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## Report of the Registry on the Comprehensive Review of the Legal Aid System of the Court\*

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### I. Introduction

1. At its eleventh session, the Assembly of States Parties (“the Assembly”) in resolution ICC-ASP/11/Res.1,<sup>1</sup> requested the International Criminal Court (“the Court”) to, *inter alia*, submit to the Bureau and the Committee on Budget and Finance (“the Committee”) by 1 April 2013 a report on a comprehensive review of the Court’s legal aid scheme.

\* Reissued for technical reasons, received by the Secretariat on 28 March 2013 and previously issued as CBF/20/22.

<sup>1</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eleventh session, The Hague, 4-22 November 2012* (ICC-ASP/11/20), vol. I, part IIIA, ICC-ASP/11/Res. 1, section H, para. 5.

2. The conclusions of the “Report of the Bureau on legal aid” of 23 October 2012 (“the Report of the Bureau”) provide certain, though limited, guidelines on the scope of the envisaged report on a comprehensive review.<sup>2</sup> In particular, as is stated in the said report, during the informal consultations held in the course of 2012 by The Hague Working Group (“The Working Group”), as well as during the course of bilateral meetings, it was observed that many aspects of the legal aid system were cross-cutting, and that some delegations considered the approach to the review of the legal aid to date to have been “piecemeal.”<sup>3</sup> Consequently, the Bureau “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.”<sup>4</sup> The Bureau then provided the following parameters to guide the envisaged review-exercise:

“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 of further strengthening the process of establishing proof of indigence of accused.

<sup>2</sup> Report of the Bureau on legal aid, ICC-ASP/11/2, 23 October 2012, paras. 20-22 (Conclusions (Part III)).

<sup>3</sup> *Ibid.*, para. 20.

<sup>4</sup> *Idem.*

## (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.”<sup>5</sup>

3. At the outset, the Registry notes the magnitude of the comprehensive review report as envisaged by the Assembly, and the fact that it requires the overhaul of certain principles and policies in place which have been carefully developed and established over the span of the past ten years, since the coming into force of the Rome Statute.

4. The call for a *comprehensive* review, by definition, also requires the due execution of an extensive and comprehensive consultation process with all relevant stakeholders. Accordingly, sufficient time should be allocated in order to reasonably allow for the necessary consultations to take place, or for the significant amount of work required to undertake a meaningful review which can adequately and responsibly respond to the issues highlighted by the Assembly or identified by the Court itself.

5. In support of this process, the Registry takes this opportunity to report on aspects that The Hague Working Group should consider in the implementation of its mandate to conduct a comprehensive review of the legal aid system and to offer its views on the notion itself of undertaking a comprehensive review of the Court’s legal aid system.

6. The observations provided below will elaborate firstly on the evolution of the Court’s legal aid scheme (Part I); identify the limitations encountered in conducting a comprehensive review at this juncture (Part II), and offer preliminary insights on potential areas of the Court’s legal aid system which may benefit from further consideration (Part III).

## II. Part I: Evolution of the Court’s Legal Aid System

### A. Background to the legal aid system: the origins<sup>6</sup>

7. The Court has in place a comprehensive legal aid system that balances the requirements for adequate, effective and efficient legal representation of indigent persons with the budgetary constraints of a publicly funded legal aid scheme. The existing legal aid system is the by-product of extensive and multiple consultations conducted by the Registry in accordance with rule 20(3) of the Rules of Procedure and Evidence (“the RPE”). It is a carefully engineered system, which has been honed over time on the strength of experiences gained from the Court’s proceedings.

8. The first version of the legal aid system of the Court was presented in 2004<sup>7</sup> after significant consultations with different stakeholders.<sup>8</sup> Numerous reports have since been produced by the Registry on all aspects of the Court’s legal aid system, from indigence determination and threshold to legal aid entitlements of victims involved in the Court’s proceedings.

9. Since its inception, the Court’s legal aid system has been continuously monitored and periodic reviews have been undertaken to gauge whether the system is in need of

<sup>5</sup>*Idem.*

<sup>6</sup> The following part reflects, *grosso modo*, the content of the *Registry’s Single Policy Document on the Court’s Legal Aid System* (“the Single Legal Aid Document”) submitted by the Registry to the Committee on 28 February 2013 (pursuant to resolution ICC-ASP/11/Res.1), in particular paras. 4-8.

<sup>7</sup> Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons, ICC-ASP/3/16, of 17 August 2004.

<sup>8</sup> There was direct consultation with over 50 experts comprising the Court’s external partners, independent bodies representing the legal profession and *ad hoc* tribunals, in a process that commenced in January 2003. Court officials undertook exploratory missions to national bars and countries such as the United Kingdom, which have in place well established domestic legal aid systems. A seminar of counsel, attended by more than 40 experts and representatives of lawyers’ associations, also provided further information.

refinement. A notable example of this *modus operandi* is the 2007 review of the Court’s legal aid system where, nine months into the first proceedings before the Court, the Registrar commenced a performance review of the legal aid scheme on a *proprio motu* basis in order to propose to the Assembly amendments intended to improve the Court’s legal aid system on the basis of the experience gained from implementation of the system in practice. The first series of amendments submitted in 2007<sup>9</sup> – which were the by-product of consultations with experts and stakeholders<sup>10</sup> – were welcomed by the Committee, which found that the Registry proposals constituted a “sound structure for the legal aid system.”<sup>11</sup> The Committee was further of the opinion — equally shared by the Registry — that a thorough review of the system ought to be done upon conclusion of a *full cycle* of proceedings.<sup>12</sup>

10. The adjusted legal aid system has been in operation since 1 January 2008. The subsequent “Decision of the Bureau on legal aid”<sup>13</sup> (“the Decision of the Bureau”) dated 23 March 2012 adopted by the Bureau in fulfilment of the mandate entrusted to it by the Assembly regarding a review of the system, as set out in resolution ICC-ASP/10/Res.4, section J, paragraphs one to three,<sup>14</sup> introduced new changes to the legal aid system.

## B. The 2012 consultation and review process

11. On completion of its tenth session (New York, 12 – 21 December 2011), the Assembly, having considered the legal aid system of the Court as one of the main cost drivers,<sup>15</sup> requested the Registrar to finalize consultations on the discussion paper it had presented on 7 December 2011,<sup>16</sup> in accordance with rule 20(3) of the RPE, and to present a proposal for a review of the legal aid system to the Bureau before 15 February 2012.<sup>17</sup> The Registrar presented the requested report in the form of the Registry’s “Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011” (“the proposal paper”).<sup>18</sup>

12. The Assembly further 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 session.<sup>19</sup> Subsequently, at the Bureau meeting of 17 January 2012, the issue of legal aid was assigned to the Working Group.

13. In order to implement the terms of resolution ICC-ASP/10/Res.4, the Registrar immediately initiated consultations on the discussion paper. The Registry considered that “in order to respond to the request of the Assembly to the Court to continue to follow up on and assess the functioning of the legal aid system, it is of paramount importance to pursue the dialogue with all the external partners in order to be able to establish a consistently and substantially revised legal aid programme.”<sup>20</sup> The discussion paper was thus submitted to

<sup>9</sup>Report on the operation of the Court’s legal aid system and proposals for its amendment, ICC-ASP/6/4, of 31 May 2007, para. 26 (“the Adjustment Report”).

<sup>10</sup>This 2007 review process involved comprehensive consultations and meetings, and contributions were received from lawyers admitted to the Court’s List of Counsel, various lawyers’ associations, including the International Bar Association and the International Criminal Bar, *ad hoc* tribunals, countries with legal aid systems.

<sup>11</sup>Report of the Committee on Budget and Finance on the work of its eighth session, ICC-ASP/6/20, para. 80.

<sup>12</sup>See, e.g., Report of the Committee on Budget and Finance on the work of its fourteenth session, ICC-ASP/9/5, para. 77.

<sup>13</sup>Decision of the Bureau on legal aid of 23 March 2012, ninth meeting (ICC-ASP-2012).

<sup>14</sup>Official Records ... Tenth session ... 2011 (ICC-ASP/10/20), vol. I, part III, ICC-ASP/10/Res.4.

<sup>15</sup>First report of the Bureau on Legal Aid (ICC-ASP/11/2/Add.1), para. 8.

<sup>16</sup>On 7 December 2011, the Registrar informally submitted a discussion paper ASP10/01P13, exploring possible preliminary avenues to optimize the efficient use of resources allocated by States to legal aid to be paid by the Court. The Registrar had indicated that the objective of the discussion paper was to launch consultations with various partners, following which she would make formal proposals on legal aid.

<sup>17</sup>*Cf.*, resolution ICC-ASP/10/Res.4/Section J, para.3 (adopted by *consensus* at the Ninth plenary meeting of the Assembly, on 21 December 2011). The Assembly also mandated its Bureau to decide on the implementation of the revised legal aid system on a *provisional* basis, and requested it to do so before 1 March 2012, with a view to enabling it to be applied with effect from 1 April 2012 to cases *currently* before the Court and to *future* cases.

<sup>18</sup>Received by the Secretariat, in French, on 15 February 2012. The proposal paper is contained in *Appendix II* of the Decision of the Bureau, *supra*, footnote 13. See, generally, the proposal paper, paras. 4-5 and 7 *et seq.*

<sup>19</sup>Res.4, section.J, para. 3, *supra*, footnote 17.

<sup>20</sup>In the discussion paper, *supra*, footnote 16, due consideration was given to the fundamental principles governing the provision of legal aid, which were already recognised in 2004, namely *equality of arms, objectivity, transparency, continuity* and *economy*. See, the proposal paper, *supra*, footnote 18, paras. 11-12.

all defence counsel and legal representatives of victims involved in cases before the Court, to legal associations and internal actors, such as the Offices of Public Counsel (“the OPCs”), for their comments.

14. The consultations initiated by the Registrar, although undertaken in a short time-frame owing to the calendar established by the Assembly, generated a considerable amount of input. In addition to feedback in writing, the Registrar also invited different stakeholders to a meeting where they engaged in an exchange of views prior to submission of the proposal paper. The Registry’s final proposals mainly addressed two aspects of the legal aid system, namely the teams’ composition and the determination of remuneration. Several topics which called for further consultation were deferred.<sup>21</sup>

15. The recommendations on legal aid were adopted by the Working Group on 21 March 2012, and the Bureau adopted the report at its ninth meeting, on 23 March 2012 (“Decision of the Bureau”), and conveyed the decision to the Court. The changes introduced to the Court’s legal aid system as a result of this process took effect as of 1 April 2012<sup>22</sup> in accordance with the modalities of implementation stipulated in the Decision of the Bureau of March 2012.

### C. Consultations for the Supplementary Report<sup>23</sup>

16. The Decision of the Bureau requested the Court to continue the elaboration of the legal aid system including on three specific aspects already identified in the proposal paper, namely: (i) remuneration in the case of several mandates; (ii) legal aid travel policy, and, (iii) remuneration during phases of reduced activity.<sup>24</sup> In addition, (iv) 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.”<sup>25</sup>

17. Following the Decision of the Bureau, the Registry once again engaged in consultations concerning four aspects of the legal aid system, in conformity with the lessons learnt from previous consultations. The feedback received was carefully reviewed and scrupulously considered in the drafting and formulation of the Registry’s final proposals.

18. Following consultations 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”<sup>26</sup> to the Committee in advance of its nineteenth session. The proposals for amendments contained in the Supplementary Report were adopted as presented without any changes by the Assembly during its eleventh session.

### D. A continuous and comprehensive review of the legal aid system

19. As stated in the introduction, pursuant to resolution ICC-ASP/11/Res.1, the Assembly requested the Court to submit to the Bureau and the Committee, by 1 April 2013, a report on the *comprehensive* review of the legal aid scheme of the Court having provided general guidelines on the scope of such a review as mandated to The Hague Working Group.

20. The Registry recalls its position as elaborated in the Supplementary Report, that “the Court’s legal aid scheme is not set in stone and is a living system, which is constantly monitored, scrutinized and moulded or perfected, to reflect the experience gained from the application of the system in practice.”<sup>27</sup> Accordingly, in practice there has been and there

<sup>21</sup> Multiple representation; the Court’s expenses policy; remuneration during phases in which activities are considerably reduced as well as an enhanced role of the Office of Public Counsel for Victims.

<sup>22</sup> In accordance with the terms of resolution ICC-ASP/10/Res.4, *supra*, footnote 17.

<sup>23</sup> Supplementary Report of the Registry on four aspects of the Court’s legal aid system (hereinafter “the Supplementary Report”), ICC-ASP/11/43, of 1 November 2012 (previously issued as CBF/19/6 and Add.1 and circulated by the Registry on 17 August 2012).

<sup>24</sup> As defined *ibid.*, para. 40.

<sup>25</sup> Report of the Bureau, *supra*, footnote 2, para. 3.

<sup>26</sup> The Supplementary Report, *supra*, footnote 23.

<sup>27</sup> *Ibid.*, para. 62.

still is a *continuous* monitoring of the legal aid system and additional reviews with corresponding amendments will be undertaken when justified – as they have been in the past – to make the system more cost effective and ever more responsive to the needs of legal aid beneficiaries based on additional experiences gained from practice.

21. The Registry reiterates that the multiple consultations and changes introduced to the legal aid system since the beginning of the Court’s activities, including following *proprio motu* review processes, as well as the countless public filings of the Registrar in response to applications for judicial review of her decisions,<sup>28</sup> demonstrate the Registry’s pro-active economically conscious stance, while at the same time remaining mindful of the need to ensure that the funds furnished under the system are sufficient and reasonable for an effective and efficient legal representation. Overall, these and other initiatives, aimed at improving the system demonstrate that, in view of the Registry, the legal aid system is a functional living scheme while its review is a continuous responsive *in fieri* process.

22. It is the Registry’s considered opinion that the Court’s legal aid system has at this stage gone through significant changes resulting in several important amendments, including those initiated by the Registry in 2007, which have refined the system. Major deficits in the system have already been duly identified and rectified, in particular in the amendments carried out in 2012. Based on the extensive experience and the *continuous* and *comprehensive* monitoring of the legal aid system since the Court’s first judicial activities, it can be safely stated that at this juncture, with the latest set of changes in 2012, the major items that required amendment, in particular from a cost-savings perspective, have been identified and remedied.

23. The Registry therefore believes that its efforts over the best part of the last decade amount, to a large extent, to a *comprehensive review* of the legal aid system, and have resulted in significant changes, which have made the Court’s legal aid system more economically conscious and efficient, while remaining responsive to the real needs of its end-users in the *sui generis* proceedings of the International Criminal Court. For a visualization of the Registry’s evolutionary review of the Court’s legal aid system from 2004 to 2013, see the graph provided in annex.

24. The results of these actions and chronological developments are further enumerated in the recently submitted Single Legal Aid Document of the Registry.<sup>29</sup>

### III. Part II: Current Limitations

#### A. Consultation process

25. As indicated above, it is axiomatic that in order to have a meaningful comprehensive review of the legal aid system, significant consultations are required in accordance with rule 20(3) of the RPE to gather the views and observations of the system’s beneficiaries first and foremost, the legal profession and other pertinent stakeholders. Such a process, by definition, requires sufficient time for it to be beneficial and generate substantive feedback which can then be used in new policy formulation.

26. The Registry reports that the Counsel Support Section (“CSS”) – in charge of managing the Court’s legal aid system on behalf of the Registrar – is presently conducting a “lessons learnt” exercise and has requested recipients of its services (*i.e.*, external defence and victims’ teams, members of the List of Counsel, NGO-partners, to name but a few) to provide observations and suggestions on the services provided by the Section during the course of the past decade, including on the Court’s legal aid system. This process will provide valuable insights to the Registry for the purposes of further analysis of the Court’s legal aid system.

27. Notwithstanding the findings to be obtained from the abovementioned lessons learnt exercise, the Registry is of the view that producing a report detailing a comprehensive review requires the organ to embark on an even more rigorous, focused and methodological

<sup>28</sup> See, in particular, *ibid.*, para. 63, footnote 18, quoting some samples of public filings (excluding confidential observations) for the period between May 2011 to June 2012 alone.

<sup>29</sup> Single Legal Aid Document, *supra*, footnote 6.

consultation process on specific and carefully defined aspects of the Court's legal aid system that may require further assessment. The Registry therefore reiterates that, in order to present the comprehensive review report, there is an absolute need for a *detailed, in-depth, and comprehensive* consultation process to take place with the relevant actors, as conducted for all previous major reviews of the legal aid system. To achieve this, adequate time is needed to fulfill this necessary consultation requirement and to produce recommendations that are both in-depth and of utility.

## B. Completion of a judicial cycle

28. The Registry further notes that to date, a complete judicial cycle (the course of proceedings from investigations to the conclusion of the appeals phase, including reparations) has not yet been concluded in a case. As noted above, the Committee has previously requested a thorough review of the legal aid system upon conclusion of a full cycle of proceedings.<sup>30</sup> In the absence of the completion of a full cycle, the Registry is of the view that it is premature to undertake a review of the system on areas in which there still is insufficient experience. A further review after the completion of such a cycle would provide a clearer perspective on the actual lessons learnt from the proceedings.

## IV. Part III: Potential Areas for Review

29. As noted in the Report of the Bureau, the main task of the 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 system.<sup>31</sup> The Registry reiterates its position that due to the series of amendments implemented since the inception of the Court's legal aid system, as it stands today the system is one which has largely remedied major areas in need of a corrective policy response based on the experiences gained from the operation of the system in practice. There are however certain aspects of the Court's legal aid system that could, in view of the Registry, benefit from further review and assessment.

### A. The modalities of the Common Legal Representation of Victims and impact on the budget

30. In accordance with the legal texts of the Court, a victim shall be free to choose a legal representative.<sup>32</sup> However, where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives.<sup>33</sup> Consequently, the decisions by the Chambers on common legal representation affect the level of resources to be granted under the Court's legal aid system. In fact, at times the Chambers' decisions themselves craft the resources to be afforded to legal representative of victims.

31. The Registry presently uses several objective parameters to determine the level of resources to be provided for an effective and efficient representation of victims.<sup>34</sup> The Registry notes that while the decisions on common legal representation have granted varied resources to legal teams,<sup>35</sup> the parameters identified by the Registry may be refined to

<sup>30</sup>See, e.g., ICC-ASP/9/5, *supra*, footnote 12, para. 77.

<sup>31</sup>See, para. 21 of the Report of the Bureau, *supra*, footnote 2.

<sup>32</sup>Rule 90(1) of the RPE.

<sup>33</sup>Rule 90(2) of the RPE.

<sup>34</sup>The parameters considered by the Registry include, amongst others, the number and locations of victims and their indigence status, the stage of the proceedings, the specific request of the relevant Chamber, the specific need of the team, the availability and or possibility of the Office of Public Counsel for Victims to intervene and/or provide assistance. *Cf.*, the Supplementary Report, *supra*, footnote 23.

<sup>35</sup>For example, in *The Prosecutor v. Katanga* (case no. ICC-01/04-01/07) and in *The Prosecutor v. Bemba* (case no. ICC-01/05 -01/08), there are two legal teams with one counsel and team members; in *The Prosecutor v. Gbagbo* (case no. ICC-02/11-01/11), a counsel from OPCV is appointed to be assisted by one team member remunerated under the legal aid scheme; in *The Prosecutor v. Kenyatta* (case no. ICC-01/09-02/11) and in *The Prosecutor v. Sang* (case no. ICC-01/09-01/11), an external counsel is appointed to be assisted by OPCV; and, in

arrive at a more uniform application of resources for victims intervening under a common legal representation. The conclusion of a cycle of a case under common legal representation and a thorough consultation process would have to be conducted in advance of any proposal in this regard. The Registry however notes that further reflection should be given to gauge whether tailored lump-sum resource packages may be a workable formula under the Court's legal aid system in the case of common legal representation.

32. While a comprehensive review at this stage is premature, the Registry will continue to monitor the resources currently provided under the Court's legal aid system in the case of common legal representation. Once the relevant parameters become clearly defined through completion of cases and through comprehensive consultation, the Registry may propose changes to the way in which common legal representation is covered by the Court's legal aid system. Any such assessment will take into consideration the role of the OPCV in this regard.

## **B. The investigation budget of defence and victims' teams**

33. The Court's legal aid system provides each defence team with a core investigation budget in the amount of €73,006 to be used for the entirety of the case.<sup>36</sup> The core budget allocated for investigations for victims' teams is €43,752 for the duration of the proceedings of the case, including the reparations phase.<sup>37</sup> These budgets provide the legal teams with the financial resources necessary to conduct effective investigations in the field, and in the case of legal representatives of victims to also meet with their clients in the field. Such costs include the hourly fees of the professional investigator(s) or resource person(s) and field assistant(s) assigned to the team to conduct investigative work in the field; travel expenses, and the daily subsistence allowance of all team members in connection with *in situ* investigation work in the field.

34. The Registry notes that the implication of a review of this aspect of the legal aid may result in an augmentation of resources to be granted rather than any cost savings. Furthermore, as indicated above, in the absence of the completion of a full cycle of the proceedings, any amount determined as the ultimate amount for investigations may not be based on objective parameters, since the uniqueness of each case before the Court has resulted in varied requests for additional resources for investigations.

35. It is critical to note, however, that this seeming limitation is remedied by the regime of additional means in place whereby the budgets may be increased in response to a successful request for additional means made pursuant to regulation 83(3) of the Regulations of the Court ("the RoC"). In practice, when justified, the Registrar has granted additional means to increase the investigations budget and resources of teams operating under the legal aid scheme,<sup>38</sup> and accordingly, the system as it is, provides enough flexibility to ensure that legal teams have adequate means for an effective and efficient legal representation of their client(s). Nonetheless, the question of whether the standard investigation budgets granted under the Court's legal aid system ought to be increased is a question that may merit further study.

## **C. The role of the OPCs and their impact on the legal aid system**

### **1. Office of Public Counsel for Victims**

36. The role of the OPCV has been considered in a number of legal aid reports, decisions and resolutions, including recently in the Supplementary Report. The Registry has previously noted that the appointment of representation of victims is ultimately a judicial

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*The Prosecutor v. Banda and Jerbo* (case no. ICC-02/05-03/09), a counsel and associated counsel are appointed to be supported by a team.

<sup>36</sup>See, the Adjustment Report, para. 47.

<sup>37</sup>*Ibid*, para. 58.

<sup>38</sup> For example in the *Lubanga* case (case no. ICC-01/04-01/06) alone, the team has been allocated a total of €241,837.56 to date for the investigations budget, while in the *Katanga* case (cit., *supra*, footnote 35), the amount is €173,151.66. The figures continue to vary for several other defence and victims' teams.



matter<sup>39</sup> and that there are strong reasons for retaining the involvement of both internal and external counsel in the representation of victims.<sup>40</sup> Accordingly, pursuant to the specific request in the Decision of the Bureau,<sup>41</sup> the Registry conducted a consultation process and based on the assessment of the feedback received, and after taking into account relevant objective parameters (*i.e.*, conflicts of interest, views expressed by victims, NGOs, representatives of the legal professional, members of the List of Counsel, etc.), the Registry recommended that the system that ought to be maintained is a two-tier system where both OPCV and external lawyers and other relevant team members (or professionals) can be engaged in the representation of victims in Court proceedings.<sup>42</sup>

37. Nevertheless, as noted in the Report of the Bureau, during the informal meetings and consultation process, some States Parties and 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.<sup>43</sup>

38. The above-mentioned report nevertheless requested the Court to study whether ways could 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.<sup>44</sup>

39. The Registry notes that the two-tier system recommended in the Supplementary Report is already implemented in practice. The Registry considers that with the recent amendments to the RoC<sup>45</sup> and the current implementation of the two-tier system,<sup>46</sup> a pattern of the modalities of legal representation by the OPCV and external counsel will be developed over time which will provide objective parameters to further study the benefits and limits of an enhanced role of the OPCV.

## 2. Office of Public Counsel for Defence<sup>47</sup>

40. The Report of the Bureau similarly requested the Court to further analyze the role of the OPCD (and the OPCV), with particular focus on the quality and professionalism of legal representation, and issues of independence, unnecessary overlap with external counsel, possible conflict of interest and economy, respectful of the rights of both defendants and victims.<sup>48</sup>

41. To sufficiently study this matter, adequate time is again required for consultation, as well as studying and reporting on the many different facets of the questions raised.

## V. Conclusion

42. The Registry considers that the current legal aid system is the by-product of nearly a decade of policy analysis, review, formulation and reformulation in response to experiences gained from implementation of the system in practice in proceedings before the Court. In other words, in the view of the Registry, a comprehensive review of the legal aid system of

<sup>39</sup>Report of the Court on legal aid: Legal and financial aspects of funding victims' legal representation before the Court, ICC-ASP/8/25, of 5 October 2009, paras.33 *et seq.*

<sup>40</sup>*Ibid.*, para. 40.

<sup>41</sup>Decision of the Bureau on legal aid, *supra*, footnote 13.

<sup>42</sup>The Supplementary Report, *supra*, footnote 23, para.46 *et seq.*

<sup>43</sup>Report of the Bureau, *supra*, footnote 2, para.18.

<sup>44</sup>*Ibid.*, para. 22, sub-para. (a).

<sup>45</sup>Regulations 80 and 81(3) of the RoC.

<sup>46</sup>In *The Prosecutor v. Gbagbo*, the OPCV is appointed as counsel, to be assisted by one external team member under the legal aid scheme (see, ICC-02/11-01/11-138). In the two *Kenya* cases, namely *The Prosecutor v. Kenyatta*, and *The Prosecutor v. Sang et al.*, the Chamber appointed external counsel as the common legal representative to be assisted by assistants from the OPCV (see ICC-01/09-02/11-537 and ICC-01/09-01/11-479).

<sup>47</sup>The Office of Public Counsel for Defence ("the OPCD").

<sup>48</sup>Report of the Bureau, *supra*, footnote 2, para.22.

the Court has in fact already been achieved by virtue of the many consultation and review processes undertaken to date.

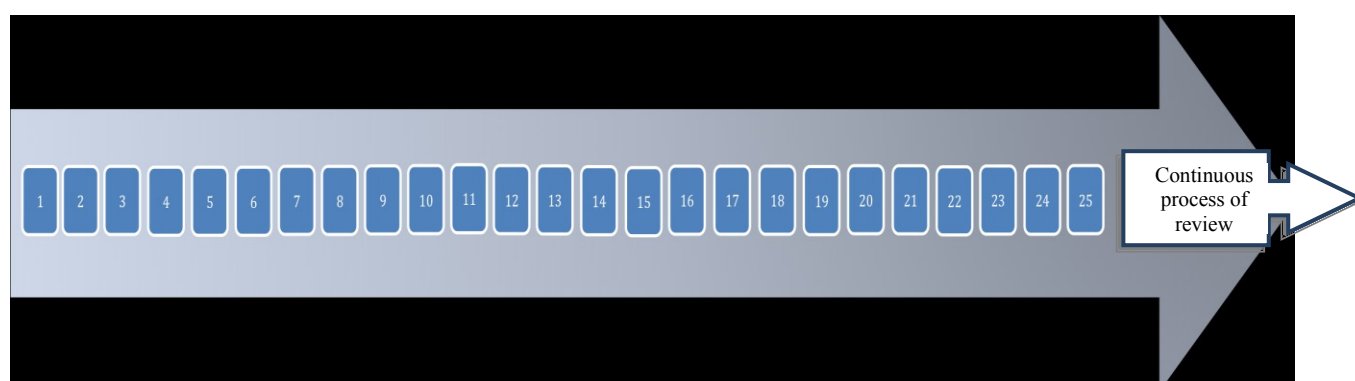
43. As stated earlier in this report, the Court's legal aid system as it stands today is fully functional and is aptly tailored to meet the needs of its end-users in the unique and complex proceedings of the Court, and benefits from the necessary controls and compliance mechanisms expected of a publicly funded legal aid scheme. The 2012 amendments in particular have remedied certain deficits which came to light from the implementation of the system in practice, ridding the system of unnecessary cost-drivers, and resulting in substantial annual savings while guaranteeing the rights of indigent persons to an effective and efficient legal representation. The approach of the Registry since the system's inception has been to engage in an ongoing monitoring and review process where the legal aid system will be subjected to further review and amendments when the circumstances, as well as the needs of the relevant stakeholders, reasonably justify adjustments to the system. This is an ongoing process.

44. Whilst the Registry is confident in the functioning of the system as crafted and in existence today, this report has highlighted areas in which additional policy review and work can be undertaken. A one-shot comprehensive review of the system which scrutinizes anew all aspects of the Court's legal aid system or sufficiently explores the issues listed in Part III of this report requires reasonable time for the necessary consultations, policy analysis and formulation to take place.

45. The Registry proposes that in the existing context of its fruitful collaboration with The Hague Working Group, the relevant Registry representatives and members of that Working Group cooperate to establish clear guidelines and a corresponding timeline for review process that can meaningfully explore additional areas of the Court's legal aid system that may benefit from further scrutiny and evaluation.

## Annex

## The Registry's Evolutionary Review of the Court's Legal Aid System



1.	Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons	ICC-ASP/3/16	17 August 2004
2.	Report by the Registry on the Formal Procedure for Assessment and Oversight of the Court's System of Legal Assistance	ICC-ASP/4/CBF.2/3	30 August 2005
3.	Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16) – Update to Annex 2: Payment details of the ICC legal aid scheme; (previously issued as ICC-ASP/4/CBF.1/8 and Corr.1)	ICC-ASP/5/INF.1	31 October 2006
4.	Report of the Committee on Budget and Finance on the work of its eighth session	ICC-ASP/6/2	29 May 2007
5.	Report on the operation of the Court's legal aid system and proposals for its amendment ; (previously issued as ICC-ASP/6/CBF.1/1 and Add.1)	ICC-ASP/6/4	31 May 2007
6.	Report on the principles and criteria for the determination of indigence for the purposes of legal aid (pursuant to paragraph 116 of the Report of the Committee on Budget and Finance of 13 August 2004); (previously issued as ICC-ASP/4/CBF.1/2)	ICC-ASP/6/INF.1	31 May 2007
7.	Report on appropriate resources for financial investigations under the Court's legal aid programme	ICC-ASP/7/4	26 May 2008
8.	Interim report on different legal aid mechanisms before international criminal jurisdictions	ICC-ASP/7/12	19 August 2008
9.	Report on different legal aid mechanisms before international criminal jurisdictions	ICC-ASP/7/23	31 October 2008
10.	Report of the Court on family visits to indigent detained persons	ICC-ASP/7/24	5 November 2008
11.	Interim report of the Court on legal aid: Legal and financial aspects for funding victims' legal representation before the Court ; (previously issued as ICC-ASP/8/CBF.1/2)	ICC-ASP/8/3	6 May 2009
12.	Interim report of the Court on legal aid: Alternative models for assessment of indigence; (previously issued as ICC-ASP/8/CBF.1/3)	ICC-ASP/8/4	6 May 2009
13.	Report of the Court on the financial aspects of enforcing the Court's obligation to fund family visits to indigent detained persons ; (previously issued as ICC-ASP/8/CBF.1/7)	ICC-ASP/8/9	6 May 2009
14.	Report of the Court on legal aid: Alternative models for assessment of indigence; (previously issued as ICC-ASP/8/CBF.2/8)	ICC-ASP/8/24	5 October 2009
15.	Report of the Court on legal aid: Legal and financial aspects of funding victims' legal representation before the Court ; (previously issued as ICC-ASP/8/CBF.2/13)	ICC-ASP/8/25	5 October 2009
16.	Report of the Bureau on legal aid for victims' legal representation	ICC-ASP/8/38	28 October 2009

17.	Report of the Bureau on Legal Aid (Defence): Alternate Methods for the Assessment of Indigence	ICC-ASP/8/39	28 October 2009
18.	Updated Report of the Court on legal aid: Legal and financial aspects of funding victims' legal representation before the Court, the comparison between internal and external counsel; (previously issued as ICC-ASP/9/CBF.1/11)	ICC-ASP/9/9	30 July 2010
19.	Report of the Court regarding the desirability of absolute thresholds for the purposes of indigence calculation; (previously issued as CBF/16/4)	ICC-ASP/10/4	17 June 2011
20.	Resolution ICC-ASP/10/Res.4 (Section J), Ninth (9 <sup>th</sup> ) plenary meeting	ICC-ASP/10/20	21 December 2011
21.	Report of the Bureau on legal aid	ICC-ASP/11/2	23 October 2012
22.	Supplementary report of the Registry on four aspects of the Court's legal aid system	ICC-ASP/11/43	1 November 2012
23.	First report of the Bureau on legal aid	ICC-ASP/11/2/Add.1	8 November 2012
24.	Resolution ICC-ASP/11/Res.1 (Section H), Eighth (8 <sup>th</sup> ) plenary meeting	ICC-ASP/11/20	21 November 2012
25.	Registry's Single Policy Document on the Court's Legal Aid System	CBF/20/5	4 March 2013