counsel” (“TAC”) with a maximal duration of seven to nine years, subject to further consultation with the United Nations and Court

⁶ Governed by the Administrative Instruction on short-term appointments, ICC/AI/2016/001, 28 January 2016.

internal entities; and c) the option of a new form of consultancy + contract, provisionally called “Assistance to Counsel” (“AtC”) under which the Court would provide them with social security, but maintain them as external personnel with the obligation to pay taxes in the Host State.. The Court would need to develop a new Administrative Instruction for the categories b) and c). The advantages of option a), the existing STA contracts would be that it is governed by an existing and functioning system within the Court; while the disadvantage is the maximum contract duration of two years, which does not reflect the duration of the proceedings at the Court. The advantage of a new type of staff contract (option b) would be that it could be adjusted to the needs of defence and victims’ teams and that persons assisting counsel would receive entitlements and adequate protection by the Court-internal protection and complaint mechanisms, while the disadvantage was that the introduction of a new form of staff contract would require further consultation with the UN, States Parties and other relevant stakeholders within the Court. Regarding option c) the advantage is full flexibility of the establishment of the contract conditions designed for the needs of defence and victims’ teams, while at the same time providing persons assisting counsel with minimum social support. The disadvantages on the other hand refer to their external status which requires them to pay high taxes in the Host State, and makes it more difficult, and subject to legal reform processes, to have access to the Court internal protection mechanism.

34. In response to a query whether non-European nationals would be able to work in the Netherlands, the representative of the Registry indicated that the discussions on the type of contract was at an early stage of consideration. The suggested TAC (option b) contract would provide social support to the individual similar to the current STA staff of the Court. In case, the TAC contract would provide considerable differences in terms of salary or entitlements, he also noted the possibility that staff in this category could be filing cases before the Administrative Tribunal of the International Labour Organization, on the basis of inequality of treatment in relation to staff of the Office of the Prosecutor who performed the same functions. The facilitator noted that geographical representation was being taken into account.

35. As regards the budgetary impact of the proposed legal aid system, the Registry presented first, the average annual costs of the current legal aid system (“envelope”) and compared it to the average annual legal aid costs under the proposed system. As a reference, the Registry took eight ongoing cases before the Court, i.e. eight defence teams and eight victims’ teams. Comparing the average annual legal aid costs, the Registry representative noted between the envelope with 2023 remuneration scale (€6,971,232) and the main text of proposed system with 2023 remuneration scale (€7,614,888), a cost difference of 9.2% (€643,656). If considering the proposed amendments in annexes III and IV, the cost difference would be 11% (€765,083). The Registry further emphasized that the cost estimation was based on averages and the annual costs for legal aid will depend on the complexity level, the stage of the proceedings and the number of cases before the Court.

36. Regarding the timeline and the steps ahead, the representative of the Registry indicated that it would be helpful if the Assembly was able to take decisions on the key concepts identified, namely; the contract type for persons assisting counsel; the proposed introduction of the complexity levels and three different programmes; and the budgetary impact of the proposed legal aid system.

37. The Registry would continue its work before the April session of the Committee on Budget and Finance, particularly on, but not limited to, the contract issue. There was room to discuss and make choices regarding, for example, social services and payment of taxes. He noted that the latter related to an interpretation of article 25 of the Headquarters Agreement and the Court was exploring this. A number of States noted the importance of the taxation issue. The facilitator noted that this issue had to be dealt with on a multilateral basis.

38. The representative of the Registry stated that the Court needed clarity on what it would recommend, i.e. whether the Court should continue with its draft proposal or take a different direction. He encouraged efforts to be open and flexible.

39. The facilitator encouraged States Parties to express their views on the recommendations for the future and to give a precise indication on the path that the Court should follow, including whether it should return to the previous system. They should also make an effort to find flexibility. She noted that progress had been made after a number of years and encouraged States Parties to positively express themselves in order to help advance the process.

40. The facilitator would meet with interested States Parties that had responded to the Court's draft reform proposal. She invited States Parties to submit specific questions to the Registry on the proposal.

41. At the fifth meeting, on 18 November 2022, the facilitation considered the draft report of the facilitation on Legal aid.

III. Recommendations

1. The facilitation recommends that the Assembly request the Bureau to continue its work on legal aid and to report thereon to the twenty-second 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, are still ongoing;
- 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. *Takes note of* the progress made by the Court, in consultation with States Parties and all relevant stakeholders, in the reform of the Court's Legal aid system;
2. *Requests* the Court to continue its efforts in the reform of the legal aid system and to present, based on further consultations with States Parties and all relevant stakeholders, another proposal for reform of the legal aid policy for external defence and victims' teams, in accordance with the mandate, taking account of cost constraints and ensuring that the reform of the Court's legal aid system can be funded within existing resources. Full attention should be paid to the status of the members of the defence and victims' teams, in order to address their conditions of service, taking into account the current economic realities;
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-second session.