



## Assembly of States Parties

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## Updated report of the Court on the progress of the development of proposals for adjustments to the legal aid remuneration system as of 2019

### *Executive Summary*

1. In compliance with the request of the Assembly at its fifteenth session, the Court intends to submit proposals for adjustments to the legal aid remuneration system as soon as possible. The Court intends that the proposals will form the basis for a facilitated consultation process between States Parties and the Court throughout 2018, following advice from the Committee at its thirtieth session, with a view to adopting a new system, as appropriate, for implementation in 2019.
2. The present report provides a summary of the outcome of the consultation process to date, a report on the Court's progress, information on the intended process going forward, and a brief overview of the key points from the Expert's assessment. The present report does not contain concrete proposals for adjustments to the Court's legal aid system. As explained herein, these are still in development and the Registrar has not yet adopted or endorsed any of the suggestions resulting from the described process.

## I. Introduction

1. At its fifteenth session, the Assembly of States Parties (“the Assembly”) acknowledged “the Court’s efforts to continue implementing the legal aid remuneration policy” but stressed “the need for continuous monitoring of the efficiency of the legal aid system to uphold and strengthen the principles of the legal aid system, namely fair trial, objectivity, transparency, economy, continuity and flexibility”.<sup>1</sup> The Assembly requested the International Criminal Court (“the Court”) “to reassess the functioning of the legal aid system and to present, as appropriate, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly at its sixteenth session”.<sup>2</sup>

2. At its twenty-eighth session, the Committee on Budget and Finance (“the Committee”) requested the Court to keep the Assembly and the Committee informed of ongoing consultation on the Court’s legal aid system, including “the outcome of the discussion, the resulting proposal(s) and the process forward”.<sup>3</sup> A report on the consultation process was submitted to the Committee in advance of its twenty-ninth session.

3. Since the last review of the Court’s legal aid system in 2012, numerous cases have fallen under the Court’s current legal aid policy. This has allowed the Court to identify the strengths and weaknesses of the current system and provided an opportunity to assess it.

4. Any proposals to adjust the Court’s legal aid system require ensuring that the principles of equality of arms, objectivity, transparency, continuity and economy are met in a balanced and appropriate manner. The Court is conscious that presenting concrete proposals for adjustments to the Court’s legal aid system requires thorough discussion and a comprehensive review of experience to date. For this reason, the Registrar has engaged in in-depth consultations with experts, civil society, counsel and bar associations as part of the assessment process. Any proposals resulting from this discussion will in turn require careful consideration by the Committee, for any financial implications, and by the Assembly to ensure that the principles of equality of arms, objectivity, transparency, continuity and economy are met.

5. The present report provides information concerning the Court’s process in assessing the functioning of the current legal aid system.<sup>4</sup> It provides a summary of the outcome of the consultation process to date and information on the intended process going forward, but does not contain concrete proposals for adjustments to the system. This is currently under consideration and with the Registrar. The Court intends to submit proposals to the Assembly as soon as possible, with the hope that following the submission of proposals, the Bureau will ensure a facilitated consultation process between States and the Court throughout 2018, following advice from the Committee at its thirtieth session on any financial implications of the proposals. The aim is to have any adjustments to the legal aid system adopted by the Assembly, as appropriate, at its seventeenth session, for implementation in 2019.

## II. Background

6. Under article 67(1)(d) of the Rome Statute, the accused is entitled to legal assistance without payment if he or she lacks sufficient means to pay. Legal assistance paid by the Court covers all costs reasonably necessary for an effective and efficient defence. The obligation of the Court relating to the rights of the defence are further elaborated in the various rules and regulations of the Court, which set out in particular the Registrar’s obligation to provide defence counsel with support, assistance and information.

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<sup>1</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifteenth session, The Hague, 16-24 November 2016* (ICC-ASP/15/20), vol. I, part III, ICC-ASP/15/Res.5, section K, para. 64.

<sup>2</sup> *Official records ... Fifteenth session ... 2016* (ICC-ASP/15/20), vol. I, part III, ICC-ASP/15/Res.5, Annex I, para. 8.

<sup>3</sup> ICC-ASP/16/5, para. 29.

<sup>4</sup> The Report also responds to the Committee’s pre-session queries dated 11 July 2017 and 28 August 2017.

7. Rule 90 of the Rules of Procedure and Evidence also sets out, among others, the procedure for ensuring effective representation of victims in Court proceedings, including the provision of financial assistance for legal representation if victims lack the necessary means to pay.

8. In August 2004, at the Committee's third session, the Court proposed a legal aid scheme "aimed at ensuring respect for equality of arms while taking due care to keep costs at a minimum".<sup>5</sup> In 2007, the Court reported to the Assembly on the operation of the Court's legal aid system and made a number of proposals for amendment. The system that was adopted contained some of the principal components of the Court's current legal aid policy: a core legal team, an investigations budget, compensation for professional charges and payment procedures.

9. In December 2011, the Assembly requested the Court to make proposals for adjustments to its legal aid policy and provided a minimum financial target to be met for the 2012 approved budget.<sup>6</sup> The Assembly requested the Bureau to decide on the implementation of the revised legal aid system before 1 March 2012 with a view to allowing it to be implemented as of 1 April 2012 in cases already before the Court as well as in future cases.

10. Following the "Decision of the Bureau on Legal Aid" in 2012, remuneration for counsel was reduced by almost 25 per cent. Reductions were justified on the grounds that payment based on gross salary equivalents in the Office of the Prosecutor (OTP) was being duplicated by granting compensation for professional charges. Thus, payment was adjusted on the basis of net salary equivalents of counterparts in the OTP. The system was also modified to ensure that only professional charges<sup>7</sup> actually incurred would be reimbursed upon verification, rather than the uplift for professional charges being provided automatically. Before 2012, the professional charges uplift was a maximum of 40 per cent for counsel and associate counsel and 20 per cent for legal assistants and case managers. From 2012, this was reduced to a maximum of 30 per cent and 15 per cent, respectively.

11. It has been widely acknowledged that the review process resulting in the 2012 legal aid system would have benefited from a longer time frame for consultation. This would have allowed sufficient and meaningful discussions to be held with counsel, the legal community, civil society organizations and experts in advance of concrete proposals being presented to the Committee and the Assembly for review and adoption.

### III. Current process

12. In response to concerns raised by counsel, civil society and bar associations that changes made to the Court's legal aid system in 2012 were made progressively without an opportunity for a meaningful comprehensive consultation on their overall impact, the Assembly requested the Court in November 2013 to undertake a comprehensive assessment of the 2012 legal aid system and to engage independent experts to reassess its functioning. Specifically, the Assembly requested that the Court report within 120 days following the first judicial cycle, i.e. on conclusion of the reparations phase in *Lubanga*.<sup>8</sup>

13. On 3 March 2015, the Appeals Chamber delivered its judgment on the Trial Chamber's decision on reparations in *Lubanga*. The Appeals Chamber amended the Trial

<sup>5</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; annex 2 was updated by document ICC-ASP/4/CBF.1/8, of 15 March 2005 (public version ICC-ASP/5/INF.1, of 31 October 2006).

<sup>6</sup> *Official Records... Tenth session...2011* (ICC-ASP/10/20), vol. I, part III, ICC-ASP/10/Res.4.

<sup>7</sup> Reimbursements for professional charges are meant to cover expenses directly related to representation, including bar fees, Chambers' fees, office expenses, pension, health care and taxes.

<sup>8</sup> "With regard to Legal Aid, [...] requests the Court to, in support of the on-going reorganization and streamlining of the Registry, engage independent experts to reassess the functioning of the legal aid system and to report on its findings to the Bureau within 120 days following the completion of the first full judicial cycles. Such reassessment should pay special regard to the determination of indigence and the resources required for the legal representation of victims, including the ability of counsels to consult with victims". (See *Official Records... Twelfth session...2012* (ICC-ASP/12/20), vol. I, part III, ICC-ASP/12/Res.8).

Chamber's reparations decision and ordered the Trust Fund for Victims to prepare a draft implementation plan for further consideration by the Trial Chamber.

14. Following the Appeals Chamber's judgment on reparations in *Lubanga* in March 2015, the Registrar accepted a proposal from the International Criminal Justice Consortium (ICJC) for it to assess, on a *pro bono* basis, the functioning of the Court's legal aid system. The ICJC's assessment was completed on 27 October 2015. The ICJC reported to the Court that it would only submit its assessment to the Court; recommendations for any proposed changes to the system would be provided by request, if at all, at a later date.

15. In light of the continued judicial activities in the reparations phase of *Lubanga* in 2015, the Assembly, at its fourteenth session, reiterated its request that the Court report on its assessment of the 2012 legal aid system within 120 days following the first judicial cycle.<sup>9</sup>

16. At its fifteenth session in 2016, with reparations activities in *Lubanga* still ongoing, the Assembly acknowledged "the Court's efforts to continue implementing the legal aid remuneration policy" and "the need for continuous monitoring of the efficiency of the legal aid system to uphold and strengthen the principles of the legal aid system, namely fair trial, objectivity, transparency, economy, continuity and flexibility". The Assembly requested the Court "to reassess the functioning of the legal aid system and to present, as appropriate, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly at its sixteenth session". Notably, the Assembly's reformulated request to assess the Court's legal aid system was no longer tied to the conclusion of the reparations phase in *Lubanga*.

17. Initial research and insight offered by the ICJC in 2015 provided a foundation for the Court's engagement of a second independent expert ("Expert") to provide both an assessment ("Assessment Report") of the Court's legal aid system and concrete recommendations for improving it. Importantly, the Assessment Report provided a comparative analysis of the legal aid systems in other international criminal tribunals and a number of specific and concrete recommendations based on that analysis. In conducting the assessment, the Expert sent questionnaires to relevant persons in the International Criminal Tribunal for the former Yugoslavia (ICTY), the Mechanism for International Criminal Tribunals (MICT), the Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) to receive information for a cost comparison of the Court's legal aid system with other international tribunals. The analysis was detailed in the Assessment Report. The Expert also met with Court staff in the Registry and Presidency, independent lawyers engaged in international cases at the Court and other tribunals, and sent questionnaires to counsel, legal assistants and case managers who had been or were currently engaged in cases before the Court.

18. The Assessment Report was finalized and submitted to the Registrar in January 2017. A key finding of the Assessment Report was that remuneration under the Court's legal aid policy falls significantly below legal aid remuneration at other international courts and tribunals. In addition, the Expert noted that in all other international tribunals surveyed for the purposes of the assessment, the core legal team is engaged at the time of, or just after, the initial appearance of a suspect until the end of the trial. The Expert noted that although the current legal aid policy provides for the possibility of requesting additional resources over and above the core team, the process for doing so is time-consuming and resource intensive. The Expert also observed that experience at the Court to date demonstrates that the investigations budget, with a set amount for the entirety of a case, is often inadequate. The Expert identified a number of areas in which the legal aid system could be administered more efficiently, saving both time and resources. The Expert made a number of recommendations to improve the Court's legal aid system while ensuring that the criteria of equality of arms, objectivity, transparency, continuity and economy are met in a balanced and appropriate manner.

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<sup>9</sup> See *Official Records... Fourteenth session... 2014* (ICC-ASP/14/20), vol. I, part III, ICC-ASP/14/Res.4, Annex I, paragraph 6.c.

19. To ensure the widest consultation possible, the Court contracted the Expert to develop a Concept Paper based on the Assessment Report and to identify those topics on which proposals to adjust the legal aid policy could be made. The Assessment Report and Concept Paper were published on the Court's website in May 2017. These formed the basis for a broad consultation with counsel, the legal community, civil society organizations and practitioners to give full effect to the Registrar's obligation under Rules 20(3) and 21(1) of the Rules and Procedure and Evidence. Interested participants were invited to submit written comments to the Court on the Concept Paper by 30 May 2017.

20. On 19 June 2017, the Court held a one-day round-table seminar to discuss the Assessment Report and the issues identified in the Concept Paper. The discussion took place within the wider context of increasing the effectiveness of legal representation, balancing principles of justice and effective use of resources, as well as developing proposals to be presented to the Assembly. A brief summary of the discussion and comments received is set out below.

21. Following the seminar, participants were invited to submit any additional written comments no later than 3 July 2017. In total, the Court received nine written submissions before and after the seminar. A summary of points raised during the seminar and in written comments is provided below for the Committee's information.

22. On 31 August 2017, and based on the Assessment Report, and input from the Registry, civil society, counsel, bar associations, and practitioners, the Expert prepared and transmitted to the Registrar two preliminary drafts of proposed legal aid policies for the Registrar's consideration (one for defence and one for victims). Following receipt, in September and October, internal consultations have been held within the Registry on the preliminary drafts. On the basis of written comments received from the Registry Legal Office, Counsel Support Section and Office of the Director of Judicial Services, second drafts have been prepared by the Expert. These are currently under review within the Registry and additional information is being gathered prior to finalisation by the Registrar. The expectation is that the finalised, proposed policies will be presented, as appropriate, to the Assembly as soon as possible.

#### **IV. Proposed steps forward**

23. The Court is mindful that a proper assessment of the legal aid system requires that the principles of equality of arms, objectivity, transparency, continuity and economy are met in a balanced and appropriate manner. Following its submission of proposed adjustments, the Court envisages a thorough and facilitated consultation process with States in the first half of 2018. The purpose of the consultation with States is to discuss the Court's proposals with the goal of ensuring the Court employs the best available methods to increase the effectiveness of legal representation, balance principles of justice and effective use of resources, as well as produce concrete proposals for the Assembly's consideration in 2018. In addition to the consultation process with States, the Registrar anticipates that the Court will receive additional feedback from civil society, practitioners and bar associations on the proposed draft legal aid policies after these have been submitted to the Assembly.

24. The Court envisages that a facilitated consultation process in 2018 will be informed by any recommendations from the Committee at its thirtieth session on the financial implications of the Court's submitted proposals.

25. The aim is that new legal aid policies resulting from a thorough discussion with all stakeholders will be submitted to the Assembly for adoption, as appropriate, at its seventeenth session with a view to starting implementation, if any, in 2019, in the context of the approved 2019 budget.

#### **V. Summary of the discussion during the 2017 consultation process**

26. The Court's seminar of 19 June 2017 was divided into five discussion blocks: (i) remuneration; (ii) complexity and resource requirements; (iii) defence-specific issues; (iv)

victim-specific issues; and (v) article 70 cases, duty counsel appointments and rule 74 advisers.

27. The event was moderated by Judge Howard Morrison. The session on defence-specific issues was moderated by the Mr Richard Rogers, the expert who prepared the Assessment Report. The session on victims-specific issues was moderated by Mr Fergal Gaynor, a former victims' counsel at the Court. The event was attended by approximately 40 participants, including the Registrar and Court staff, legal practitioners with experience representing accused persons and/or victims before international tribunals and in domestic settings, representatives of civil society organizations and representatives from regional and international bar associations. Representatives from other international tribunals and from the relevant sections and independent offices of the Court were also invited to take part. The Bureau's focal point for legal aid was invited to attend. Several States expressed an interest in participating in the seminar, and ultimately one State attended.

28. A summary of the key points arising from the discussion and written submissions received before and after the seminar is provided below. The summary is not intended to signal the Registrar's endorsement of any aspect of the discussions; any proposals to be made by the Court are still under consideration. The summary is also not intended to provide a comprehensive account of all of the points raised in the consultations to date; rather, it aims at providing a general overview of the parts of the discussion specifically impacting remuneration and resource allocation.

#### **A. Remuneration**

29. Participants reached a broad consensus in support of the Expert's findings on the need to adjust fee levels to ensure greater equivalence with counterparts in the OTP and at comparable international courts and tribunals, for the reasons cited by the Expert.

30. Some noted that a greater disparity in equivalence exists in the remuneration of junior staff, i.e. legal assistants and case managers. Participants considered that the "critical underfunding" of defence and victims' teams would be best addressed by adjusting remuneration levels within the range provided by the other international criminal tribunals. In addition, participants formulated a number of proposals specific to the issue of remuneration, i.e. to engage in discussions with the Host State for tax-free status for defence and victims' teams; to move toward a lump-sum system rather than a system dependent on administration and verification; or to remunerate junior members of legal teams with the same entitlements as staff of the Court, in a manner similar to the system at the STL. Of particular concern was the current system for providing compensation for professional charges. Participants suggested establishing a system of payment made automatically and on a monthly basis, instead of upon request and with the provision of supporting documentation, at the end of the year.

#### **B. Assessing complexity and resource requirements**

31. With regard to case complexity and resource requirements, participants considered whether the Court's cases were too diverse to allow for a standard formula to assess a case's complexity *ab initio*. Some considered that establishing a lump-sum system, of which complexity is a criterion, could be employed for the investigations budget or, for example, during the appeals phase of a case. In particular, participants suggested that there must be provisions in any legal aid system to account for unforeseeable potential increases in workload which could not have been budgeted for in advance. In light of this, the discussion focused on the need for ensuring flexibility in the legal aid system. In respect of victims' teams, participants supported the idea of establishing an overall budget to allow victims' representatives to adequately plan and organize case strategy in accordance with their available resources.

**C. Victims: Team composition, overall budget, and presumption of victims' indigence**

32. With regard to victim-specific issues, participants noted that the Court's jurisprudence concerning victim participation is still in development in particular with respect to the role of victims at each phase of the proceedings. Participants also pointed out that experience so far has demonstrated that the reparations phase requires a greater contribution from victims' teams in terms of the level of resources required. Participants shared their experience that, while some phases of the proceedings may necessitate more intensive levels of client communication by victims' counsel in order to provide sufficient updates and seek instructions as live issues arise, a base level of regular communication is necessary from the beginning of victim participation until the end of proceedings (and potentially a short while thereafter). Most participants emphasized that ensuring maximum victim participation in the courtroom requires activities to take place primarily in the field. As for a recommendation to apply a presumption of indigence to victims participating in the Court's proceedings, it was noted that currently, the process of determining indigence actually costs the Court more than it recovers, and that, thus far, all of the victims participating in cases before the Court had been declared indigent.

**D. Defence: Team composition and investigations budget**

33. With regard to defence-specific issues, participants concurred with the Expert's assessment that it is necessary to have a full core team from the suspect's initial appearance through the end of trial. Participants considered this essential at the Court in particular because of the specificity of the Court's proceedings in respect of the volume of work in the pre-trial phase and during the disclosure process. The need to ensure that the defence has the means to access experts and technology as required, consistent with the rights of accused under article 67(1)(b) of the Statute to have adequate time and facilities to prepare the defence, was also discussed. There was a general consensus on the need to increase the standard budget ceiling for defence investigations and to support defence teams in hiring professional and well-trained investigators, and agreement with the Expert that a "one budget-for-all" approach is incompatible with the vast diversity in cases at the Court. It was recalled that the quality of legal representation has an impact on the fairness and efficiency of the judicial process. Therefore, the costs for the Court in this regard – including perceptions of the fairness of the trials – may be far greater than the actual expenses associated with operating a well-resourced legal aid system.

**E. Article 70 cases, duty counsel and rule 74 appointments**

34. With regard to article 70 cases, duty counsel and rule 74 appointments, it was noted that experience to date in cases arising under article 70 of the Statute has demonstrated that these cases may involve multiple accused or rely on complex evidence, making them potentially as resource intensive as a case arising under article 5 of the Statute. Nevertheless, the Expert considered that fewer resources could be allocated at the outset for an article 70 case by limiting team composition and reducing the lump sum in the appeals phase. Participants also discussed ways to improve the efficiency of the list system and transparency in the assignment of duty counsel and rule 74 advisers.