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## Performance Audit Report on Legal Aid\*

\* Some parts of this report have been redacted at the request of the Registry.



**BAI**  
BOARD OF AUDIT AND INSPECTION  
REPUBLIC OF KOREA

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## I. Executive Summary

The report presents the result of the Board of Audit and Inspection of the Republic of Korea (BAI)'s performance audit on "Legal Aid" of the International Criminal Court (ICC). The objectives of this audit were to assess and improve the effectiveness, efficiency, and economy of the administrative processes of the legal aid system and the allocation of available resources. Specifically, the External Auditor reviewed the indigence assessment, counsel appointment, and budget payment of the legal aid of the ICC. While it is commendable that the ICC has managed to operate legal aid within limited resources to ensure the proceedings of trials and the rights of the accused, there have been findings and recommendations mostly with the perspective of transparency and internal control as follows.

### *Legal Aid Based on Indigence Assessment*

In the last 10 years, a total of 16 defendants have applied for legal aid, and all of them received legal aid from the ICC. As a result of reviewing the legal aid process for these defendants, it was found that 11 of the 16 had already started receiving legal aid before even applying, that legal aid was provided before or without Registrar's decision, and that in some cases the legal aid continues without a decision by the Registrar even after the results of the indigence assessment are available.

Furthermore, due to the lack of a verification process, absence of oversight, and confusion of the reporting line, legal aid continued to be provided to defendants even though the results of the indigent assessment showed that some defendants were not indigent. And the ICC has made no effort to recover €1.92 million that was overpaid to these defendants.

Also, indigent assessments to determine the provision of legal aid were found to be prolonged, with an average of 293 days and a maximum of 1,073 days to reach a conclusion, despite the fact that Regulation of the Court requires the results of such assessments to be available within 30 days from commencement of assessment. It was analyzed that non-cooperation from States Parties in submitting information for indigence assessment was the main reason.

The practice of granting legal aid to defendants regardless of whether they have applied for legal aid and regardless of the outcome of the indigence assessment may create ethical problems for defendants and weaken internal controls over the legal aid budget. Failure to properly verify the results of the indigence assessment or to seek to recover overpaid legal expenses from defendants may also result in budget waste. Of course, while Articles 64 and 67 of the Rome Statute provide that a defendant has the right to a fair and expeditious trial and the right to be represented by a counsel of his or her choice, it is also worth recalling that Article 67 of the same Statute provides that legal aid shall be granted to the defendant who lacks sufficient means to pay for it. Moreover, given that the recovery process for legal aid already granted to non-indigent defendants is not working, the ICC needs to improve its current practice in future reforms so that the principle of providing legal assistance only to the indigent could be observed while ensuring the expeditiousness of trial proceedings.

### *Appointment of Counsel*

The ICC provides legal representation (counsel) for suspects, defendants, witnesses, and victims through legal aid. Before appointing counsel, the ICC has established a three-person internal evaluation panel to verify that the applicants are qualified for inclusion in the List of Counsel, but the assessment result of the first panel member can influence the other panels. Also, the hierarchical structure of the panel members composed of the same section may make it difficult to conduct an independent assessment.

Moreover, there was no monitoring system in place to verify that all candidates were contacted to confirm their availability at the stage of the appointment process for Ad-hoc counsel, duty counsel, and legal advisor for a witness, and 45 out of a total of 938 counsel (as at the end of December 2022) had not been contacted over the past two years, and 13 of the 45 were listed as having confirmed their availability even though they were unable to receive communication during the period.

This raises concerns that the ICC's panel is not performing an independent verification for the qualification of counsel who wishes to be included in the List of Counsel and that the appointment process is not transparent as the List of Counsel is not updated, and is not monitored to ensure that all candidate counsels are available.

In addition, the ICC does not provide the relevant Chambers with sufficient information on the overall financial implication of choosing different types of legal counsel for victims despite the recent increased rate of the legal aid budget for victims.

### ***Transparency and Budgetary Oversight for the Legal Aid Payment***

Although the legal aid budget is allocated to two commitment items, referred to as “Counsel for defense” and “Counsel for victims”, the ICC has used €259,678 of the victims’ budget allotment to cover defense team costs over the past five years (2018-2022). In particular, in relation to the Contingency Fund for 2020, the ICC misreported the actual expenditures per commitment item to the CBF and ASP.

The ICC used the practice of covering legal aid costs from different budget categories. While the ICC could reject requested missions if the specific budget was depleted, €424,341 were overspent under the flexibility principle. In addition, the ICC has not appointed a Legal Aid Commissioner as required by the ICC Legal Aid Policy (ICC-ASP/12/3) since 2013.

As a result, inaccurate reporting could have led States Parties to the misunderstanding legal aid budget’s actual expenditure, weakening legal aid budget transparency. Also, the lack of an oversight body on legal aid payment could undermine financial control over the legal aid budget.

## **II. Objectives and Scope of Audit**

1. Pursuant to the Assembly of States Parties (ASP) decision dated 16 December 2020, the Board of Audit and Inspection of the Republic of Korea (BAI) has been serving in the capacity of the External Auditor of the International Criminal Court (ICC) since the financial year 2021. As set out in Article 2.1.8. of the Agreement for External Audit Services between ICC and BAI, the External Auditor’s responsibility comprises conducting up to two performance audits each year, as per the request of the ASP.
2. During the Budget Management Oversight (BMO) meeting on 8 November 2021, States Parties concurred with the proposals of the two performance audits for 2022, namely Temporary Personnel and Legal Aid. After submitting an audit report on temporary personnel to the Committee on Budget and Finance (CBF) on 17 September 2022, the External Auditor presented the audit objectives and scope of audit on legal aid during the BMO meeting on 12 October 2022, and also reported that the audit result on legal aid would be submitted in May 2023.
3. The External Auditor sent a draft of the Terms of Reference for the audit on 24 October 2022. Upon the consensus on the Terms of Reference, a notification letter was sent to the Registrar on 27 October 2022. Subsequently, two on-site audit missions on the ICC were conducted from 31 October to 10 November 2022 and from 6 to 22 March 2023.
4. The audit objectives were to assess and improve the effectiveness, efficiency, and economy of the administrative processes of the legal aid system and the allocation of available resources.
5. The audit was carried out in accordance with the International Standards of Supreme Audit Institutions (ISSAI) on performance audits, and Regulation 12 of the Financial Regulations and Rules (FRR), including additional terms of reference governing the audit of the ICC, disclosed in the annex 6(c) to the FRR. These standards require the External Auditor to comply with relevant ethical rules, exercise professional judgment, and take a systematic approach throughout the audit by identifying problems, seeking solutions, and providing recommendations for improvements.
6. The audit focused on only administrative processes related to the legal aid system, and judicial activities were excluded from the audit scope. The scope of the audit is limited to the last ten years (2013-2022) after the year in which the current legal aid system of the ICC had been put in force.

7. The audit covered the assessment of the following detailed objectives, among other things:
  - a) Whether the budget has been prepared in an efficient manner and its expenditure has been carried out in a transparent and cost-efficient manner;
  - b) Whether the processes for appointing counsel and managing the list of counsel have been conducted in a fair, efficient, and transparent manner;
  - c) Whether the processes for applying legal aid and determining indigence have been performed in an efficient and effective manner; and
  - d) Whether there exist overlapping duties among relevant divisions or sections, and coordination among them is in place and works in an efficient and effective manner.
8. The audit was based on:
  - a) Review of the ICC's regulatory framework (regulations, rules, administrative instructions, SOPs, risk management, control activities, etc.) related to the legal aid system;
  - b) Review of the implementation of previous recommendations from the ASP, the CBF, external and internal auditors related to the legal aid system;
  - c) Analysis of the evolution of the ICC's legal aid system and costs;
  - d) Review of the basis for budgetary planning for costs of the legal aid system and the implementation thereof;
  - e) Review of the ICC's documents and reports related to the legal aid system submitted to the CBF, the ASP, and external and internal auditors;
  - f) Assessment of the effectiveness and internal controls for the administrative processes to appoint counsel for defense and victims and determine indigence;
  - g) Interviews with those in charge and other relevant stakeholders; and
  - h) Review of any documents and reports related to the legal aid system, if necessary.
9. All observations and recommendations were discussed with the relevant staff in the Counsel Support Section, Budget Section, Finance Section, Office of Public Counsel for Victims, Victims Participation and Reparations Section, and External Operations Support Section. In order to facilitate the discussion, the observations and preliminary audit findings were summarized and communicated to them during the field audit mission.
10. The draft audit report was sent to the ICC on 2 May 2023, and the final version of the audit report was finalized by reflecting their comments.
11. The following six auditors of the BAI participated in this performance audit mission, namely Mr. Yangchan Cho (Director of Division of Audit on International Organizations), Ms. Jung A Chae (Team leader), Mr. Hyunseok Kim, Ms. Mina Jeong (Senior Auditors), and Ms. Yunyoung Ko, Mr. Yunhyeok Park (Auditors).

### III. List of Recommendations

**Recommendation 1:** The External Auditor recommends the Court to prepare measures to ensure the following principles are upheld while ensuring the protection of defendants' rights under the Rome Statute guaranteed and without compromising the expeditiousness of the trial:

- a) Individuals seeking legal assistance must apply for legal aid in order to be eligible for legal aid;
- b) All legal aid, including provisional ones, should be subject to the legitimate decision-maker; and
- c) When reliable indigence assessment results come out, they should be taken into account when making legal aid decisions.

**Recommendation 2:** The External Auditor recommends the Court to

- a) Establish a verification process for indigence assessment; and
- b) Clearly identify the department responsible for supervising the RFI's indigence assessment work in the Registry.

**Recommendation 3:** The External Auditor recommends the Court to:

- a) Establish clear administrative procedures and division of tasks for the recovery of overpaid legal aid funds; and
- b) Promptly inform any defendants found to have received legal aid despite having assets and solicit their opinion, and actively pursue measures to recover overpaid legal aid funds by promptly requesting the Chamber or the Presidency for a recovery order if the defendant appeals.

**Recommendation 4:** The External Auditor recommends the Court to find ways to further induce cooperation from States Parties in the indigence assessment process by, for instance, inserting specific provisions in the legal framework related to the legal aid system.

**Recommendation 5:** The External Auditor recommends the Court to:

- a) Amend the SOP relating to the evaluation of applications submitted by counsel candidates for inclusion in the List of Counsel in order to ensure eligibility assessment in a horizontal sense and to oversee the final decision by a third party; and
- b) Revise the review system with the assistance of the IMSS to strengthen an independent review process that prevents individual panels from viewing other panels' assessment results.

**Recommendation 6:** The External Auditor recommends the Court to:

- a) Implement monitoring the process for confirming availability to ensure that every counsel candidate is contacted; and
- b) Find a way to ensure that the contact information of counsel candidates in the List of Counsel is periodically updated to provide candidates with a fair opportunity to practice counsel.

**Recommendation 7:** The External Auditor recommends the Registry to, as a standard item in its reports on legal representation of LRV to Chambers, provide relevant options alongside their financial implications for the Court's budget as far as these can be calculated.

**Recommendation 8:** The External Auditor recommends the Court to use the due internal process when transferring legal aid budget and to ensure accurate reporting on the actual expenditures of the legal aid budget for defense or victims respectively in the annual budget performance report to be submitted to the ASP.

**Recommendation 9:** The External Auditor recommends the Court to minimize the practice of covering legal aid costs from different budgets, and where it is necessary to use other budget categories for flexibility, the Court should provide a rule basis in order to draw on the legal aid funds of other budget categories.

**Recommendation 10:** The External Auditor recommends the Court to appoint and operate the Legal Aid Commissioners (or the Joint Committee on Legal Aid pursuant to the new Legal Aid Policy) as an independent oversight body in order to ensure transparency and objectivity in the legal aid budget use.

## IV. Introduction

### 1. Overview of the Legal Aid Policy

12. The ICC operates a legal aid system in accordance with Articles 55(2)(c) and 67(1)(d) of the Rome Statute, which guarantees the right of persons to be questioned either by the Prosecutor, or by national authorities under Part 9 of the Statute, and accused persons respectively to legal assistance. In cases where the interests of justice require legal assistance, but they lack sufficient means to pay for it, the ICC provides legal assistance to them free of charge.

13. The Rome Statute does not clearly state that victims have the right to receive legal assistance paid by the Court. However, Rule 90(5) of the Rules of Procedure and Evidence (RPE) says that if a victim or group of victims cannot afford to pay for a legal representative chosen by the Court, they may receive assistance from the Registry, which may include financial assistance. In order to make sure that indigent victims can exercise their rights under the Court's legal framework, the Court has been providing them with legal aid resources, even though the legal basis for funding their legal representation is not as clear as it is for the defense.

14. The ICC has been managing the legal aid system since January 2003 and has revised its policy two times in 2008 and 2012. At the 11th session of the ASP in 2012, it was resolved that the Court would submit a single policy document on the legal aid system to the Bureau and the Committee on Budget and Finance.<sup>1</sup> In the following year, or 2013, the Court submitted the single policy document to the ASP (hereinafter the "ICC Legal Aid Policy"), and it was approved.<sup>2</sup>

15. The ICC Legal Aid Policy is a result of the Assembly's previous resolutions regarding legal aid, as well as the legal provisions outlined in the Court's legal documents and internal guidelines. This document serves as the official legal aid scheme for the Court since 2013 and up to the present.

16. The basic principles of legal aid operation established in the above policy are the Equality of Arms, Objectivity, Transparency, Continuity and Flexibility.<sup>3</sup> Especially, considering that the most practical and effective means of defense for defendants is the right to the assistance of counsel, it can be said that achieving the principle of the equality of arms through the legal aid system is the most effective way to ensure the right to a fair trial for indigent people.

17. On 9 December 2021, the ASP requested the Court to continue its review of the functioning of the legal aid system and to present a range of fully costed proposals for reform of the legal aid policy for external defense and victims' teams for the consideration of the Assembly, through the CBF, at its twenty-first session. In producing these proposals, the Court was requested to take account of cost constraints and to explore constructive options to improve the conditions of services of external defense and victims' team members.<sup>4</sup>

18. At its 39th session of the CBF in September 2022, further to the mandate to reform the Court's legal aid system given by the ASP, the Registry submitted to the CBF documents with regard to the said reform, including the Draft Legal Aid Policy of the ICC and supplementing documents<sup>5</sup>. The Draft proposes a new system to allocate legal aid resources based on the stage of the proceedings and the complexity of the case. The Draft also includes an improvement of working conditions of defense and victims' team members, by adopting a legal aid system in which persons assisting counsel are engaged by the Court via "Assistance to Counsel" contracts. However, as the new legal aid policy has not been finalized by the ASP, and is still under active discussion to the present, the proposed reforms were not included in the scope of this audit.

## 2. Operation of the Legal Aid System

19. The operation of the legal aid system is managed by the Registry, and various departments within the Registry are responsible for carrying out specific tasks related to legal aid. The Counsel Support Section (CSS) provides the defendants with application forms for legal aid, receives and reviews the submitted applications, provides the List of Counsel for the defendants to choose from, supports the appointment of counsel at the request of the Chamber, Office of the Prosecutor (OTP), and Victims and Witnesses Section (VWS), and manages the legal aid budget for remunerating the selected counsel and spending operational expenses.

<sup>1</sup> Resolution ICC-ASP/11/Res.1 (ICC-ASP/11/20).

<sup>2</sup> Registry's single policy document on the Court's legal aid system (ICC-ASP/12/3).

<sup>3</sup> *Ibid.* para. 9.

<sup>4</sup> ICC-ASP/20/Res.5, paras. 89-93.

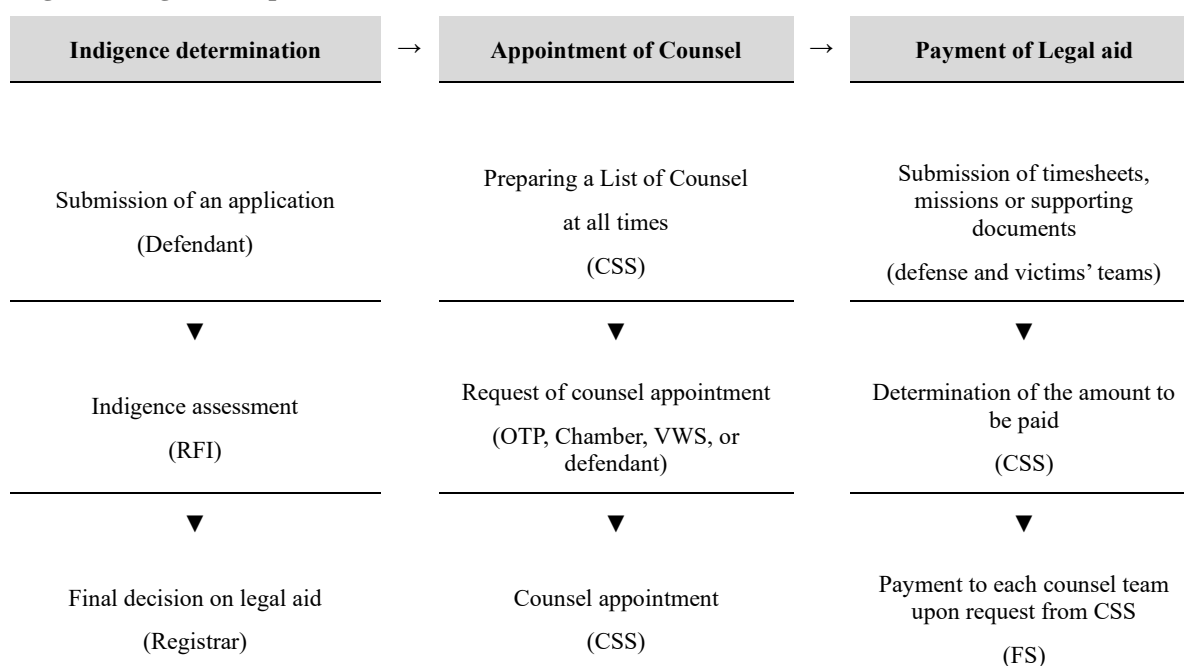
<sup>5</sup> Two amendment proposals to the Draft Legal Aid Policy (annexes III and IV), The Registry Guidelines on Implementation of the Legal Aid Policy of the ICC, and The Supplementary Document on the Annual Budget for Legal Aid.

20. The Victims Participation and Reparations Section (VPRS) within the Registry is responsible for processing victims' applications for participation and reparations, and if a legal representative is appointed by the relevant Chamber, the CSS is responsible for budget expenditure such as payment to the legal team. However, if a counsel from the Office of Public Counsel for Victims (OPCV) is selected as the victim's legal representative, the compensation and operating expenses are executed from the budget assigned to the OPCV, not from the legal aid budget. It should be noted that only the budget paid to external counsel was audited in this review, and the budget spent by the OPCV was not within the scope of the audit.

21. The detailed provisions for the operation of legal aid established under Article 67(1)(d) of the Rome Statute are scattered throughout the RPE, the Regulations of the Court (RoC), and the Regulations of the Registry (RoR). These regulations cover indigence determination, making a List of Counsel, a procedure for payment of legal fees, and other relevant matters.

22. The proceedings of the legal aid system are conducted as follows: indigence determination, appointment of counsel, and budget implementation. Indigence determination is triggered by the submission of an application by the defendant, indigence assessment by the Registry Financial Investigator (RFI), and the final decision on whether to grant legal aid by the Registrar. With respect to the appointment of counsel, a List of Counsel is prepared by the CSS at all times, and upon request of the OTP, the Chamber, the VWS, or the defendant, the CSS shall appoint a counsel from the list. Regarding legal aid costs, the CSS determines the amount to be paid after assessing timesheets, missions or any supporting documentation submitted by counsel teams, and the Finance Section (FS) pays the determined costs to each counsel team upon request from the CSS.

**Figure 1: Legal Aid Operational Procedure**



## V. Preliminary Analysis

23. The External Auditor analyzed the number of persons eligible for legal assistance over the past ten years, the number of counsels involved in the legal aid system, as well as the trend of budget and expenditure for legal aid. First, it was confirmed that 16 defendants underwent indigence assessment over the past ten years while all victims were considered indigent and did not undergo indigence assessment. Additionally, 938 external counsels were included in the List of Counsel over the past ten years, of which 373 were designated as counsel for the defense team, including duty counsel and ad hoc counsel. In contrast, 13 external counsel and six counsel of the OPCV were designated as legal representatives for the victims. Finally, the ICC spent a total of 58.2 million euros from the legal aid budget allocated from 2013 to 2022.



**Table 1: Preliminary Analysis of Legal Assistance over the Past Ten Years**

Type	Indigence Assessment	External Counsel		Expenditure (€) <sup>6</sup>
		List	Appointed <sup>7</sup>	
Defendant	16	938	373	43,249,000
Victim	0		13	14,954,000

Source: Data submitted by the Court

### *Legal aid status by stage of proceedings*

24. The duration and amount of legal assistance provided by the ICC to defendants who applied for legal aid between 2013 and 2022, as well as the number of assigned counsel and case progress, are as follows. According to this table, over the past decade, the ICC has provided an average of 1,642,856 euros per defendant (minimum of 62,852 euros, maximum of 4,992,359 euros) and the average duration of assistance was 1,666 days per defendant. From 2013 to 2022, 16 defendants applied for legal aid, and the ICC provided legal aid to all of them. The total amount of legal aid provided is 26.29 million euros as of 31 October 2022.

**Table 2: Legal Assistance to Defendants by the ICC over the Past Decade** (in euros)

No.	Defendant	Duration of Legal Aid	Day	Amount of Legal Aid	Status of Proceedings
1	(A)	-----	3,483	4,992,359	Reparation
2	(B)	-----	1,801	913,249	Closed
3	(C)	-----	1,854	925,192	Closed
4	(D)	-----	1,531	769,231	Closed
5	(E)	-----	3,144	3,245,377	Closed
6	(F)	-----	1,466	817,500	Closed
7	(G)	-----	2,811	4,420,521	Appeal
8	(H)	-----	2,587	923,495	Reparation
9	(I)	-----	1,664	2,633,682	Trial
10	(J)	-----	1,443	2,391,857	Trial
11	(K)	-----	1,377	1,788,529	Trial
12	(L)	-----	872	914,519	Trial
13	(M)	-----	714	505,390	Closed
14	(N)	-----	613	474,941	Trial
15	(O)	-----	231	62,852	Pre-trial
16	(P)	-----	1,064	507,007	Closed
Average			1,666	1,642,856	-
Total			26,655	26,285,701	-

\*The data in the table are as of October 2022

Source: Data submitted by the Court

<sup>6</sup> These figures include not only the 16 defendants who underwent indigence assessment starting from 2013, but also encompass defendants and victim teams who received legal aid prior to that period and have continued to receive legal aid until the present.

<sup>7</sup> The appointed number is a number with duplicate appointments, which is different from para. 29 (based on person).

25. Of the 16 defendants mentioned above, excluding the Article 70 case<sup>8</sup>, there are a total of four cases where the status of each trial stage in the main trial can be determined either guilty or innocent, and the sentences finalized. The average duration for these cases is 2,175 days (about six years), as shown in the table below, and the period from the commencement of the trial to the verdict took the longest time with an average of 912 days. In cases where there was an appeal, it took an average of 828 days from the verdict to the appellate verdict.

**Table 3: Average Duration at Each Stage of the Proceeding over the Past Decade**

	(A)	(G)	(H)	(E)	Average
First Appearance	-----	-----	-----	-----	
↓	441 days	426 days	177 days	263 days	327days
Decision on the Confirmation of Charges	-----	-----	-----	-----	
↓	451 days	256 days	152 days	411 days	318days
Opening of the trial	-----	-----	-----	-----	
↓	1,406 days	1,156 days	3 days	1,084 days	912days
Verdict	-----	-----	-----	-----	
↓	632 days	1,046 days	-	807 days	828days
Appeals judgment	-----	-----	-----	-----	
↓	↓	↓	↓	↓	
Total	2,927 days	2,881 days	330 days	2,562 days	2,175 days

Source: Case information sheet of the ICC web page

26. And during the same period, a total of ten new victim teams were established, with five teams consisting of external counsel (including mixed teams with the OPCV), and an average of 1,093,683 euros were provided per external counsel team. It was also found that victims tend to receive legal assistance for average 268 days (minimum 149 days, maximum 432 days) after the start of the defendant's legal assistance, compared to the commencement date of the defendant's legal assistance.

<sup>8</sup> It is the case of offences against the administration of justice pursuant to Article 70 of the Rome Statute.

**Table 4: Legal Assistance to Victims by the ICC over the Past Decade (in euros)**

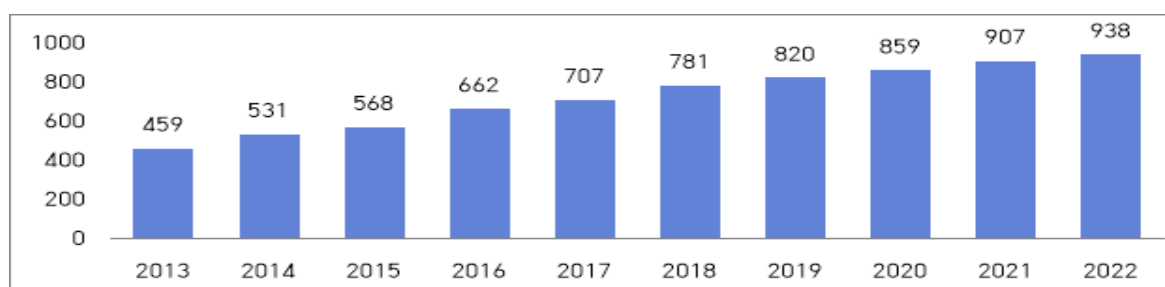
No.	Defendant	Duration of Legal Aid	Day	Gap <sup>9</sup>	Number of Teams (legal representative)	Amount of Legal Aid <sup>10</sup>
1	(G)	----- ~ ongoing	2,531	+281	2(3)	1,732,709
2	(H)	----- ~ ongoing	2,337	+251	1(1)	1,535,481
3	(I)	----- ~ ongoing	1,233	+432	1(3)	913,211
4	(L)	----- ~ ongoing	592	+281	1(2)	330,877
5	(J)	----- ~ ongoing	1,229	+215	2(7)	956,137
	(K)			+149		
Average			1,584	+268	-	1,093,683
Total			5,468,415			

\*The data in the table are as of October 2022.

Source: Data submitted by the Court

### *The List of Counsel*

27. The number of the counsel in the List of Counsel has shown a steady increase from 2013 to 2022, as evidenced by "the Status of the List of Counsel (2013-2022)" in Figure 2. As of 31 December 2022, there are a total of 938 members on the list.

**Figure 2: Status of the Counsel Team (2013-2022) (number of persons)**

\* Two counsels were removed with the record of disciplinary/criminal in 2016 and 2022 from the List of Counsel.

Source: Data submitted by the Court

28. The following table shows an analysis of Geographical Representation and Gender Balance (GRGB) in the List of Counsel. The External Auditor analyzed gender balance (GB) for a total of 938 counsel on the list and geographical representation (GR) for a total of 996 nationalities, reflecting the multinationality of 938 counsels. The gender distribution shows that out of the total 938 individuals, males account for 694 (73%), and females for 244 (27%). In the case of geographical representation, the number of counsels belonging to WEOG within the entire list of counsel is 577, with the highest proportion (58%). GRULAC has the lowest proportion, with 24 individuals (3%).

<sup>9</sup> The differences between the date of appointment of counsel for Defence and the date of appointment of legal representatives for victims. For example, a gap of +281 days in (G) case indicates that the victim's representative was appointed 281 days after the appointment of the Defence counsel.

<sup>10</sup> The amount of 2022 legal aid expenditure is an estimated figure reported to the CBF in October 2022.

**Table 5: Status of the List of Counsel by GRGB (2013-2022)** (number of persons/nationality)

	Total*	WEOG**	GRULAC**	EEG**	Africa	Asia and the Pacific
<b>Male</b>	694 (731)	417	22	25	229	38
<b>Female</b>	244 (265)	160	2	8	84	11
<b>Total</b>	938 (996)	577(58%)	24(3%)	33(3%)	313(31%)	49(5%)

\* Total number means individuals, and the numbers in the parentheses around the total means the number of nationalities considering multinationality.

\*\* WEOG: Western European and Other Group, GRULAC: The Group of Latin America and Caribbean Countries, EEG: Eastern European Group

Source: Data submitted by the Court

### *Appointed counsel*

29. The following table shows the current status of appointed counsel in the List of Counsel by GRGB out of 209<sup>11</sup>, the total number of appointed counsels<sup>12</sup>. Duty counsel represent the highest number, 94 (45%), while legal representatives for victims account for the lowest number, 15 (7%). In terms of gender balance, 163 individuals (78%) out of 209 are males, and 46 individuals (22%) are females. When taking into account multinationality, the total number of nationalities of appointed counsel stands at 219, among the total 219 nationalities, those with African nationalities account for the highest number, 109 (50%), while those with GRULAC nationalities for the lowest number, only 6 (3%).

**Table 6: Status of Appointed Counsel by GRGB (2013-2022)** (number of persons)

	GB			GR					
	Total	Male	Female	Total	WEOG	GRULAC	EEG	Africa	Asia and the Pacific
Defense Counsel	16	12	4	16	11	0	0	5	0
Ad-hoc Counsel	17	13	4	17	9	0	1	7	0
Duty Counsel	94	77	17	99	28	3	2	62	4
Legal Advisor under Rule 74 <sup>13</sup>	67	52	15	72	37	2	3	27	3
Legal Representatives for Victims	15	9	6	15	5	1	1	8	0
<b>Total</b>	<b>209</b>	<b>163</b>	<b>46</b>	<b>219</b>	<b>90</b>	<b>6</b>	<b>7</b>	<b>109</b>	<b>7</b>

\* Total number of GR means total number of nationalities of appointed counsel considering multinationality

Source: Data submitted by the Court

<sup>11</sup> The number is based on the person (not duplicate), which is different from paragraph 23 (based on appointment) and the number of LRV includes OPCV.

<sup>12</sup> Counsel is divided into five types of counsel: Defence counsel, Ad-hoc counsel, Duty counsel, Legal advisor under Rule 74, and Legal representative for victims. Specific descriptions of counsel are covered in section VI.2.

<sup>13</sup> "Legal Advisor under Rule 74" is defined in Rule 74(10) of the RPE.

### *The status of budget implementation*

30. From 2013 to 2022, the ICC expended a legal aid budget of 58.2 million euros over ten years, including the Contingency Fund (CF), and the annual trends are shown in the table below. In terms of the implementation rate against the budget, the implementation rate for defendants continued to exceed the budget from 2013 to 2018 (up to a maximum of 124.9%) before operating the legal aid system within the budget from 2019 to 2022. On the other hand, the implementation rate for victims was operated with a surplus in the budget from 2013 to 2017, but exceeded the budget in 2018 and 2019, and it is shown that the legal aid system has been operated within the budget again since 2021.

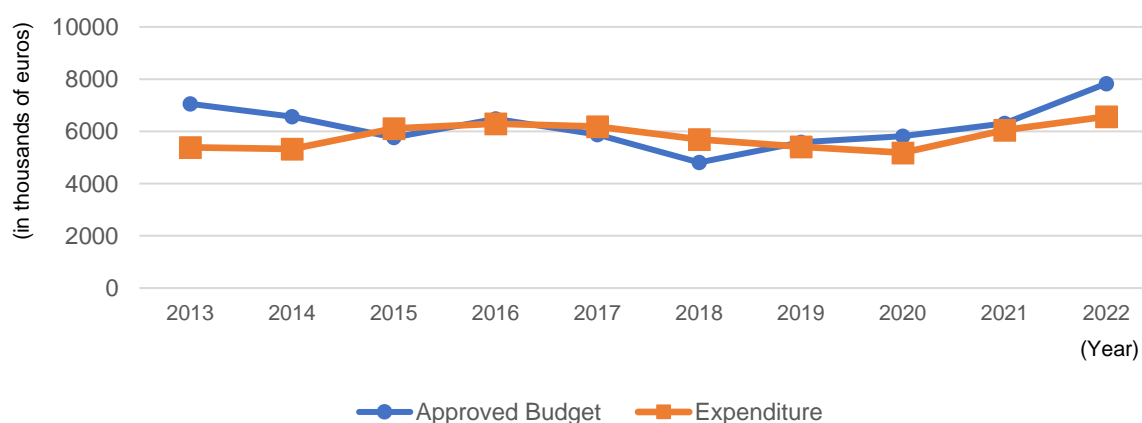
**Table 7: Trends in ICC Legal Aid Budget and Expenditure over Ten years** (in thousands of euros)

		2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	Total
Defense	Approved Budget	3,533	3,542	3,907	4,521	4,454	3,646	4,310	4,146	4,581	5,785	42,425
	Expenditure	3,633	3,578	4,879	4,950	4,838	4,232	4,118	3,643	4,518	4,860	43,249
	Implementation Rate	102.8%	101%	124.9%	109.5%	108.6%	116.1%	95.6%	87.9%	98.6%	84%	101.9%
Victims	Approved Budget	3,518	3,027	1,862	1,963	1,428	1,165	1,275	1,674	1,727	2,042	19,681
	Expenditure	1,756	1,746	1,234	1,345	1,341	1,466	1,289	1,541	1,528	1,708	14,954
	Implementation rate	49.9%	57.7%	66.2%	68.5%	93.9%	125.9%	101.1%	92.0%	88.5%	83.6%	76%
Total	Approved Budget	7,052	6,569	5,769	6,485	5,882	4,811	5,585	5,820	6,308	7,827	62,108
	Expenditure	5,390	5,323	6,112	6,295	6,180	5,698	5,407	5,184	6,047	6,567	58,203
	Implementation rate	76.4%	81%	106%	97.1%	105.1%	118.4%	96.8%	89.1%	95.8%	83.9%	93.7%

Source: Data submitted by the Court

31. The trend of the total amount for both defendant and victim teams shows that the legal aid budget has been decreasing from 2013 to 2018, but has steadily increased from 2018 to 2022, as shown in Figure 3. The amount expended has increased from 2013 to 2016, but has been decreasing from 2016 to 2020. However, it has been increasing again since 2020. In 2022, both the budget and expenditure reached their highest levels ever recorded.

**Figure 3: Trend of Budget and Expenditure of Total Legal Aid incl. CF**



Source: Data submitted by the Court

## VI. Observations and Recommendations

### 1. Legal Aid Based on Indigence Assessment

#### 1.1. Appropriateness of Legal Assistance under the Relevant Regulations

32. Pursuant to Article 67(1)(d) of the Rome Statute, the defendant has the right to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if he or she is indigent. Accordingly, the ICC conducts an indigence assessment to determine whether the legal aid applicant meets the qualifications. Currently, only one RFI is responsible for indigence assessment which is a part of his mandate.<sup>14</sup>

33. According to Regulation 85(1) of the RoC, the Registrar shall decide within one month from the submission of an application or, within one month of expiry of a time limit set in accordance with the Regulations of the Registry,<sup>15</sup> whether legal assistance should be paid by the Court. The Registrar may also make a provisional payment of legal aid at his discretion in appropriate circumstances.<sup>16</sup> In other words, the Registrar shall decide the provision of legal aid based on the results of the indigence assessment and, if necessary, may provide provisional legal aid even before the completion of the indigence assessment. The decisions on payment of legal assistance may be subject to review by the judiciary, i.e., the relevant chamber or the Presidency according to Regulation 135(2) of the RoR and Regulation 85(3) of the RoC.

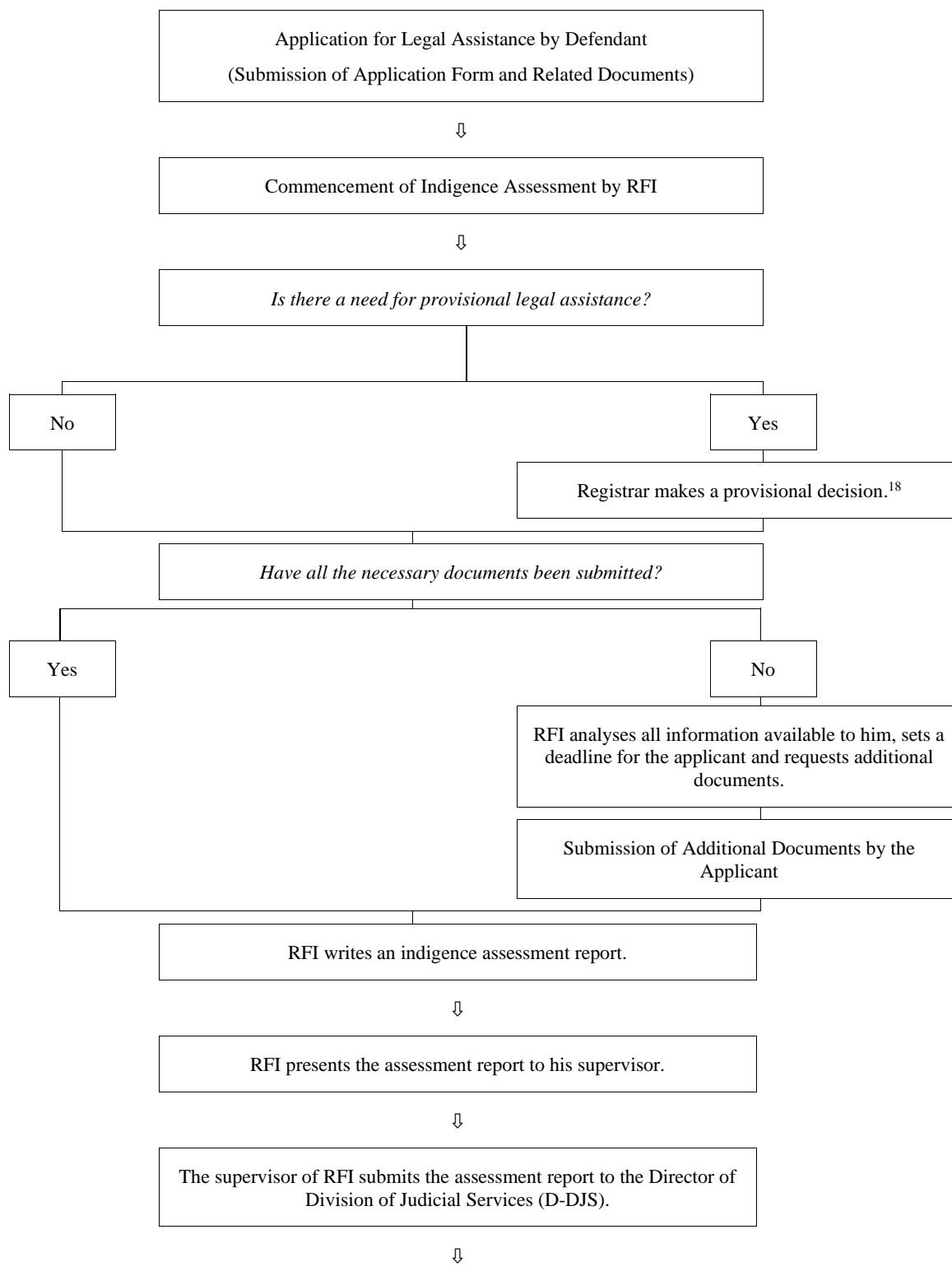
34. Meanwhile, according to Article 68(3) of the Rome Statute and Rule 90(5) of the RPE, a victim who lacks the means to pay can receive financial support from the Court so that a legal representative can be appointed. Since 2010, the ICC has been providing legal assistance in the context of common legal representation following a decision by a Chamber without conducting an indigence assessment. Even if some victims have means, the cost of conducting an indigent assessment may be higher than the legal fees they would have to pay, and demanding payment from them could discourage them from participating in the proceedings. The ICC will have explicit provisions stating that victims are presumed to be indigent through the reform of the legal aid system.<sup>17</sup>

<sup>14</sup> The RFI has a role to write a financial investigation report with regard to a defendant's general financial information, an indigence assessment report for legal aid, and a solvency report on the defendant when ordered by a Chamber for the purposes of reparation proceedings.

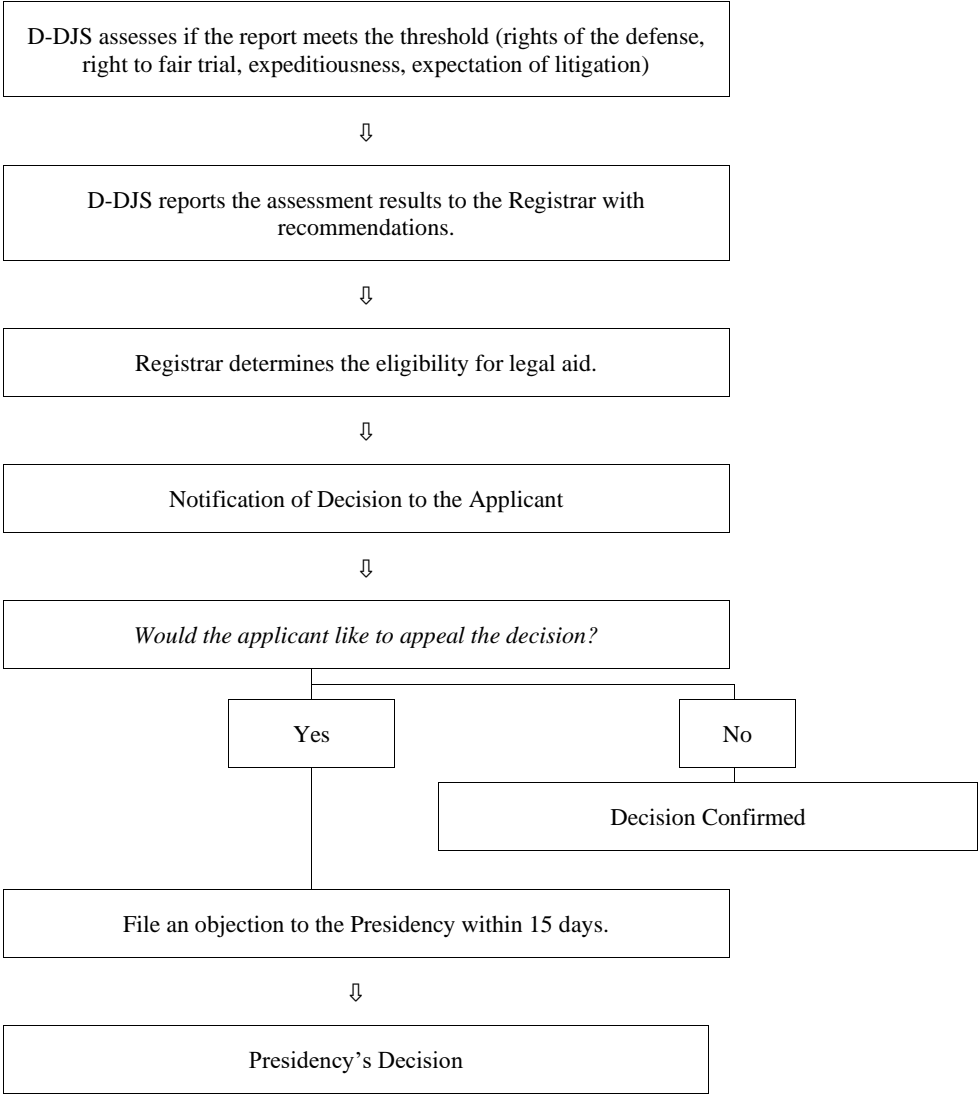
<sup>15</sup> According to Regulation 132(3) of RoR, the Registrar should make a decision as to whether legal assistance should be paid in full or in part by the Court within 30 calendar days of the submission by the person concerned of all the documentation required.

<sup>16</sup> The External Auditor, during the audit period, requested a legal interpretation from the RLO regarding whether the decision for provisional legal assistance must be made within 30 days from the date of the application submission according to Regulation 132(3) of RoR. The response from the RLO was as follows: The basic position concerning the provisional payment of legal aid is set forth in Regulation 85(1) of RoC, which provides *inter alia* that "the Registrar may, in appropriate circumstances, make a provisional decision to grant payment on legal assistance." [Emphasis added] Regulation 132(3) of RoR addresses a specific situation in which legal assistance may be provisionally paid.

<sup>17</sup> An indigence assessment of the Registrar may be initiated *proprio motu* at any time, where the Registrar has reason to believe that a victim has sufficient means, in part or in whole, to assume costs of legal representation.

**Figure 4: The Procedure of Indigence Assessment for Legal Aid**

<sup>18</sup> According to the RLO's analysis, a decision for provisional legal assistance aims to ensure that the defendant has legal representation throughout the criminal process. In this respect, article 67(1)(d) of the Rome Statute established that the Court has the duty to ensure the right of the accused "to be present at the trial, [...] and to have legal assistance assigned by the Court in any case where the interests of justice so require and without payment if the accused lacks sufficient means to pay for it." [Emphasis added] In practice, the need to secure full compliance with the fair trial rights of the accused is considered to be an "appropriate circumstance" "for the purpose of Regulation 85(1) of RoC.





35. From 2013 to 2022, 16 defendants applied for legal aid, and the ICC provided legal aid to all of them. The total amount of legal aid provided is 26.29 million euros as of 31 October 2022. Of these cases, 11 have resulted in indigence assessment while the remaining five are still under indigence assessment and results have not come out. Among the 11 cases that have received indigence assessment results, the RFI has assessed that six were not indigent while five have been assessed to be indigent.

36. Despite the procedures explained in paragraphs 32 and 33, the ICC has been, in practice, providing legal assistance regardless of whether a legal aid application was submitted, or an indigence assessment result was obtained. But this practice was not an official policy of the CSS, and no documentation exists to this effect.

37. The External Auditor identified two types of non-compliance with the procedures stipulated in the regulations regarding legal assistance for the 16 defendants since 2013 as follows.

**Table 8: Types of Non-Compliance with Regulations of Legal Aid**

Type	Findings	No. of Cases
Type 1	Legal assistance already started before the defendant's application	11 out of the total 16 cases
Type 2	Providing legal assistance before or without any decision regardless of indigence assessment results	13 out of the total 16 cases

Source: Data submitted by the Court

***Type 1. Legal assistance already started before the defendant's application.***

38. After comparing the dates of the 16 defendants' requests for legal assistance and the dates of support, it was found that 11 out of the 16 defendants (68.75%) received legal assistance before submitting their applications. A certain defendant even submitted an application for legal assistance 90 days after receiving legal aid.

**Table 9: Comparison of Dates between Application for Legal Aid and Legal Aid Initiation**

No.	Name	Date when legal aid was initiated <sup>19</sup>	Date when the application for legal aid was submitted	Gap <sup>20</sup>
1	(I)	-----	-----	+4 days
2	(C)	-----	-----	+5 days
3	(E)	-----	-----	+5 days
4	(G)	-----	-----	+6 days
5	(O)	-----	-----	+9 days
6	(L)	-----	-----	+13 days
7	(B)	-----	-----	+17 days
8	(N)	-----	-----	+18 days
9	(K)	-----	-----	+39 days
10	(J)	-----	----- <sup>21</sup>	+78 days
11	(M)	-----	-----	+90 days <sup>22</sup>

Source: Data submitted by the Court

<sup>19</sup> The date of the appointment of permanent counsel was considered the start date of legal assistance.

<sup>20</sup> It refers to the gap between the date when legal aid was initiated and the date when the application for legal aid was submitted. For example, a gap of +4 days in (I) case indicates that he started receiving legal aid 4 days prior to the date of the application for legal aid.

<sup>21</sup> (J) submitted his application twice, on ----- and ----- . The date listed on the table represents the last submission date.

<sup>22</sup> According to the CSS, in the case of (M), where the application was submitted more than 90 days after the start of legal assistance, the legal support started on -----, when he expressed the intention to receive legal assistance from the CSS orally.

**Type 2. Providing legal assistance before or without any decision regardless of indigence assessment results**

39. From 2013 to the present, out of the 16 defendants who have applied for legal aid, it has been confirmed that 15 defendants received provisional legal assistance excluding (P)<sup>23</sup>. Among the 15 defendants, specifically, only two of them were provided legal assistance after obtaining its decision, seven had already been receiving legal aid prior to its decision (up to a maximum of 102 days before), and the remaining six defendants received legal assistance without a decision by the Registrar or anyone else. Furthermore, among the six defendants, four of them have been receiving legal assistance for up to five years, even though they have never resulted in an indigence assessment until now (as of March 2023).

**Table 10: Decisions for Cases Where Legal Assistance Was Provided**

No.	Defendant	Commencement of legal aid	Decision for provisional legal aid	Gap <sup>24</sup>	Completion of indigence assessment	Legal aid decision as per indigence assessment
Cases where legal aid was provided after the completion of the indigence assessment and decision						
1	(P)	-----	-	-	----- -----	----- by the Registrar
					----- -----	----- by Director of DJS
					----- -----	----- by Director of DJS
Cases where legal aid was provided after a decision was made						
2	(A)	-----	----- by the Registrar	-7 days	Not yet	-
3	(D)	-----	----- by Chief of CSS	-32 days	----- ----- ----- -----	----- by Director of DJS
Cases where legal aid was provided before a decision was made						
4	(B)	-----	----- by Chief of CSS	+64 days	----- -----	-
					----- -----	-
5	(C)	-----	----- by Chief of CSS	+16 days	----- -----	-
6	(E)	-----	----- by Director of DJS	+31 days	----- -----	-
7	(F)	-----	----- by Director of DJS	+19 days	----- -----	-

<sup>23</sup> (P) was not provided provisional legal aid as he received some legal aid during the trial, based on a ----- indigence assessment that he was partially indigent.

<sup>24</sup> It refers to the gap between the date of commencement of legal aid and the date of the decision for provisional legal aid. For example, a gap of +64 days in (B) case indicates that he started receiving legal aid 64 days prior to the date of the legal aid decision.

8	(H)	-----	----- by Director of DJS	+13 days	----- -----	-
9	(G)	-----	----- by Director of DJS	+18 days	----- -----	
10	(J)	-----	----- by Director of DJS	+102 days	----- ----- ----- -----	-
<i>Cases where legal aid was provided without any decision</i>						
11	(I)	-----	Undecided		Not yet	-
12	(L)	-----	Undecided		Not yet	-
13	(N)	-----	Undecided		Not yet	-
14	(O)	-----	Undecided		Not yet	-
15	(K)	-----	Undecided		----- -----	-
16	(M)	-----	Undecided		----- -----	-

Source: Data submitted by the Court

40. In other words, whether it is provisional or not, legal aid should be provided based on the Registrar's decision. However, among the 16 defendants mentioned above, 13 of them did not receive any decision or received legal aid before receiving a decision. Regarding this matter, the CSS explained that there was no need to go through the administrative procedure of receiving a decision from the Registrar as the letter of appointment sent to the counsel for the defendant meant that provisional legal aid was provided. However, this letter was just a notification to be sent to a counsel that he/she was appointed as a counsel for a defendant and it did not indicate the defendant's right to receive provisional legal aid and appeal to the decision, and the possibility that it would be reconsidered once the indigence assessment has been completed as shown in Figure 5, whereas in the document for the case of (A) as illustrated in Figure 6, which was only obtained from the Registrar's decision, there was a notification for defendant's right and possibility of change due to the upcoming indigence assessment.

Figure 5: Sample of Letter sent to Counsel

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Figure 6: Sample of Registrar's Decision for Legal Assistance

<p>DÉCIDE :</p> <p>QU'au vu des circonstances et des informations soumises par le Demandeur, (A) est provisoirement considéré totalement indigent en application de la norme 85.1 in fine du Règlement de la Cour, ceci dans l'attente des suites de l'enquête sur son indigence ;</p> <p>QUE les coûts de la défense du Demandeur dans les procédures devant la Cour seront provisoirement pris en charge par la Cour conformément à son système d'aide judiciaire ;</p> <p>QUE la présente décision sera réexaminée une fois que l'enquête sur les avoirs du Demandeur aura été complétée en application des dispositions de la norme 85.2 du Règlement de la Cour ;</p> <p>RAPPELLE au Demandeur son obligation prescrite à la norme 132-4 du Règlement du Greffe, de signaler au Greffe tout changement dans sa situation financière qui serait susceptible d'affecter son droit à l'aide judiciaire de la Cour ;</p> <p>INFORME le Demandeur qu'il a la possibilité de saisir la Présidence de la Cour aux fins de réexamen de la présente décision dans un délai de quinze jours calendaires à compter de la date de sa notification ;</p> <p>NOTIFIE la présente décision à (A)</p>	<p>Decide:</p> <p>That in view of the circumstances and the information submitted by the applicant, Mr. (A) is provisionally considered totally indigent pursuant to Regulation 85(1) of RoC, pending the outcome of the investigation into his indigence;</p> <p>That the costs of the defense in the proceedings before the Court will be provisionally paid by the Court in accordance with its legal aid system;</p> <p>That this decision will be reconsidered once the investigation of the applicant's assets has been completed pursuant to Regulation 85(2) of the RoC;</p> <p>Remind the applicant of his obligation, prescribed in Regulation 132(4) of RoR, to notify the Registry of any change in his financial situation which is likely to affect his right to legal aid from the Court;</p> <p>Inform the applicant that he has the possibility of asking the Presidency of the Court to review this decision within fifteen calendar days from the date of its notification;</p> <p>Notifies this decision to Mr. (A).</p>
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41. In addition, as shown in Table 10, there have been a total of 13 legal aid decisions for the aforementioned 16 defendants regardless of whether it was provisional legal assistance or not. Out of these, only two decisions were made by the Registrar, while eight were made by the Director of DJS and three were made by the Chief of CSS.

42. The CSS explained that the legal aid decision was delegated to the Director of the DJS from the Registrar in 2013. But according to the document on delegation of authority in 2010, the authority to make legal aid decisions was under the Registrar's authority. The CSS explained that around 2013 or 2014, the decision on legal aid was delegated to the Director of the DJS. Accordingly, the External Auditor repeatedly requested the CSS to submit the revised document on delegation of authority, but the CSS did not provide the relevant document, stating that they would revise this document soon.<sup>25</sup>

**Table 11: Changes in Decision Makers of Legal Assistance by Year**

Year	2013	2014	2015	2016	2017	2018	2019
Decision maker	Chief of CSS (2)	Chief of CSS (1)	Director of DJS (3)	Director of DJS (1)	-	Director of DJS (1)	Director of DJS (1)
(No.)	Registrar (2)	Director of DJS (2)					

Source: Data submitted by the Court

43. What is even more noteworthy is the fact that, even when the results of the indigence assessment were available, they were not being utilized as the basis for making legal aid decisions. While the Registrar has the authority to provide provisional legal aid prior to the completion of the indigence assessment, it is reasonable to reassess the provision of legal aid based on the indigence assessment if there have been changes in the defendant's financial situation. However, the ICC continued to maintain the initial provisional legal aid without making any new decisions after the result of indigence assessment. For instance, in cases such as (B) and (M), provisional legal assistance was being provided, and remarkably, (M) was receiving provisional legal aid without any formal decision. Despite the indigence assessment results indicating that these defendants were not indigent or partially indigent<sup>26</sup>, the ICC persisted in providing legal aid, citing concerns about the reliability of the indigence assessment results. Further details regarding this matter will be provided in section 1.2.

44. The two types of problems mentioned above indicate that although the ICC initially established the principle of providing legal assistance to indigent defendants under the Rome Statute, the system has been operated based on the practice of providing legal assistance to all defendants who require the services of counsel regardless of indigence, and the ICC stated that this practice was based on Article 67(1)(d) of the Rome Statute. However, the Court only focused on the right of the defendant stipulated in the Rome Statute to receive legal assistance, and did not consider the fact that legal aid is provided only to the one who lacks sufficient means to pay for it, which is stipulated in the same Article of the Rome Statute.<sup>27</sup>

45. Furthermore, the ICC emphasized that the continuousness and expeditiousness of proceedings should not be compromised due to the legal assistance process and that the Registry maintains the possibility to request the re-payment of advanced resources in all cases

<sup>25</sup> According to the document regarding the delegations of authority in 2010, the authority for legal aid decision, regardless of whether it was provisional legal assistance or not, rests with the Registrar. However, on 17 October 2013, the Chief of CSS requested the Registrar to delegate this decision-making authority to him. Although the External Auditor was able to access the request document, confirmation of the Registrar's approval was not available until the end of the audit. Additionally, during a meeting, the CSS stated they would properly revise this delegation document soon.

<sup>26</sup> In addition to (B) and (M), there are four other cases that the results of indigence assessment were 'not indigent' or 'partially indigent'. In the cases of (J) and (K), the RFI reported to the CSS that the reports would be updated soon as he received new information right after the submission of his reports. So, the External Auditor considered that the CSS could not reflect these two reports on the legal aid decision. For the (P) case -----, the indigence assessment explaining that he was not indigent was reflected in the Registrar's decision on -----, However, for the (D) case, even though the Director of the DJS even made a decision stating that the defendant was not indigent on ----- after getting the RFI's indigence assessment report, this decision did not take effect. Further details are found in paragraph 51.

<sup>27</sup> The ICC also explained that it was in line with the Court's jurisprudence (----- Decision on the "Defence Request for the Review of the Scope of Legal Assistance"). However, in this case, the Chamber ruled that the Registry should pay the legal assistance retrospectively to the counsel who worked for the defendant before the defendant submitted the application for the legal aid, but only when the defendant was indigent at the relevant time after the final indigence determination by the Registrar.

where legal aid resources have been advanced. While such an explanation has its merits, considering the fact mentioned in section 1.3. that the ICC has lacked efforts in recovering overpaid legal aid budget from defendants<sup>28</sup>, it becomes necessary to adhere to the existing regulations regarding legal assistance procedures. Otherwise, the process of conducting an indigence assessment would become meaningless, and there is a concern that non-indigent defendants would continue to receive legal assistance, leading to a waste of budget.

46. In addition, as for the defendant, there was no incentive to submit the necessary documents for legal aid since the benefits of legal assistance had been already provided. This leads to serious concern for moral hazard among those who apply for legal aid, as the demand for document submission by the RFI could be seen as uncooperative, deteriorating the situation. In fact, it was confirmed that some defendants submitted documents for application fact-checking only after being urged to submit them several times or others did not submit the related documents at all.<sup>29</sup>

47. Lastly, the purpose of receiving a legal aid application and establishing the Registrar as the authority was to examine the validity and appropriateness of legal aid, to provide legal aid only to indigent defendants, and to prevent indiscriminate legal assistance and budget waste in advance. However, due to the operation of the legal aid system without an application procedure of type 1 or without the Registrar's control in the case of type 2, the internal control function of the legal aid budget has been lost. Considering the enormous impact of this decision – since once legal assistance commences, the legal aid budget is spent endlessly even in the reparation stage – the External Auditor is of the view that the legal aid system should be operated with appropriate internal control mechanisms such as the Registrar's decision in compliance with relevant regulations. In particular, when it comes to protecting the right of the defendant to receive the assistance of counsel even before applying for legal aid, there might be one possible way to comply with the relevant procedures while protecting the rights of the defendant, such as allowing the defendant to receive the assistance of duty counsel before he/she applies for legal aid.

**Finding:** An analysis of 16 cases that received legal aid since 2013 revealed the following issues:

- a) Legal aid was provided before the application for legal aid was written out.
- b) Legal aid, including provisional ones, was provided before a decision and some defendants have been provided legal aid without any decision, even when the indigence assessment revealed that the defendants were not indigent.
- c) Additionally, the legal aid decisions were being made by the Director of DJS or the Chief of CSS instead of the Registrar even though there is currently no explicit delegation document stating that the authority of the legal aid decision was delegated from the Registrar to another person.
- d) All of these practices have the risk of providing legal assistance to defendants who are not indigent, leading to moral hazard among defendants who applied for legal aid and exposing weaknesses in the internal control mechanisms for managing the legal aid budget. In particular, given that once legal assistance is initiated, the legal aid budget is spent endlessly even in the reparation stage, which has a significant impact on the ICC's expenditure structure, these practices should be reconsidered.

<sup>28</sup> The ICC explained that the Registry has successfully done regarding the re-payment of advanced resources in the past, but the External Auditor was only able to confirm the recovery of legal aid expenses in the (P) case ----- and as seen in section 1.3., in other cases, the recovery of funds has not been successful.

<sup>29</sup> For example, in the case of (I), the RFI requested the submission of documents on ----- and followed up three times, but three years later, on -----, the counsel submitted copies of the defendant's and spouse's identification documents responding that there were no supporting documents for the listed items, such as housing, cars, and bank account information on the application form. Also, in the case of (D), the RFI requested the submission of documents after he received the (D)'s application on ----- but the counsel did not submit significant documents such as bank accounts and rental agreements on several properties until he received the decision of Director of the DJS that the legal assistance would be suspended on -----.

**Recommendation 1:** The External Auditor recommends the Court to prepare measures to ensure the following principles are upheld while ensuring the protection of defendants' rights under the Rome Statute guaranteed and without compromising the expeditiousness of the trial:

- a) Individuals seeking legal assistance must apply for legal aid in order to be eligible for legal aid;
- b) All legal aid, including provisional ones, should be subject to the legitimate decision-maker; and
- c) When reliable indigence assessment results come out, they should be taken into account when making legal aid decisions.

## 1.2. Effectiveness of the Operation of Indigence Assessment

48. Pursuant to Regulations 85(2) and 85(3) of the RoC, if the financial situation of the person receiving legal assistance is found to be different than indicated in the application, the Registrar shall reconsider his or her decision on payment of legal assistance.<sup>30</sup> If the person wishes to object to the decision, they must submit an objection to the Presidency within 15 days from the date of notification of the decision, and the final determination of the legal aid will be made by the Presidency.

49. Also, as per the ICC Legal Aid Policy, the eligibility for legal aid requires that the applicant's disposable assets (MDM<sup>31</sup>) be less than the monthly legal costs for the most onerous stage of the proceedings required for the trial. The application will be rejected if the disposable assets are greater than the costs mentioned above. If they are less than the said costs but greater than or equal to zero, partial assistance can be granted. If the disposable assets are less than zero, the applicant will be recognized as indigent, and legal assistance paid by the Court will be granted in full.

50. Based on the results of the indigence assessment and legal assistance, it has been confirmed that out of the total 11 defendants who received an indigence assessment, six had entire or partial ability to pay for legal expenses. However, legal assistance was carried on for these defendants for some reasons, and it was found that legal assistance was provided until the termination of the case or is ongoing at the time of writing this report.

**Table 12: List of Providing Legal Assistance to a Non-Indigent Defendant**

Defendant	Result of Indigence Assessment	The Date of Completing Indigence Assessment <sup>32</sup>	Status of Legal Assistance	Reason Why Legal Assistance Was Continued	Amount of Legal Assistance (As of 31 October 2022)
(P)	Partially Indigent	-----	-----	Partial legal assistance was provided as per the indigence assessment	€507,007
	Not Indigent	-----	-----	Legal assistance was provided as per the Chamber's decision	
(D)	Not Indigent	-----	-----	Explained in para. 51	€769,231
(B)	Partially Indigent	-----	-----	Explained in para. 52	€913,249

<sup>30</sup> That is why there can be multiple indigence assessment reports for one person.

<sup>31</sup> It refers to the amount of monthly disposal means (ICC-ASP/12/3, para. 29).

<sup>32</sup> In the case of defendants who underwent multiple indigence assessments, all dates of the reports indicating that they were non- or partially indigent were recorded.



(M)	Not Indigent	-----	----- -----	Explained in para. 53	€505,390
(J)	Not Indigent	-----	-----	RFI informed CSS that additional investigation would be conducted because new information was found	€2,391,857
	Partially Indigent	-----	-----		€1,788,529
(K)	Partially Indigent	-----	-----		€1,788,529
	Not Indigent	-----	-----		
Total					€6,875,263

Source: Data submitted by the Court

51. In particular, for the (D) case, the RFI assessed that (D) was not indigent on ----- . Accordingly, on -----, the Director of the DJS even made a decision stating that legal aid for the defendant would be terminated and sent it ----- . After the defendant received this decision, his counsel sent an email to the CSS expressing an objection to the decision and on -----, the counsel submitted a significant amount of additional information such as bank accounts, rental agreements on several properties and income received by the defendant's spouse. Due to these additional documents, the CSS did not suspend legal assistance to the defendant. Then, -----, based on the additional information submitted, the RFI supplemented the indigence assessment and concluded that the defendant still was not indigent. Nevertheless, the CSS continued to provide legal assistance to the defendant until the case was terminated on ----- . The CSS explained that given the legal context and with a view to safeguarding defense interests and not to obstruct proceedings, legal assistance was further provided until the case was terminated.

52. For (B), the RFI submitted an indigence assessment report concluding that he was partially indigent on ----- . Still, the CSS continued to provide legal assistance to him until -----<sup>33</sup> without reporting to the Registrar. In response, the CSS put forward the same reason as in the (D) case.

53. In the case of (M), the RFI concluded on ----- that he was not indigent and submitted the report to the CSS. The CSS delivered this assessment report to the defendant and his counsel claimed that his apartment had been disposed of after receiving the indigence assessment report. Then, the CSS requested the evidence that showed the claim. However, the counsel did not submit the evidence. On -----, since (M) had not provided evidence related to the matter, the RFI conducted re-assessment based on what he had provided, leading to the conclusion that the defendant was still not indigent. Although this second assessment report was submitted to the CSS, the CSS neither delivered it to the defendant nor proceeded with the procedure to suspend legal aid, citing that further information was still required for assessment if the threshold such as the right of the defense or expeditiousness was met. ----- .

54. As a result, the total amount of legal aid spent on defendants who were assessed non- or partially indigent by the RFI finally<sup>34</sup> amounts to €2,187,870 (as of 31 October 2022), and the overpaid amount of legal aid provided for them is €1,927,217 (as of 30 September 2022). After analyzing the causes for continuing legal assistance despite the results of the indigence assessment showing that the defendant was not indigent, the causes were found as follows.

#### ***Cause 1. Lack of verification process for indigence assessment results***

55. In practice, when the RFI prepares an indigence assessment report for the defendant and submits it to the CSS, instead of conducting a separate verification process for the report, the CSS sends the report to the defendant's counsel for confirmation that there are no issues with the contents. If the defendant raises any objections to the report, the CSS forwards them back to the RFI for review and consideration.

<sup>33</sup> The appeal for the (B) case was terminated on -----.

<sup>34</sup> It refers to the (D), (B) and (M) case.



56. However, upon reviewing the results of processing the submitted indigence assessment report, it was found that when the defendant raised objections to the report that the RFI had assessed as non- or partially indigent, the CSS did not follow the procedure of reporting it to the Registrar, and instead put the report on hold while waiting for the defendant to submit new evidence.

57. For example, in the (B) case, the RFI determined that the defendant was partially indigent, but the defendant claimed that some assets were put up as collateral, which should have affected the calculation. However, the defendant did not submit any evidence to support the claim. The CSS then did not proceed with any further procedure, citing the need to confirm the defendant's new claim with evidence. Even after the case was closed, no action was taken.

58. In the (M) case, the RFI assessed twice that the defendant was non-indigent. However, the CSS did not proceed with the procedure, citing the need to receive evidence of the defendant's new claim that the defendant had disposed of his apartment and his spouse's assets had changed after receiving the first report. -----, and the CSS was now in a situation where they needed to take recovery measures.

59. The CSS responded that they approach indigence assessment reports that conclude non-indigence or partial indigence with caution, because when the Presidency determines that he/she is indigent on the challenge raised by the defendant as per Regulation 85(3) of the RoC, it could damage the Court's reputation and credibility as well as impairing cooperation with States Parties. They stated that they could not accept such reports without further supporting information. The CSS explained their position that the Registrar's decision can come out only if it is recognized as a strong solid case, even though the Presidency can review the Registrar's decision when the defendants appeal against the decision pursuant to Regulation 85(3) of RoC. Also, the CSS expressed concern that privileges and immunities of the Court may be at stake in the event of civil procedures if they withdrew legal assistance for defendants.

60. In the view of the External Auditor, the CSS had to address these concerns through a reliable verification process for the indigence assessment report, but due to the lack of expertise required for indigence assessment tasks, they stated that they were unable to carry out the verification. As a result, there was no entity within the Registry that could verify the indigence assessment report, leaving the CSS to rely solely on the defendant's opinion, and to await the submission of new evidence without suspending legal aid decisions.

## ***Cause 2. The absence of oversight for indigence assessment***

61. The RFI (P4 level) was previously under the CSS of the DJS. But, in line with the recommendation of the 2015 ReVision Project, which aimed to integrate financial investigation functions and strengthen cooperation with member countries, its role was moved to the External Operations Support Section (EOSS) under the Division of External Operations (DEO) on 1 June 2017. In addition, on -----, the Registrar sent an internal document (-----) to the EOSS, the DEO, and the HRS, deciding that reporting and supervision of the RFI's work should be carried out by the head of the EOSS and the Director of the DEO as follows.

*Your (RFI's) new reporting line is as follows: your first appraising officer is the Chief of the External Operations Support Section, and your reviewer is the Director of the Division of External Operations. The appraising officers will, together with you, set the relevant performance objectives for the current appraisal cycle.*

62. However, there seems to be a difference in understanding between DJS and DEO regarding a proper reporting line for the indigence assessment function of the RFI. The RFI has a role to write a financial investigation report with regard to a defendant's general financial information, an indigence assessment report for legal aid, and a solvency report on the defendant when ordered by a Chamber for the purposes of reparation proceedings. Among these mandates, the RFI still believed that the indigence assessment of the defendant in his own work was under the jurisdiction of the DJS and reported it directly to the CSS section of

the DJS without reporting it to its own section, the EOSS, and the director of the DEO. Similarly, the Chief of the EOSS and the Director of the DEO believed that the responsibility of overseeing the indigence assessment of the RFI belonged to the DJS, as the DJS is in charge of managing the legal aid system and its budget. They understood that the only task that the DEO had taken over in the organizational restructuring of 2017 was the financial investigation for the reparation orders.

63. On the other hand, the CSS and the Director of the DJS are of the view, based on the current chain of command, that duties of the RFI are under the jurisdiction of the DEO due to the organizational restructuring and, therefore, the indigence assessment mandate should be managed and supervised by the Director of the DEO. As an example, on -----, the CSS rejected the RFI's report on (M)'s indigence assessment, which was submitted to the CSS on -----, citing the reason that the report did not properly follow the reporting line within their own department as it was not sent first to the Director of the DEO.

64. According to the organizational manual of the ICC, which specifies the division of departmental tasks, the Country Analysis Unit (CAU) under the EOSS of the DEO, to which the RFI belongs, is responsible for financial investigations, specifically "investigations for freezing or recovery of assets of defendants." The CSS under the DJS is responsible for "managing the Court's programme of legal aid for indigent defendants and victims."

65. Taking all of this into account, according to the organization manual that specifies departmental duties, the indigence assessment duties of the RFI seem to be closer to the CSS department. However, according to the Registrar's reporting line decision, the RFI must report its indigence assessment report to the DEO. The disagreement between CSS/DJS and DEO seems to be due to the Registrar's reporting line decision, which does not consider the actual responsibilities of divisions. This ultimately means that no one was supervising and managing the indigence assessment report, making it difficult for the results of the assessment to have practical effect, such as being used for reconsidering legal aid decisions for non-indigent defendants.

**Finding:** Legal aid was not discontinued even after the indigence assessment revealed that the defendant was not indigent because of the absence of a verification and supervising system, and confusion regarding the reporting line.

**Recommendation 2:** The External Auditor recommends the Court to

- a) Establish a verification process for indigence assessment; and
- b) Clearly identify the department responsible for supervising the RFI's indigence assessment work in the Registry.

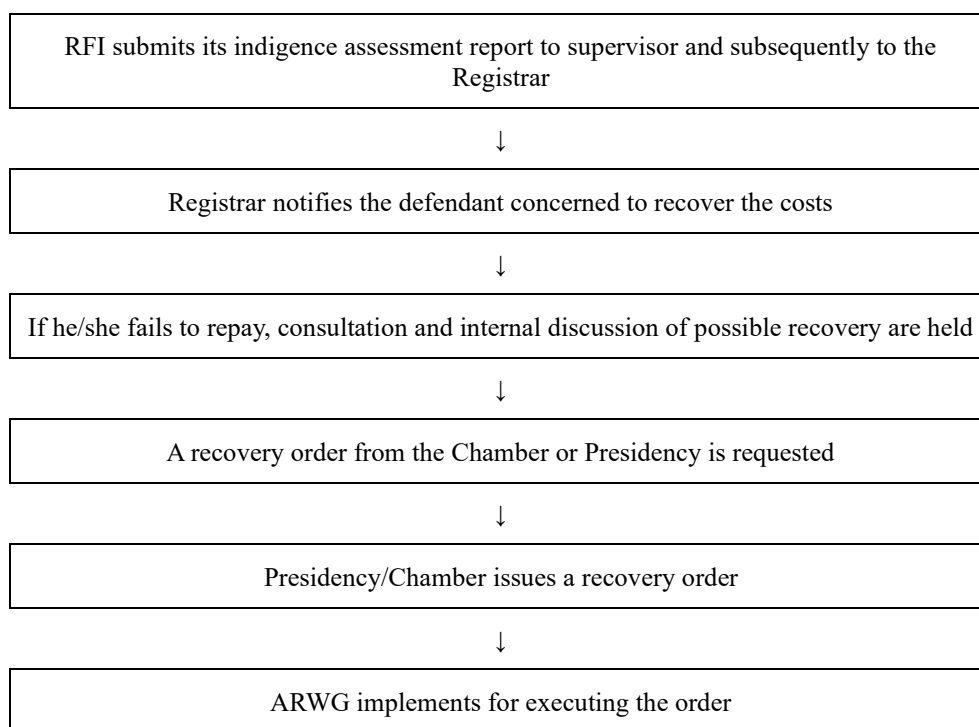
### 1.3. Appropriateness of Operation for the Recovery of Overpaid Legal Aid Budget

66. According to Rule 21(5) of the RPE, where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel. And in accordance with Regulation 85(4) of the RoC, where the Court has paid legal assistance, and it is subsequently established that the information provided to the Registrar on the applicant's means was inaccurate or means are not available to the applicant at that time, the Registrar may seek an order from the Presidency for recovery of the funds paid from the person who received legal assistance paid by the Court. And the Registrar may seek the assistance of the relevant States Parties to enforce that order.

67. There is no codified policy for the procedure in order to recover legal aid costs, but according to the CSS and the Asset Recovery Working Group (ARWG), the procedure is as follows: Once the RFI completes an indigence assessment report, he/she submits it to his/her supervisor for review. If it is found that defendants have received legal assistance despite having the means to pay for it themselves, the supervisor notifies the defendant concerned, under the name of the Registrar, that he/she must reimburse the financial assistance received

within a specified period. In addition, the ARWG<sup>35</sup> may hold meetings and provide recommendations on the recovery of overpaid legal expenses for the defendant, although this is not an obligation. If the defendant fails to repay the costs within the specified period after receiving the Registrar's notification, the Registrar, after consultation and internal discussion, may request a recovery order from the Chamber or Presidency. If the Presidency determines that there is a reason for the request, they may issue a recovery order. If the defendant fails to comply with the recovery order, the ARWG may request the assistance of the relevant States to execute the order.<sup>36</sup> The recovered amount is, then, redistributed after offsetting with the contributions of the relevant States Parties.<sup>37</sup>

**Figure 7: Procedure for the Recovery of Overpaid Legal Expenses**



68. According to the list of overpaid legal expenses prepared by the RFI, four<sup>38</sup> among 16 defendants who have received legal assistance since 2013 have been identified as subject to cost recovery. Whereas in the ----- case of (P), the recovery of legal aid fees has been completed,<sup>39</sup> as for the remaining three defendants, the recovery measures have not yet been taken.

<sup>35</sup> The ARWG is mandated to 1) implement the cooperation requests issued by a Chamber pursuant to Articles 57(3)(e) and 93(1)(k) of the Rome Statute by transmitting the request to the relevant states, following up on the execution of the requests by the states, and reporting to the Chamber, 2) assist in the RFI's financial investigation by communicating requests for cooperation to States Parties for the identification and tracing of the property and assets of the applicants for legal assistance paid by the Court, 3) execute any order of fine/forfeiture, and 4) recover the legal aid overpayment once an 'Order of Recovery' or an 'Order of Contribution' is issued. It is composed of the following Staff/Section: External Affairs Coordinator (ODDEO), Chief EOSS (EOSS), Head of ERSCU/EOSS (ERSCU/EOSS), External Relations & Cooperation Officer (ERSCU/EOSS), Associate External Relations & Cooperation Officer (ERSCU/EOSS), Head of CAU/EOSS (CAU/EOSS), Registry Financial Investigator (CAU/EOSS), Legal Officer (RLO), Chief CSS (CSS).

<sup>36</sup> For the purpose of the recovery of legal aid, the Registry has set up the ARWG within the DEO which is tasked with assessing different avenues to recover legal aid once a decision has been issued by the relevant chamber.

<sup>37</sup> ICC-ASP/13/20, part III(A)(5).

<sup>38</sup> In addition to the four defendants mentioned above, in the case of (J) and (K), although the RFI submitted a report to the CSS stating that the defendants were not (partially) indigent, after that, it notified the CSS that further investigation was deemed necessary, so the recovery process could not proceed.

<sup>39</sup> (P) -----

**Table 13: List of Defendants Who Need to Return Legal Aid Expenses**

Defendant	Result of indigence assessment	Key dates	Status	Overpaid <sup>40</sup>
(P)	Non-indigent	On -----, the Chamber issued a recovery order to him	----- ----- ----- -----	€453,622 (recovered)
(B)	Partially indigent	----- ----- ----- ----- -----	Not recovered	€774,720
(D)	Non-indigent	----- ----- ----- -----	Not recovered	€638,979
(M)	Non-indigent	On -----, Registrar decided to proceed recovery procedure	Not recovered	€513,518

Source: Data submitted by the Court

69. For the case of (B), the ARWG reviewed the indigence assessment report written by the RFI and recommended on ----- that (B) should recover his overpaid legal aid expenses. After about a year, on -----, the CSS notified the defendant on behalf of the Registrar of his obligation to recover legal aid costs. On -----, one year after the notification, the CSS submitted a request for a recovery order to the Director of the DJS. However, it was decided to send a notification to the defendant instead of making a request to the Chamber. On -----, when the CSS re-notified the defendant of his obligation to recover his overpaid legal aid cost, the defendant expressed his refusal on ----- On -----, when the RFI recalculated the final amount that the defendant had to return, and the RFI notified the CSS of the results of the recalculation, the chief of the CSS replied that the ARWG, not the CSS, was the entity that should approve the recovery. On -----, the Director of the DEO, who is the chairperson of the ARWG, informed the Chief of the CSS that there was no need for further investigation or information on (B) from the State Party and that the CSS was the entity that should request a recovery order from the Chamber. However, on -----, the chief of the CSS informed the DEO that the ARWG should request the recovery order from the Chamber after discussing it with the Director of the DJS. Finally, on -----, the Registry Legal Office (RLO) gave the opinion that the CSS was the entity to file the request for a recovery order. However, no measure for recovery has been taken since then.

70. In the case of (D), on -----, the Director of the DJS decided to pursue the recovery of the overpaid legal aid expenses against (D). Similarly to (B), the ARWG, which includes the chief of the CSS, gave a recommendation on ----- that (D) should return the overpaid legal aid cost. On -----, the CSS drafted a notice of his obligation to recover. On -----, the RLO reminded the CSS and the ARWG to take prompt measures for recovery as the -----<sup>41</sup> was soon to be closed. Subsequently, on -----, the chief of the CSS circulated the overpayment letter to the ARWG for comments and requested the Registrar's signature on the letter. The discussion continued on how the letter should be delivered. On -----, the CSS updated the letter to (D) and confirmed with the RFI that the amount to be returned had been properly calculated. However, since then, the letter has not been sent to the defendant. The CSS explained that they could not proceed with the procedure due to the absence of sufficient/solid information to request a recovery order.

<sup>40</sup> As of 30 September 2022.

<sup>41</sup> The defendants for this ----- case are (P), (B), (C), (F) and (D).

71. In the case of (M), as stated in paragraph 53, the RFI informed the CSS that the defendant was not indigent, and the defendant's counsel argued without evidence that there had been a change after the assessment. On -----, the RFI advised the CSS to finalize the reassessment for (M) and pursue the recovery measure immediately. On -----, the RFI informed the CSS that, based on the evidence submitted up until that time, the defendant was still not indigent. However, no actions were taken for the recovery following the submission of the second report -----.

-----. Afterward, the Registrar decided to pursue the recovery measure of the overpaid legal aid costs for (M) on -----, -----.

-----. As of the audit date (1 March 2023), the director of the DJS and the CSS has been preparing letters to relevant parties requesting additional evidence on the income of the (M) ----- and actual property information of the defendant from the ----- authorities.

72. If recovery orders would be obtained eventually, there is a possibility to recover 1,927,217 euros paid to defendants who were deemed to have the means to pay their legal fees.

73. The External Auditor has identified two causes for the low recovery performance of overpaid legal aid payments in the three cases examined, which include: firstly, there was a lack of clear guidelines and division of responsibilities within the ICC regarding how to proceed with the recovery process when defendants who are deemed to be not indigent are identified; and secondly, as mentioned in the above section, due to the absence of sufficient trust in the indigence assessment report, efforts to recover the overpaid legal aid budget were put on hold while waiting for new financial information of the defendants, despite the availability of the RFI's indigence assessment report and the recommendations of the ARWG.

74. The provisions related to this recovery offer an opportunity to restore the spirit of the Rome Statute, which was designed to provide legal assistance only to indigent defendants. If the recovery measures are further delayed, there is a risk that, for example, property and funds may be disposed of, as such a disposal may possibly reduce the prospects of recovery.

75. Therefore, the ICC should establish clear administrative procedures and responsibilities for the recovery of legal aid funds and identify the relevant section which will have the mandate to request recovery orders from the Chamber, and should make efforts to get back the overpaid legal aid budget by promptly pursuing the relevant procedures when non-indigent defendants are identified through the indigence assessment report. Additionally, as discussed in paragraph 60, to ensure the reliability of the indigence assessment report, introducing a verification system for indigence assessment reports, and properly managing and supervising the investigation process should be a prerequisite for taking recovery measures for legal aid funds.

**Finding:** Due to the lack of clear instructions and procedures regarding which department is responsible for initiating recovery proceedings in cases where legal aid has been overpaid, there has been confusion among departments during the recovery process. Additionally, the CSS has been awaiting further information due to a lack of confidence in the indigence assessment report. For these reasons, the ICC has not made efforts to recover 1,927,217 euros overpaid as legal expenses.

**Recommendation 3:** The External Auditor recommends the Court to:

- a) Establish clear administrative procedures and division of tasks for the recovery of overpaid legal aid funds; and
- b) Promptly inform any defendants found to have received legal aid despite having assets and solicit their opinion, and actively pursue measures to recover overpaid legal aid funds by promptly requesting the Chamber or the Presidency for a recovery order if the defendant appeals.

#### 1.4. Adequacy of Duration of Indigence Assessment

76. As a result of analyzing the duration of the indigence assessment for the 16 defendants from the beginning of the indigence assessment to the end, it was found that in a total of five cases<sup>42</sup>, including the case of (A) where the indigence assessment report has not been issued even after ----- years since the application date, the report has not been submitted for several years (minimum ----- days, maximum ----- days as of 31 December 2022). In addition, it was found that the assessment period of the other 11 cases where the report was issued had an average of 293 days (minimum 2 days, maximum 1,073 days), indicating that the RFI takes a long time despite the regulation of a 30-day investigation period.

77. To conduct an indigence assessment, information about the defendant's financial situation is necessary, which can be obtained through the defendant and relevant departments such as the OTP or States Parties. However, since most defendants are detained, there are limitations to obtaining information from them. In addition, there are often cases where relevant departments cannot cooperate due to the confidentiality necessary for prosecution and trial. As the defendant's financial information is personal data and is mostly held by the country concerned, the most efficient and expedient way to obtain the necessary information is through the cooperation of States Parties.

78. According to Article 93 of the Rome Statute, States Parties have an obligation to assist the ICC in investigations and prosecutions, including by providing documents or submitting evidence. But there is no explicit obligation for States Parties to cooperate with the ICC in conducting indigence assessment for the purpose of providing legal aid to defendants.

79. The declaration attached to the defendant's application for legal assistance gives the Registry complete access to the defendant's financial information, but this declaration has no legal effect. The reason is that the States concerned are not obliged to submit data as the obligation to cooperate in the indigence assessment is not specified in the Rome Statute. In addition, there are often no provisions for cooperation in their domestic law. Among States Parties, only Belgium is required under domestic law to cooperate with the ICC's request to provide financial information for an indigence assessment.

80. The RFI has requested information from each respective country for the indigence assessment of the defendant. The current procedure for transmitting requests for legal aid is the following: 1) The RFI identifies States Parties and other entities which it needs to contact in order to obtain the information; 2) If the information is to be obtained from States Parties, the RFI requests the External Relations and State Cooperation Unit (ERSCU) to transmit a request. The content of the request and the list of States to be contacted is provided by the RFI; and 3) The ERSCU puts the request in an appropriate format and transmits it to States Parties. It also follows-up with States Parties.

81. The External Auditor has examined the status of cooperation from States Parties and found cases of non-cooperation where the ICC requested cooperation from certain States Parties but did not receive submission of materials, in such cases of (A), (O), and (N). However, at the request of the ICC, which deemed it diplomatically sensitive, this report did not mention specific States Parties. Instead, at the request of the External Auditor, the ICC has conducted a statistical analysis of the past five years from 2016 to the present regarding the status of cooperation from States Parties.

82. As per the statistics showing the status of cooperation in requesting information from States Parties for indigence assessments in Table 14, the RFI has requested information from a total of eleven countries for seven cases during the past five years, and 71 follow-ups for requests have been made. Also, it was found that States Parties finally responded to ten requests among 17, and there has been no answer to four requests so far, and they rejected one request. It is a 58.8% response rate with regard to the request of information to States Parties. The average duration for positive replies is 317 days (minimum 37 days, maximum 1,048 days) and in case of requests not answered, no response has been received for an average of 1,183 days from the date of the request (minimum 654 days, maximum 1,618 days) as of 31 March 2023.

<sup>42</sup> It refers to (I), (L), (O), (A), and (N) case.

**Table 14: Status of Cooperation from States Parties from 2016 to 2022**

Request	Number	Responses	Number	Duration
Requests sent for indigence assessment for legal aid	17	Positive replies	10	317 days
		Requests denied	1	1,101 days
		Requests not answered	4	1,183 days
		Obsolete <sup>43</sup>	2	-
Follow-ups on requests			71	-
Countries that received requests			11	-
Cases where requests were sent			7	-

Source: Data submitted by the Court

83. This table shows that uncooperative attitude of States Parties in providing financial information regarding defendants, such as non-submission of the requested information or responding late, can induce the prolonged duration of the indigence assessment. The ICC has been making an effort such as publishing the annual report by reporting the situation of cooperation from States Parties regarding indigence assessment for legal aid and holding regular meetings with the focal points of States Parties to discuss cooperation measures, and organizing seminars among states to enhance cooperation. However, given the current situation of their cooperation in indigence assessment, the ICC urgently needs to establish more realistic and direct measures. For example, the ICC can at least make necessary action for States Parties' obligation to cooperate to be stipulated in the relevant regulations or resolutions.

**Finding:** Non-cooperation from States Parties in submitting information for indigence assessment has led to prolonged indigence assessment for legal aid.

**Recommendation 4:** The External Auditor recommends the Court to find ways to further induce cooperation from States Parties in the indigence assessment process by, for instance, inserting specific provisions in the legal framework related to the legal aid system.

## 2. Appointment of Counsel

### *Composition of counsel*

84. The ICC provides legal representation (counsel) for suspects, defendants, witnesses, and victims through legal aid. There are five types of legal representation before the Court:

- i) Defense counsel (permanent counsel) for defendants supported through Articles 61(1)(2) and 67 of the Rome Statute
- ii) Ad-hoc counsel (temporary counsel) to protect the right of defendants supported under the instructions of the Chamber according to Article 56(2)
- iii) Duty counsel (temporary counsel) for persons to be questioned by the OTP in accordance with Article 55(2)
- iv) Legal Advisor under Rule 74 for witnesses providing testimony in accordance with the RPE
- v) Legal representatives for victims (LRVs) supported under Rule 90 of the RPE

85. The appointments of the four types of legal counsel, except LRVs, are managed by the CSS based on criteria requested by defendants, relevant Chambers, the OTP, and VWS. LRVs are usually appointed by the relevant Chamber following recommendations of the VPRS regarding both internal<sup>44</sup> and external legal representatives.

<sup>43</sup> The change in circumstances of the trial resulted in no need for information requests from States Parties.

<sup>44</sup> Internal counsels are composed of staff of the Office of Public Counsel for Victims (OPCV).



86. In line with the relevant regulatory framework<sup>45</sup>, de facto, it is mandatory for all persons involved in the legal representation of suspects, accused, defendants, victims, and witnesses to be included on the list of counsel.

87. The CSS deals with verifying the qualifications of legal counsel, and appointment of counsel candidates to form the "List of Counsel" in accordance with Regulation 70 of the RoC and the "Guide for applicants to the ICC counsel and assistants to counsel".

88. As mentioned above in paragraph 27, the number of counsels in the list of counsel increased from 2013 (459 persons) to 2022 (938 persons). In addition, a total of 209<sup>46</sup> legal counsel appointed over the past ten years are appointed from the list of counsel prepared by the CSS, as shown in Table 15.

**Table 15: Status of Counsel Appointed from the List of Counsel (2013-2022)** (number of persons)

Item	Total	Defense counsel	Ad-hoc counsel	Duty counsel	Legal Advisor under Rule 74	Legal representative for Victims
Total No. of List of Counsel	209	16	17	94	67	15
Counsel from List of Counsel	209	16	17	94	67	15

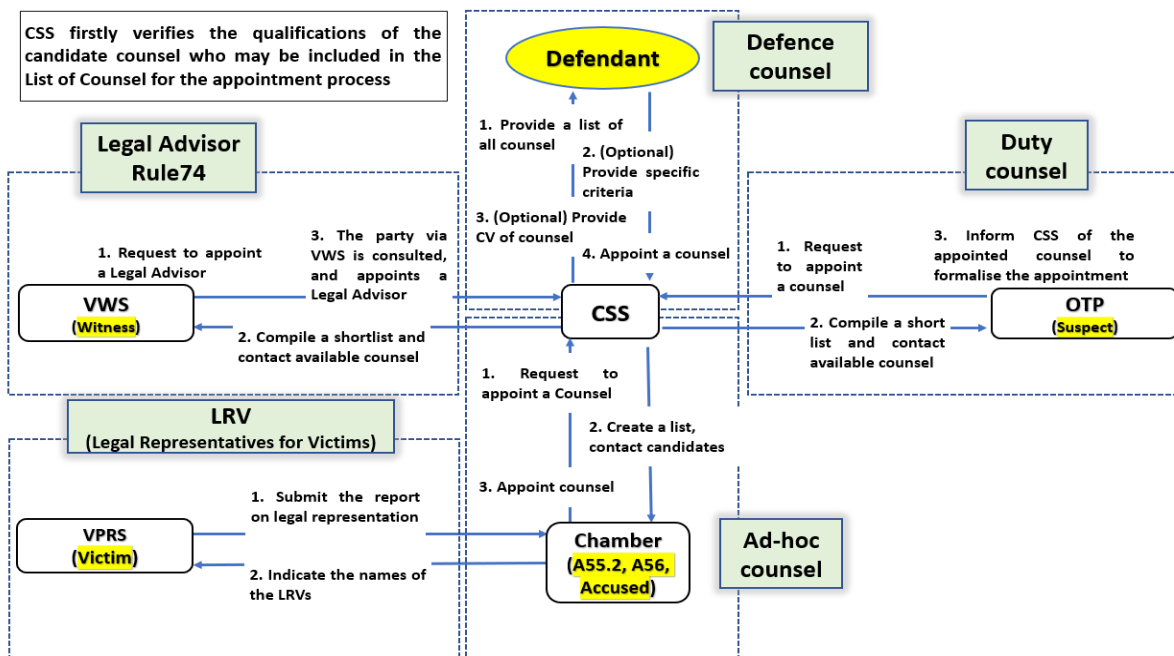
\* The numbers are for the persons appointed (not the number of appointments - no duplicate names)

Source: Data submitted by the Court

### *The procedures for appointing counsel*

89. The detailed procedures for appointing counsel according to the five types of counsel are as follows:

**Figure 8: The Appointment Process of Counsel**



<sup>45</sup> Rule 21(2) of the Rules of Procedure and Evidence, regulations 75, 76, 79, and 80 of the Regulations of the Court.

<sup>46</sup> As previously described in paragraph 29, the number is based on the person who was deduplicated, not the appointments and the LRV includes internal counsel (OPCV).



90. Any counsel wishing to be included in the list of counsel should fill in the application form provided by the ICC pursuant to Regulation 69 of the RoC and submit the form to the ICC with qualifications materials such as the original of the certificate issued by the relevant authority for verification. The application and qualifications materials are provided to the panel of reviewers composed of three members in the CSS to evaluate whether the applicant can be included in the List of Counsel. After the panel completes the evaluation of the counsel candidate and finalizes an "Accept" decision, the successful candidate is included in the List of Counsel and becomes eligible for appointment as one of the five types of counsel.

91. In the process of appointing ad-hoc counsel, duty counsel, and legal advisors under Rule 74, excluding defense counsel and LRVs, each party requiring the appointment of such counsel provides specific criteria, such as location, gender, etc., to the CSS. The CSS, then, creates a shortened list of candidates from the List of Counsel and confirms the availability of the counsel on the shortlist to act as legal counsel.

92. Defense counsel is not necessarily subject to CSS making a shortlist or confirming their availability. Instead, the CSS appoints defense counsel after providing the curriculum vitae (CVs) of the counsel candidates when the defendant requests a summarized version of the list of counsel with specified criteria (i.e., gender, nationality, etc.). For LRVs, the Chamber appoints single or multiple candidate from the shortlist prepared by the VPRS after the VPRS collects the preferences of victim representatives for the appointment of the LRV and all LRV candidates who are chosen by victims and added into VPRS report are confirmed on their availabilities while in the field meeting with victims or their representatives. Thus, it is not necessary for VPRS to conduct additional confirmation process on the availabilities of LRV candidates.

93. It is clear that the appointment process for legal counsel must be transparent and fair. In particular, to ensure fair proceedings, it is important for the Court to establish fair and objective procedures so that prejudice or personal interests of those who are not eligible to appoint counsel do not interfere with the whole process from assessing the qualifications of counsel candidates to be included in the List of Counsel to appointing counsel and other legal representatives. It will, thus, help ensure that defendants, witnesses, and victims have access to qualified legal counsel.

## 2.1. Control of Evaluation Process for Verification of Qualifications

94. The Court assesses the qualifications of applicants through an evaluation panel consisting of three people in the CSS, with regard to their knowledge of international criminal law or litigation, language skills, disciplinary history, and other factors. It, then, decides whether to put them in the List of Counsel by consensus in line with "Guide for applicants to the ICC List of Counsel and assistants to counsel."

95. *SOP document* (-----)<sup>47</sup> stipulate that the three-person evaluation panel should conduct independent assessments and if consensus is not reached among the panels, the CSS should request the applicant additional materials necessary for the evaluation of the applicant's qualifications.

96. To ensure the fairness of process for the counsel's inclusion in the List of Counsel, it is reasonable that the independence of evaluation panels should be guaranteed in a way that each panel evaluates in a horizontal position and the independent supervisor gets an access and, then, reviews the result of the panel's evaluation to prevent bias or the pursuit of personal interests in the panel assessment system.

### *Lack of independence in a horizontal sense*

97. In this regard, the External Auditor observed the procedure in the SOP to see whether it was well-established to ensure the fairness and objectivity in the panel system. However, it states that the first evaluation is currently performed by an assistant legal officer of the CSS. The results are, then, passed on to the Head of the Legal Aid Unit of the CSS for the second evaluation. After the second evaluation is completed, the results are, then, passed on to the Chief of CSS for the third evaluation. (If one panel member is absent, another CSS staff member performs the review.)

<sup>47</sup> It was established as a procedure to describe the role and evaluation process of the panels in detail.

98. Indeed, it is observed that the evaluation by the panel of applicants who wish to be included in the List of counsel is conducted through a computerized system, where the first panel's assessment result is transmitted to the second panel according to the aforementioned SOP, and finally, the last panel is able to view the results of the previous two panels.

99. In addition, the External Auditor reviewed how independently the panels have assessed the applications for the past two years. It was found that three panels conducted 249 evaluations for 83 counsels. 234 evaluations (78 counsel) were deemed "qualified" (Accept) by all three panels, whereas 15 evaluations (five counsel) were considered "not qualified" (Reject) by all three panels.

100. This suggests that there was no disagreement or conflict of opinions on 249 evaluations, and there is a doubt that the established process for achieving consensus among panels is operating independently. That is, the first panel member performs the evaluation whether career certificates, criminal records, and other qualifications records of applicants who have submitted their applications for the List of Counsel satisfy the criteria under Regulation 69 of the RoC, and, then, the second panel member refers to the first evaluation result to conduct the evaluation, and at last, the final panel member, then, refers to both the first and the second evaluation results to prepare the final evaluation report.

101. This is a sequential process, and it cannot guarantee mutually exclusive evaluation by individual reviewers. As a result, the second and third evaluations might be influenced by the results of the first evaluation, which could potentially compromise the fairness and integrity of the process.

102. It is also noted that the head of the Legal Aid Unit<sup>48</sup> is the third and last evaluator. It means that this evaluation system consists of a hierarchical structure and such hierarchical positionings of the panel in the evaluation system may not be conducive to consensus in a horizontal sense. In particular, a lack of independence in a horizontal sense can hinder the performance of the work of the panel, which is supposed to achieve a consistent consensus through a transparent and fair process.

103. -----<sup>49</sup>, -----  
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**Finding:** The evaluation system for verifying the qualifications of applicants for inclusion in the List of Counsel is conducted through a sequential process in which the assessment result of the first panel member can influence the assessment of other panel members. Also, the panel members are composed of staff members in the hierarchical structure of the same section (CSS), which would cause a lack of independence in each panel evaluation and may not be conducive to ensuring the assessment in a horizontal sense.

**Recommendation 5:** The External Auditor recommends the Court to:

- a) Amend the SOP relating to the evaluation of applications submitted by counsel candidates for inclusion in the List of Counsel in order to ensure eligibility assessment in a horizontal sense and to oversee the final decision by a third party; and
- b) Revise the review system with the assistance of the IMSS<sup>50</sup> to strengthen an independent review process that prevents individual panels from viewing other panels' assessment results.

<sup>48</sup> According to the SOP, the Chief of CSS is the third reviewer, however, the Chief of CSS is vacant. Thus, the second reviewer of the panel is held by the Legal Aid Fund Monitoring Specialist of the CSS and the third reviewer by the Head of the Legal Aid Unit of the CSS.

<sup>49</sup> IOM Report (-----).

<sup>50</sup> Information Management Service Section.

## 2.2. Control of the Appointment Process for Legal Counsel

104. When the CSS receives a request from a party asking for the appointment of any type of counsel<sup>51</sup>: duty counsel, ad-hoc counsel, and legal advisor under Rule 74, it creates a shortened List of Counsel from the list of counsel for appointment by filtering based on the criteria requested from the party. These filtering criteria are based on the location of the activities including interview and testimony, language requirements, and other relevant criteria.

105. Once the CSS has a shortened List of Counsel candidates that meet the above criteria, it, then, sorts the candidates based on the number of recent appointments and the order in which they were included in the List of Counsel. The CSS, then, checks to see if the candidates are available for the case via email.

106. From 2013 to 2022, for duty counsel, the CSS has contacted 1,383 candidates for availability confirmation<sup>52</sup> and received responses from 807, of which 216 are appointed by the OTP. For Legal Advisor under Rule 74, the CSS has contacted 1,050 candidates and received responses from 428, of which 117 have been appointed by the party of witnesses. For Ad-hoc counsel, the CSS has contacted 292 candidates and received responses from 116, of which 23 are appointed by the Chamber.

**Table 16: Status of Availability Confirmation (2013-2022)** (number of persons)

Item	Counsel Contacted	Counsel Available	Counsel Retained
<b>Duty Counsel</b>	1,383	807	216
<b>Legal Advisor under Rule 74</b>	1,050	428	117
<b>Ad-hoc Counsel</b>	292	116	23
<b>Total</b>	2,725	1,351	356

\* The numbers mean the sum of the contacts if a single counsel has been contacted multiple times for different cases.

Source: Data submitted by the Court

107. The CSS contacts counsel candidates in the shortlist to check whether the candidates are available in terms of time or geographical location to represent a particular case. In this process, it is important to have a mechanism and a monitoring system in place to ensure that every single candidate on the shortlist is fully contacted so that their intentions can be accurately communicated as to whether they are available to take the case.

108. In addition, despite email being the primary means of communication in today's world, contacting counsel candidates exclusively via email may not result in complete contact with all candidates, and some may not be contacted at all due to email overflow, incorrect email addresses, and other technical issues. Therefore, if a candidate is identified as having not been contacted via email for a long period, it seems to be required that the candidate should be reached through practical means other than email so as not to cause the candidate to miss the opportunity to act in the appointment process. This seems necessary to ensure transparency in the appointment process as well.

109. In this regard, the External Auditor reviewed whether the Court confirms the availability of counsel candidates with proper internal control and how the CSS manages contact information in the List of Counsel.

<sup>51</sup> As mentioned in paragraph 92, the CSS does not necessarily create a shortlist for Defence counsel and LRVs. For Defence counsel, it provides CVs to the defendant upon request. Also, for the VPRS, the Chamber appoints one counsel candidate from the options prepared by the VPRS after it collects the preferences of victim representatives for the appointment of an LRV.

<sup>52</sup> The process of determining whether a counsel included in the shortlist is available in terms of geographical location or time to represent a particular case.

***Lack of internal control on monitoring for availability confirmation***

110. First of all, the External Auditor reviewed whether adequate internal controls are in place to ensure that every counsel candidate on the shortlist is contacted, and their availability is accurately checked, and identified two instances<sup>53</sup> where not all candidates were being contacted.

111. In the first instance, it was found that the process of appointing counsel for defendant A involves at least one counsel eligible as a counsel candidate because he/she resided in the Netherlands on the proximity criteria, but the CSS did not contact any of the candidates residing in the Netherlands in 2020. In addition, in the second instance, Counsel C was appointed as the Legal Advisor under Rule 74 for witness B in 2016. However, there is a question as to whether Counsel C, who ranked only 34th in terms of priority, could have been appointed if a high-priority counsel had been contacted. These incidents highlight the potential lack of a system to verify and monitor that all candidates have been conducted.

112. In this regard, the External Auditor requested the email distribution lists that have been used to contact counsel candidates in the past one year to check the system for monitoring that the process of checking for availability is working properly and well implemented. However, the CSS refused to provide the list, responding that since the process of determining availability involves applying filtering criteria to an Excel file and manually sending emails to each candidate, it is difficult<sup>54</sup> to find email correspondence of the past one year with their current human resources. Furthermore, the CSS expressed concerns that providing records regarding candidates' email addresses to the External Auditor without informing them could raise concerns regarding privacy issues.

113. As a result, the External Auditor was unable to obtain an email distribution list and ultimately, it was unable to verify whether all counsel candidates who should have been contacted were properly contacted. In addition, as the CSS explains, it is notable that the entire process of contacting candidates is being carried out manually, and the email distribution list is not well-organized, so even the External Auditor could not scrutinize the process faithfully.

114. The External Auditor considers that in order to monitor the availability of counsel candidates at all times and to ensure that the CSS actually contacts individuals who should have been contacted for availability, there should be a system in place to verify whether every candidate has been included in the record of the actual emails sent by the CSS. However, the Court does not have a computerized system to compile the records of CSS emails to candidates, so it does not seem to be possible to monitor the process of checking the availability of candidates in a proper way.

115. As such, the lack of a vetting system can lead to weakening of internal controls in the current counsel appointment process. This may undermine the transparency in the appointment process.

***Lack of management of counsel's information for checking availability***

116. The External Auditor reviewed how the CSS contacts counsel candidates to determine the availability of candidates and manages the contact information for candidates in the List of Counsel.

117. The CSS emails the individual candidates, who meet the criteria required by the parties such as the Chamber, the OTP, and the representative party of the VWS seeking to appoint counsel, in order to see if they could perform as counsel. It is noteworthy that the CSS contacts individuals only by email and manages all candidates' contact information such as email addresses and phone numbers in Excel spreadsheets manually.

<sup>53</sup> IOM Report (-----).

<sup>54</sup>The CSS stated, "With regard to the retention policy, in the context of communication with counsel, it was meant as settings applied Outlook and referred to as Cached Exchange Mode that provides general search results only up to a certain period, currently set to less than a year. These settings are sent by IMSS, and CSS cannot modify that. For that reason, it becomes impossible to locate certain information unless specific keywords are used, which may not be known to a person doing the search".

118. The reason why the liaison between CSS and candidates for counsel is important is that it is a process of contacting all candidates to ensure that they have been given a fair opportunity to act as counsel.

119. Therefore, if the CSS wishes to contact the counsel candidate only by email, the email information for the candidate managed by the CSS should always be updated to date, and if the CSS receives an undeliverable email message from the candidate to be contacted, it is desirable for the CSS to ask such a person to update the email information by using another practical means of communication such as text message, another email account, or phone,<sup>55</sup> since the candidate who cannot be contacted may not even realize they are unreachable.

120. Nevertheless, the External Auditor found that 45 out of 938 counsels were not contacted due to mail delivery failure within the past two years as of 31 December 2022, and the CSS was aware of this fact when creating the List of Counsel annually during the period.

121. In addition, the External Auditor found that 13 out of the above 45 counsel who were not reachable were included in the shortlist<sup>56</sup> for 26 cases (22 cases for Duty Counsel, 1 case for Ad-hoc Counsel, and 3 cases for Legal Advisor under Rule 74). Unsurprisingly, they were neither contacted nor accordingly given the opportunity to comment on whether they could take the case.

122. The reason why the CSS was unable to contact the counsel candidate as mentioned above is that CSS's email did not reach the recipient and was returned. This seems likely due to email inbox overflow, incorrect email address or other technical reasons.

123. In particular, as mentioned in paragraph 120, the CSS confirmed that the mail delivery failure was confirmed through the process of sending and receiving emails to counsel candidates for the purpose of counsel's annual seminar and training which are conducted every year. In other words, even though the CSS already knew it was not able to communicate with 13 candidates via email, it continued to contact them through unreachable email addresses only, without searching for other ways to update the email information.

124. In response to this issue, during the audit, the Court has expressed the opinion that the responsibility for updating contact information lies with an individual candidate for counsel, as mandated by Regulation 69(3) under the RoC.

125. However, it is more reasonable to attribute mail delivery failure to the lack of mutual efforts between CSS and individual counsel to actively update their contact information. This is because the cause of failure to receive emails cannot be accurately identified, and candidates who do not receive emails may not know that there is a problem with their contact information.

126. In this regard, the Court needs to establish a way to update the counsel candidates' contact information through contact with them so as not to deprive them of the legitimate opportunities for being appointed as counsel.

**Finding:** The following observations were made during the audit:

- a) The CSS does not have a system to monitor whether the process of checking the availability of counsel candidates is working adequately. For instance, failure to organize or compile the records of emails sent to check the availability of candidates may lead to undermining transparency in the appointment process and not providing a fair opportunity to potential counsel candidates; and
- b) At least 45 out of 938 counsels on the list were found not to have been contacted because of mail delivery failure from 2021 to 2022 although the List of Counsel was annually created and maintained from 2021 to 2022. Furthermore, 13 out of the above 45 counsel were included in the shortlist even though they were unable to receive communication during the period.

<sup>55</sup> According to the regulations (-----, Appointment of ad hoc counsel), the CSS shall contact counsel through the most practical means such as email, phone or by letter.

<sup>56</sup> A condensed List of Counsel compiled by the CSS based on specific criteria presented by the defendant or witness (OTP or Chamber) for the purpose of appointing counsel.

**Recommendation 6:** The External Auditor recommends the Court to:

- a) Implement monitoring the process for confirming availability to ensure that every counsel candidate is contacted; and
- b) Find a way to ensure that the contact information of counsel candidates in the List of Counsel is periodically updated to provide candidates with a fair opportunity to practice counsel.

### 2.3. Appointing Different Types of Legal Representatives for Victims

127. The ICC currently appoints two types of legal representatives for victims: external legal counsel provided by ICC's legal aid scheme and OPCV legal counsel (internal counsel) who are not provided by legal aid assistance because OPCV legal counsel are staff of the Court.

128. As shown in the table below, during the period from 2013 to 2022, a total number of ten LRV teams, composed of 19 LRVs were appointed, with teams of external counsel, internal counsel (OPCV) and mix<sup>57</sup> of external counsel and internal counsel (OPCV), comprising four, five and one respectively.

**Table 17: The Number of LRV teams<sup>58</sup> (Legal Counsel) Appointed from 2013 to 2022**

Type	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	Total
External counsel	0	0	1(2)	1(1)	0	0	1(3)	0	1(2)	0	4
Internal Counsel (OPCV)	2(2)	0	1(1)	0	0	0	1(1)	0	1(1)	0	5
Mix of external counsel and OPCV	0	0	0	0	0	0	1(6)	0	0	0	1
<b>Total</b>	<b>2(2)</b>	<b>0</b>	<b>2(3)</b>	<b>1(1)</b>	<b>0</b>	<b>0</b>	<b>3(10)</b>	<b>0</b>	<b>2(3)</b>	<b>0</b>	<b>10</b>

\* The data in the parentheses indicate the number of legal counsels within the LRV team. More than one person can be appointed as LRVs in one case.

Source: Data submitted by the Court

129. Meanwhile, considering the following regulations, historical background, and precedents, it seems that supporting victims, unlike defense counsel, with legal aid can be limited depending on the Court's administrative and financial conditions and the ICC's budget.

- i) While the victims' right to choose legal counsel and to receive legal aid assistance to the victims who are indigent is stated in the RPE (not in the Rome Statute), this does not guarantee unconditional financial assistance to the indigent because legal representatives not appointed by the Court will not be covered with the legal aid pursuant to Rule 90 of the RPE and the relevant Chamber may reject victim's request of providing legal aid to legal representatives for victims.<sup>59</sup>

<sup>57</sup> One OPCV counsel and five external counsels.

<sup>58</sup> The number of legal counsels within each team varies case-by-cases.

<sup>59</sup> ICC, (G) case, Trial Chamber IX, case no. -----, -----, paras. 7-13.

ii) In addition, jurisprudence have been made stating that victims' freedom of choosing a legal representative is not absolute and subject to practical, financial, infrastructural and logistical constraints faced by the Court<sup>60</sup>.

130. In other words, in the case of victims, the ICC needs to support the appointment of a legal representative within available resources of the ICC.

131. Moreover, the External Auditor has found no evidence of any difference between external counsel and the OPCV in terms of expertise and professionalism as well as issues like conflicts of interest<sup>61</sup> except the financial implications. This implies that the appointment of one type of LRV affects the number of appointments for the other type and thus, affects the total expenditure of the ICC budget (trade-off).

132. Therefore, in the case of victims, it seems that the overall analysis of the full financial implications<sup>62</sup> of choosing different types of legal counsel for victims with the consideration of the ICC's financial situation is required in order to deal with the appointment of the LRV within available resources of the ICC and in an effective way.

***Submitting insufficient information to the relevant Chamber for the appointment of LRVs***

133. In this regard, the External Auditor reviewed whether the Court is utilizing the established process or criteria for appointing LRVs while taking into account the financial impact on the Court.

134. However, while the VPRS of the Registry submits a report which contains information<sup>63</sup> the relevant Chamber uses to appoint LRVs, the report does not provide information such as overall financial implications of the different alternatives for choosing LRVs<sup>64</sup> as well as the current/additional caseload processing capacity of the OPCV because it has been found that the ICC does not possess criteria or parameters to adequately measure and compare the cost of the external counsel with that of the OPCVs. Accordingly, concerns can be raised that the relevant Chamber is not well informed of all the sufficient information when making a decision on the appointment of the LRVs.

135. For example, in October 2021, the Registry submitted a report (-----) on the (L) case, in which it presents information on the option of external counsel and the OPCV working together within one team, but not the information of overall financial implications of the option. The relevant Chamber appoints a team of external counsel as per the majority of victims' wishes. (-----)

***Lack of precedent for analyzing financial implications of appointing different types of LRVs***

136. Furthermore, the External Auditor reviewed whether the Court had made an effort on establishing processes or criteria for selecting LRVs while taking into account the financial impact on the Court in the past.

137. In the past, in fact, there have been discussions about a way to expand the role of internal counsel for victims considering that legal aid for victims would be a significant financial risk for the ICC<sup>65</sup>. A plan to actively utilize the OPCV to reform the legal support policy was discussed, but no consensus on an enhanced role of the OPCV was found<sup>66</sup>.

<sup>60</sup> ICC, (W) case, Trial Chamber IV, case no. -----, -----, para. 12., ICC, (U) Case, Trial Chamber II, case no., -----, -----, para. 11.

<sup>61</sup> Regarding the qualifications, both the external and internal counsel need to have the same legal experience in criminal proceedings and language proficiency in accordance with the relevant regulations and operate in the same way and as for the issue of conflicts of interest, both are subject to the Code of Professional Conduct for Counsel and measures will be taken accordingly should a problem arises.

<sup>62</sup> Information such as cost between external counsel and OPCVs, and additional personnel costs of the OPCV in case the demand for the OPCV rises.

<sup>63</sup> Information such as victims' preference of potential legal representation in the ICC proceedings, the Registry's recommendations for the appointing LRVs.

<sup>64</sup> While the Registry does provide the Chamber with information indicating the general financial framework (Registry Report on Legal Representation of Victims, -----, -----, paras. 21, 52-54), the Registry does not provide a detailed cost analysis and comparison between different options.

<sup>65</sup> Report on different legal aid mechanisms before international criminal jurisdictions, 31 October 2008 (ICC-ASP/7/23), Annex I, para. 6. b)

<sup>66</sup> Report of the Bureau on legal aid, 23 October 2012, (ICC-ASP/11/2), III. Conclusions, para. 18.

138. In particular, in 2009, as per a CBF's request, the ICC calculated the cost for each trial stage and type of legal representatives for the victim and submitted a report (ICC-ASP/8/25 Annex II, III) showing that the utilization of the OPCV could be cheaper than appointing external legal representatives.<sup>67</sup>

139. Recently, the average increase rate of the approved budget of legal aid for victims during the past three years stands at 17%, while that of the defense is 10%<sup>68</sup>. In addition, in view of the full reform of the ICC Legal Aid Policy submitted in 2022<sup>69</sup> which takes into account factors such as the stage and complexity of the trial in determining the necessary number of external legal counsel team members, as well as related personnel expenses, it is more important to give due consideration to the potential financial impact on all types of LRVs such as additional personnel costs of the OPCV following the different stages and complexity of the trial in the event that the demand for the OPCV increases. Accordingly, it becomes increasingly pertinent to conduct a cost comparison between external and internal legal counsel.

140. However, until now, no concrete analysis, such as an analysis of the cost-effectiveness of the use of external legal representatives or the OPCV at the different stages of the proceedings, has been conducted.

**Finding:** The following observations were made during the audit:

- a) The Court does not possess the criteria nor standards for assessing the financial impact of the appointment of different types of LRVs. Thus, the Registry submits a report of recommendations for appointing LRVs to the relevant Chamber containing the preferences of the victims but does not submit sufficient information on the overall financial implications of the options.
- b) The Court has not initiated the full cost comparison of the external and internal legal representatives for victims at the different stages and complexity of the trial as well as potential financial implications such as additional personnel costs of the OPCV.

**Recommendation 7:** The External Auditor recommends the Registry to, as a standard item in its reports on legal representation of LRV to Chambers, provide relevant options alongside their financial implications for the Court's budget as far as these can be calculated.

### 3. Transparency and Budgetary Oversight for the Legal Aid Payment

#### 3.1. Victims' Legal Aid Budget Used to Cover Defense Costs

141. The legal aid budget is allocated to two commitment items, referred to as "Counsel for defense" and "Counsel for victims," as depicted in Figure 9 below. As the budget is approved by the ASP and serves different targets with varying legal assistance purposes, the Court is responsible for managing legal aid funds in accordance with the two commitment items, especially when developing the annual programme budget and calculating actual expenditures. The Court also applies this distinction to the objects of expenditure to Contingency Fund (CF) notifications, as illustrated in Figure 10 below.

<sup>67</sup> The costs were only estimations because the Court had not completed the full judicial cycles at that time.

<sup>68</sup> *Report of the Committee on Budget and Finance on the work of its thirty-ninth session*, 15 October 2022, (ICC-ASP/21/15), Annex III.

<sup>69</sup> *Annual Budget for Legal Aid, III. Legal Aid Resources under the Draft Legal Aid Policy (Core Text)*, Table 8 (ICC-ASP/12/3).



**Figure 9: The Approved 2022 Programme Budget of the ICC****Table 2: Total ICC: Approved budget for 2022**

ICC	2020 Expenditures (thousands of euro)			2021 Approved Budget	Resource Changes		2022 Approved Budget
	Total	Cont. Fund	Total Incl. CF		Amount	%	
<i>Judges</i>	5,211.6	-	5,211.6	4,711.1	365.0	7.7	5,076.1
Professional staff				64,587.2	626.0	1.0	65,213.2
General Service staff				25,005.5	208.9	0.8	25,214.4
<i>Subtotal staff</i>	89,008.8	-	89,008.8	89,592.7	834.9	0.9	90,427.6
General temporary assistance	17,055.9	348.6	17,404.5	18,648.3	3,424.7	18.4	22,073.0
Temporary assistance for meetings	446.7	166.3	613.0	511.8	383.1	74.9	894.9
Overtime	181.9	40.1	222.0	237.2	106.5	44.9	343.7
<i>Subtotal other staff</i>	17,684.6	555.0	18,239.6	19,397.3	3,914.3	20.2	23,311.6
Travel	1,995.4	123.1	2,118.5	4,096.9	50.2	1.2	4,147.1
Hospitality	14.0	-	14.0	28.0	-	-	28.0
Contractual services	3,373.9	177.3	3,551.2	4,056.0	(646.5)	(15.9)	3,409.5
Training	371.2	-	371.2	624.8	47.7	7.6	672.5
Consultants	1,006.9	128.2	1,135.0	627.2	93.5	14.9	720.7
Counsel for defence	2,710.4	921.4	3,631.7	3,943.7	1,289.0	32.7	5,232.7
Counsel for victims	1,211.9	328.8	1,540.7	1,727.1	284.5	16.5	2,011.6
General operating expenses	13,674.2	208.8	13,882.9	14,026.5	270.3	1.9	14,296.8
Supplies and materials	920.1	138.5	1,058.6	1,111.0	20.7	1.9	1,131.7
Furniture and equipment	1,294.2	82.1	1,376.3	731.6	72.4	9.9	804.0
<i>Subtotal non-staff</i>	26,572.1	2,108.2	28,680.3	30,972.8	1,481.8	4.8	32,454.6
<b>Total</b>	<b>138,477.1</b>	<b>2,663.2</b>	<b>141,140.3</b>	<b>144,673.9</b>	<b>6,596.0</b>	<b>4.6</b>	<b>151,269.9</b>
<i>Host State Loan</i>	3,585.1	-	3,585.1	3,585.1	-	-	3,585.1
<b>Total Including Host State Loan</b>	<b>142,062.2</b>	<b>2,663.2</b>	<b>144,725.4</b>	<b>148,259.0</b>	<b>6,596.0</b>	<b>4.4</b>	<b>154,855.0</b>

Source: The Approved 2022 Programme Budget of the ICC

**Figure 10: Budget Performance for the Contingency Fund in 2020****Table 5: Overall budget performance in 2020 for the four Contingency Fund notifications, by item of expenditure (amounts in thousands of euros)**

Item	Approved Budget 2020	Actual Expenditure* 2020	Implementation rate in %
	[1]	[2]	[3]=[2]/[1]
General temporary assistance	620.7	348.6	56.2
Temporary assistance for meetings	191.6	166.3	86.8
Overtime	70.0	40.1	57.3
<i>Subtotal staff costs</i>	882.3	555.0	62.9
Travel	287.9	123.1	42.8
Contractual services	300.6	177.3	59.0
Consultants	158.1	128.2	81.1
Counsel for defence	978.1	921.4	94.2
Counsel for victims	374.3	328.8	87.8
General operating expenses	428.0	208.8	48.8
Supplies and materials	99.5	138.5	139.2
Furniture and equipment	84.6	82.1	97.1
<i>Subtotal non-staff costs</i>	2,711.1	2,108.2	77.8
<b>Total ICC</b>	<b>3,593.4</b>	<b>2,663.2</b>	<b>74.1</b>

Source: Report on activities and programme performance of the ICC for the year 2020 (ICC-ASP/20/7)

142. Pursuant to Rule 104 and Regulation 10 of the FRR, the Registrar shall maintain internal financial controls to ensure that obligations and expenditures align with the appropriations or other financial provisions approved by the ASP, as well as the relevant rules and purposes, although having the authority to redeploy resources among organizational units and objects of expenditures<sup>70</sup>. In addition, according to the ICC Legal Aid Policy, to ensure transparency in the legal aid payment system, it should be structured and operated in accordance with the requirements of budgetary oversight and auditing in the management of public funds<sup>71</sup>.

143. In the meantime, the Court provides an annual report, named “Report on activities and programme performance of the ICC” (hereinafter “budget performance report”) to the ASP through the CBF, detailing its main activities and offering an overview of its budgetary

<sup>70</sup> FRR Rule 104.3.<sup>71</sup> Registry’s single policy document on the Court’s legal aid system (ICC-ASP/12/3), para. 9.

performance for the year. In this report, the Court is required to transparently disclose the actual expenditure and budget performance for each commitment item, including the CF notifications<sup>72</sup> as shown in Figure 9, with the aim of enabling States Parties to exercise effective budgetary oversight and control. Therefore, it is reasonable that the Court should report to States Parties on any transfers made between different commitment items, including accurate figures of actual expenditures. Furthermore, when transferring funds between items in this manner, appropriate internal control measures should be put in place.

144. The External Auditor reviewed the breakdowns of legal aid budget payments over the past five years (2018-2022) with the objective of verifying that the funds have been utilized in accordance with the intended purpose of each budgetary item as outlined in the APB (Approved Programme Budget). During the examination, it was observed that there were instances where the use of the legal aid funds did not comply with the approved purpose of each item. Additionally, the annual budget performance report did not accurately reflect the actual expenditures.

145. First of all, a total amount of 259,678 euros from the legal aid budget for victims has been disbursed to eight defense teams over the past five years, as shown in Table 18.

**Table 18: Legal Aid Budget for Victims Paid to the Defense Teams (2018-2022)**

	2018	2019	2020	2021	2022 <sup>73</sup>	Total
(A) defense	-	4,530	3,460	-	-	7,989
(P) defense	-	1,588	-	-	-	1,588
(C) defense	3,300	-	-	-	-	3,300
(E) defense	-	3,664	-	-	-	3,664
(G) defense	-	4,797	-	17,537	-	22,334
(I) defense	-	120	-	-	-	120
(J) defense	-	-	159,683	-	-	159,683
(K) defense	-	-	61,000	-	-	61,000
<b>Total (€)</b>	3,300	14,698	224,142	17,537	-	259,678

\*The data in the table are as of October 2022

Source: Data extracted from the SAP of the ICC

146. In particular, In 2020, 224,142 euros were spent on defense teams from the victims' budget, of which 163,923 euros were spent from the CF. Pursuant to Regulation 6.7 of the FRR, if a need to meet unforeseen or unavoidable expenses arises, the Registrar, by his or her own decision, is authorized to enter into commitments not exceeding the total level of the CF. Before entering into such commitments, the Registrar shall submit a short, supplementary budget notification to the CBF through its Chairperson. It is also stated that the Registrar shall report together with the new draft programme budget to the ASP, through the CBF, on any exercise of the commitment authority given under regulation 6.7 according to the regulation 6.8. Besides, the CBF made a recommendation for updating the Committee on the status of its implementation of the CF expenditures at the Committee's second session.<sup>74</sup> Therefore, it is desirable that the ASP should be reported with accurate statistical figures on actual expenditure of the CF.

147. Nonetheless, it was found that neither the CBF nor the ASP was informed of accurate figures related to the exercise of the commitment. Specifically, in 2020, the actual expenditure of the counsel for defense stood at 798.0 thousand euros on the budget performance report, while that of the counsel for victims amounted to 328.8 thousand euros (Figure 11). It is also stipulated that the implementation rate of the defense budget is 100%, while that of the victims' budget is 97.8%.

<sup>72</sup> FRR Regulation 6.8 "The Registrar shall report together with the new draft programme budget to the Assembly of States Parties, through the Committee on Budget and Finance, on any exercise of the commitment authority given under regulation 6.7."

<sup>73</sup> November to December in 2022 is excluded from the audit analysis due to limitation of audit period.

<sup>74</sup> CBF Policy and Procedure Manual, para. 208.

**Figure 11: Budget performance for Contingency Fund notifications in 2020**

392. Table 8 below shows the budget performance for the Registry in respect of the CF notification for the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* in the situation in the Central African Republic (CAR II). At year-end, the actual implementation rate was 93.5 per cent, or €1.64 million, against the notification amount of €1.75 million. The funds were used to cover detention, language services, victim participation activities, legal aid for two defence teams and one team of common legal representatives of victims, support for victims and witnesses, and field operational support activities in the Country Office, Central African Republic.

**Table 8: Budget performance in 2020 for the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (Yekatom and Ngaïssona) in the situation in the Central African Republic (CAR) II, by item of expenditure (amounts in thousands of euros)**

Item	Approved Budget 2020 [1]	Actual Expenditure* 2020 [2]	Implementation Rate in % [3]=[2]/[1]
General temporary assistance	225.7	171.0	75.8
Temporary assistance for meetings	50.3	51.7	102.7
<i>Subtotal staff costs</i>	<i>276.0</i>	<i>222.7</i>	<i>80.7</i>
Travel	53.0	39.2	74.0
Contractual services	29.1	5.9	20.4
Consultants	134.4	108.4	80.7
Counsel for defence	798.0	798.0	100.0
Counsel for victims	336.0	328.8	97.8
General operating expenses	41.4	26.7	64.4
Supplies and materials	57.1	77.1	135.1
Furniture and equipment	26.3	30.8	117.2
<i>Subtotal non-staff costs</i>	<i>1,475.3</i>	<i>1,414.9</i>	<i>95.9</i>
<b>Total ICC</b>	<b>1,751.3</b>	<b>1,637.6</b>	<b>93.5</b>

Source: Report on activities and programme performance of the ICC for the year 2020 (ICC-ASP/20/7)

148. However, an amount of 163,923 euros of the CF which was paid to the defense out of the total 328.8 thousand euros not correspondingly to the original commitment item, mentioned above in paragraph 146, was not reflected on the budget performance report. As a result, it has been reported to the ASP that the actual expenditure and implementation rate of the counsel for defense were underestimated than they actually were. On the contrary, those of the counsel for victims were overstated than the actual. In order to correct the report by reflecting the 163,923 euros mentioned above, the report should have been reported as in Table 19.

**Table 19: Accurate Figures of Budget Performance for Contingency Fund Notifications in 2020** (in thousands of euros)

	Approved Budget	Actual Expenditure	Implementation Rate
<b>Counsel for defence</b>	798.0	798.0 → 961.9*	100.0 → 120.5%
<b>Counsel for victims</b>	336.0	328.8 → 164.8**	97.8 → 49.0%

\* 961.9=798.0+163.9 \*\*164.8=328.8-163.9

149. It was found that such an operation was done because a due technical transfer process had not worked when using the legal aid funds from another commitment item. The annual budget performance report is prepared by the Budget Section (BS), using records in the database of the SAP created by the certifying officers of each section. As the only section that knows the actual details of the legal aid expenditure was the CSS, which is in charge of the legal aid system, the certifying officer of the CSS should have requested the BS to transfer the necessary amount of funds to the appropriate commitment item<sup>75</sup> in the “Budget Status Report” of the SAP<sup>76</sup>. However, it was found that the CSS directly charged the expenditure for supporting defendants to the victims’ budget accounts without necessary formalities for transferring funds, making it difficult for the BS to prepare the annual budget performance report with accurate expenditure figures of each commitment item.

<sup>75</sup> Counsel for victims (account code: 5520), Counsel for Defence (account code: 5510).

<sup>76</sup> System Analysis Program development.

150. With regard to this operation, the CSS explained that “due to the depletion of the defense legal aid budget at the end of that year, these defense fees were directly charged to the remaining victims’ budget accounts with a view to using the available funds as swiftly as possible,” and “while a new MOD<sup>77</sup> should be created in order to transfer funds and pay a defense team with defense budget, the MOD creation was not allowed at the end of the year according to the instruction by the Finance Section (FS).” The CSS also added that while “the process was entirely internal to the CSS, as per agreement with the BS, the use of victims’ budget could be used to pay defense teams,” and that “in consultation with the Finance Section (FS), this practice has been discontinued.”

151. However, these CSS’s explanations are still questionable. First of all, the defense budget of 2020 has not been depleted contrary to the comment.<sup>78</sup> The approved budget for the defense was 2,867,500 euros, while the expenditure was 2,584,738 euros, thus 282,762 euros was left. In addition, the FS confirmed that a new MOD creation would never be banned at the end of the year, and that there was no consultation with regard to discontinuation of those practices. Also, the BS said that there was rather an agreement on overall possibility to transfer between defense and victims’ budget than an agreement on a particular point.

152. The External Auditor requested further clarification on the question raised above.<sup>79</sup> The CSS was unable to provide any relevant specifics.

153. The relevant departments (CSS, BS, FS) of the ICC acknowledged the amount in Table 19 and those practices were not desirable. As a result of this operation, it is noted that inaccurate reporting could lead to misunderstanding with States Parties regarding the actual expenditures for the defense and victims’ budget respectively. Additionally, even considering that the ASP has requested the Court to take account of cost constraints and ensure that all options presented can be funded within the existing resources,<sup>80</sup> it is important for the Court to calculate accurate statistics on the actual legal aid costs. According to Table 19, fortunately, these practices do not appear to have occurred in 2022. But given that the data were only up to October 2022, it could not be concluded that this practice has ceased.

154. It seems recommendable to go through a due internal transfer procedure, if there is a necessity to transfer legal aid funds between two commitment items (Counsel for Defense and Counsel for Victims) so that such expenditures paid from another item are transparently disclosed to States Parties through the annual budget performance report.

**Finding:** The Court inappropriately used a limited amount of the victim’s budget allotment to cover defense team costs instead of undergoing the due internal transfer procedure. As a result, the actual expenditures per commitment item were not reported accurately in the budget performance report.

**Recommendation 8:** The External Auditor recommends the Court to use the due internal process when transferring legal aid budget and to ensure accurate reporting on the actual expenditures of the legal aid budget for defense or victims respectively in the annual budget performance report to be submitted to the ASP.

### 3.2. Legal Aid Costs Covered from Different Budgets

155. The legal aid funds are composed of four budget categories according to the ICC Legal Aid Policy: 1) Team fee (also stated as “Remuneration”) <sup>81</sup>, 2) Professional charges<sup>82</sup>, 3)

<sup>77</sup> MOD stands for Miscellaneous Obligation Document, which is an exceptional type of financial obligation equivalent to a Purchase Order (PO) or Travel Expense Report (TER), according to Rule 110.8 of the FRR. This obligation document is usually created if there are multiple vendors, concepts and payments that cannot be split into several Pos or Trips due to the nature of activity.

<sup>78</sup> Implementation Rate “Legal aid for Defence” in 2020 was 90.1% (ICC-ASP/21/15, Annex III).

<sup>79</sup> The External Auditor’s request included A) any regulations on time limits of transfers, B) any basis for Defence budget depletion at the end of the year 2020, and C) any evidence of agreements or consultation facts by BS or FS.

<sup>80</sup> ICC-ASP/20/Res.5, para. 90.

<sup>81</sup> *Ibid.* section VI.

<sup>82</sup> *Ibid.* section VII.

Investigation budget<sup>83</sup>, and 4) Expenses budget.<sup>84</sup> These four budget items are separated by purpose, requirement, and internal control method, like Table 20 below.

**Table 20: Budget Categories of Legal Aid Funds in the ICC Legal Aid Policy**

	Purpose	Requirement	Internal control method
<b>1) Team fee (Remuneration)</b>	<ul style="list-style-type: none"> <li>■ To pay monthly net fees to each counsel team member</li> <li>■ Monthly fees payment for 4 legal team members (counsel, associate counsel, legal assistant, case manager) are covered by this budget; it applies neither to the remuneration of professional investigators nor resource person</li> </ul>	<ul style="list-style-type: none"> <li>■ At the end of each month, the legal team presents to CSS the schedule of work done by the hour for each member with details of the activities carried out</li> <li>■ All time sheets of a team must be signed by the counsel before the 15th of each month</li> </ul>	<ul style="list-style-type: none"> <li>■ The CSS checks that the timesheets are correctly completed and signed by team members and counsel, and verifies the sound basis of the schedule of work done by the hour</li> <li>■ Pursuant to <i>SOP document</i> - Payment of Fees</li> </ul>
<b>2) Professional charge</b>	<ul style="list-style-type: none"> <li>■ To compensate costs that have a direct link with intervention and involvement in Court proceedings</li> <li>■ (Example) pension, health insurance contributions, bar association payments</li> </ul>	<ul style="list-style-type: none"> <li>■ The person concerned has to provide supporting evidence/documentation of the actual payment of charges</li> <li>■ Where simultaneous mandates, the payment for professional charges is not applicable for the second case</li> </ul>	<ul style="list-style-type: none"> <li>■ The CSS determines whether the person concerned is eligible for compensation on the basis of the supporting evidence that he/she submitted</li> <li>■ CSS calculates the applicable rate of compensation using objective criteria</li> <li>■ No special SOP for professional charges</li> </ul>
<b>3) Investigation budget</b>	<ul style="list-style-type: none"> <li>■ All costs associated with the investigation requirements of the defense and victims' team are assumed by this budget</li> <li>■ (Example) the hourly fees of the professional investigators, resource persons, or field assistants; travel expenses; daily subsistence allowance of all team members in connection with in situ investigation work in the field</li> </ul>	<ul style="list-style-type: none"> <li>■ The mission request and plan must be submitted to CSS with a reasonable advance notice</li> <li>■ Upon return from the mission, the traveler submits a request for reimbursement of travel expenses along with supporting documents</li> </ul>	<ul style="list-style-type: none"> <li>■ The mission will be assessed by CSS based inter alia on provided justifications for the mission and availability of budget (expenses or investigations)</li> <li>■ The mission can be rejected on various grounds, including insufficient or depleted budget and security situation</li> <li>■ Pursuant to <i>SOP document</i> - Organization of travel and payment of related expenses and ICC SOP for Official Travel</li> </ul>
<b>4) Expenses</b>	<ul style="list-style-type: none"> <li>■ To reimburse two categories of expenses: miscellaneous and travel</li> <li>■ Miscellaneous expenses include office supplies; translation costs and expert fees</li> <li>■ Travel expenses cover transportation and accommodation expenses incurred by counsel and associate counsel to and from The Hague</li> </ul>	<ul style="list-style-type: none"> <li>■ The person concerned has to provide proof that such costs have actually been incurred</li> <li>■ Regarding travel costs, same as 3) Investigation budget</li> </ul>	<ul style="list-style-type: none"> <li>■ Regarding travel costs, same as 3) Investigation budget</li> </ul>

Source: ICC Legal Aid Policy (ICC-ASP/12/3)

156. In addition, specific amounts are mentioned for each type of budget as shown in Table 21 below.

<sup>83</sup> *Ibid* section IV.

<sup>84</sup> *Ibid* section VIII.

**Table 21: Maximum Ceiling for Each Budget Category in the ICC Legal Aid Policy**

	Maximum ceiling			
		Net base salary (€)	Max. percentage (%) compensation for charges	Max. total monthly payment (€) <sup>85</sup>
<b>1) Team fee (Remuneration)</b>	Counsel	8,221	30	10,687
<b>2) Professional charge</b>	Associate counsel	6,956	30	9,043
	Legal assistant	4,889	15	5,622
	Case manager	3,974	15	4,570
<b>3) Investigation budget</b>	<ul style="list-style-type: none"> <li>73,006 euros for each defense team and 43,752 euros for each victims' team to be used for the entirety of the case</li> <li>The investigation may be increased in response to a successful request for additional means made pursuant to regulation 83(3) of the RoC.</li> </ul>			
<b>4) Expense</b>	<ul style="list-style-type: none"> <li>Monthly allotment of 3,000 euros for each team.</li> <li>This ceiling is separate from the investigation budget afforded to each legal team.</li> </ul>			

Source: ICC Legal Aid Policy (ICC-ASP/12/3)

157. Considering that there is a limit for legal aid to cover only necessary and reasonable expenditure arising from the defense of the person against whom proceedings are directed<sup>86</sup>, it would be reasonable to interpret that there is an upper limit for each of these budget categories. Also, these specific amounts are to be considered as the “maximum ceiling” of each budget to be spent<sup>87</sup>, pursuant to the phrases of the ICC Legal Aid Policy, besides the cost spent from additional means.

158. Regulation 133 of the RoR states that remunerations of persons acting within the scheme of legal assistance paid by the Court shall accord with the relevant documents adopted or approved by the ASP, which could include the ICC Legal Aid Policy document.<sup>88</sup> Meanwhile, according to *SOP document*, the CSS assesses each timesheet and determines the payment. Likewise, the mission will be assessed by the CSS based *inter alia* on the provided justification for the mission and availability of budget (expenses or investigation) and the mission can be rejected upon various grounds including an insufficient or depleted budget in accordance with *SOP document*.

159. Therefore, the legal aid funds should be spent within maximum limits of each corresponding budget to which each payment belongs. In addition, mission requests can be denied at any given stage if funds are not available.

160. In this regard, the External Auditor reviewed the breakdowns of budget payments for the last five years (2018-2022) in order to check whether the use of funds complies with the four budgetary categories in the ICC Legal Aid Policy. It was found that the legal aid funds, at some instances, were not being used correspondingly within each budget.

161. As a result of reviewing the actual expenditure for legal aid over the last five years (2018-2022) and the supporting documents, the External Auditor observed that 1,605,681 euros were used against the purpose or requirement prescribed in the ICC Legal Aid Policy. It could be classified into a total of four: 1) flexibility (budget depletion), 2) erroneously charged, 3) internal decision on additional resources, and 4) consideration of the specificity of the case, as in Table 22, depending on the reason.

<sup>85</sup> Maximum total monthly payment of Team fee + Professional charge.

<sup>86</sup> Report to the ASP on options for ensuring adequate Defence counsel for accused person (ICC-ASP/3/16), para. 16.

<sup>87</sup> The CSS differed in that it interpreted these amounts as rather “entitlement” for each counsel team. The Registry offered its opinion that the amount of investigation budget as determined in the ICC LAP is not a fixed maximum investigation budget because of the use of additional resources and flexibility principle.

<sup>88</sup> It is submitted to the 12th session of the ASP in November 2013, and is “the combined updated effect of relevant resolutions adopted by the ASP, such as the applicable legal provisions governing legal aid as stipulated in the Court’s legal instruments and internal Registry guidelines and standard operating procedures.”



**Table 22: Legal Aid Costs Covered from Different Budgets (2018-2022)** (in euros)

	2018	2019	2020	2021	2022 <sup>89</sup>	Total
1) Flexibility principle	308,579	171,727	112,939	120,965	5,750	719,959
budget depletion	211,087	74,264	42,861	90,380	5,750	424,341
2) Erroneously charged <sup>90</sup>	-	400	-	-	-	400
3) Internal decision on additional resources <sup>91</sup>	70,000	107,086	222,276	289,748	162,321	851,430
4) Consideration of the specificity of the case <sup>92</sup>	10,185	23,707	-	-	-	33,892
<b>Total</b>	<b>388,763</b>	<b>302,919</b>	<b>335,215</b>	<b>410,713</b>	<b>168,071</b>	<b>1,605,681</b>

\*The data in the table are as of October 2022

Source: Data submitted by the Court

162. What is especially remarkable is that 719,959 euros were provided on the “flexibility principle”<sup>93</sup> accounting for 44.8% out of the total 1,605,681 euros of legal aid costs covered from different budgets. The CSS commented that the practice of covering legal aid costs from different above-mentioned budgets was done because of the limited resources. It is recognized that flexible management of the legal aid funds would be necessary in some cases due to the unpredictability of the judicial proceedings and the specificity of each case. Given that legal aid resources are limited, flexible payments would be useful in protecting indigent clients’ right to get legal assistance.

163. However, 424,341 euros, which account for 58.9% out of the expenditures paid as part of flexibility principle occurred because of the “budget depletion.” It was analyzed that most of these amounts are caused on account of investigation budget paid over the maximum allotment, as shown in Table 23. For example, for (Q) defense team, 31,277 euros of travel costs of missions including -----, ----- were covered by expenses budget instead of investigation budget which they should have spent with. The CSS explained that the investigation costs for (Q) defense have been charged to their expenses budget from April 2016, due to depletion of the budget.

164. Especially in accordance with *SOP document*, in case of investigation or expenses budget being depleted, missions can be rejected through mission assessment. Nonetheless, the CSS answered that the mission was only denied for the security issue and rejecting the mission was never considered for the reason of budget availability issue. As a result, it is concerned that this practice of covering legal aid costs with different budgets could not only diminish the effect of the ICC Legal Aid Policy which is the Resolution of the ASP, but also increase legal aid expenditures beyond the specific budget amounts foreseen in the ICC Legal Aid Policy, as shown in Table 23.

<sup>89</sup> November to December in 2022 is excluded from the audit analysis due to limitation of audit period.

<sup>90</sup> Monthly fees for the resource person were erroneously charged to fees budget instead of investigations budget.

<sup>91</sup> Additional resources were granted to the different budgets. For example, monthly fees for field assistants should have been provided from the investigation budget. However, additional resources were added to the team fee (remuneration) budget, from which fees for the field assistants are spent.

<sup>92</sup> The specific circumstances of each case differ. For example, as defendants were no longer in detention (not in The Hague) in some cases, so travel costs to visit the client who is not in The Hague still fall under expenses budget (not investigations since it is not related to investigations).

<sup>93</sup> According to the ICC Legal Aid Policy, “the payment system must provide for mechanisms that are flexible enough to adapt to situations as they arise in order to preclude any paralysis prejudicial to the interests of the due administration of justice, and “counsel may exercise the flexibility principle of the Court’s legal aid system to utilize the resources provided to structure the team in a manner that both best serves the interests of the indigent client and is compatible with the judicious financial use of legal aid funds.”

**Table 23: Amount Paid over the Maximum Ceiling in the ICC Legal Aid Policy (2018-2022)**

	Team fee + Professional charges		Investigation budget		Expenses		Legal aid total	
	Total exp.	excess	Total exp.	excess	Total exp.	excess	Total exp.	excess
(Q) defense	1,536,432	-	-	31,277	91,749	-	1,628,181	31,277
(A) defense	1,691,711	-	58,342	4,987	143,465	2,200	1,893,517	7,187
(E) defense	1,589,894	81,381	43,745	-	91,247	-	1,724,886	81,381
(G) defense	2,417,438	-	243,961	14,344	202,297	2,797	2,863,696	17,141
(I) defense	2,223,909	8,156	75,517	-	178,569	95,821	2,477,996	103,978
(R)-(S) victims	516,586	-	49,135	13,125	13,744	-	579,466	13,125
(R)-(T) victims	580,691	-	41,814	27,040	45,297	-	667,801	27,040
(U)-(V) victims	917,719	-	73,139	51,090	38,890	-	1,029,748	51,090
(P) victims	360,946	-	-	44,619	62,064	-	423,010	44,619
(H) victims	900,553	-	148,690	47,503	60,478	-	1,109,721	47,503
<b>Total</b>		89,538		233,985		100,818		424,341

\*The data in the table are as of October 2022.

Source: Data submitted by the Court.

165. CSS's position on this operation is that the budget could be used flexibly within the budget approved by the ASP, so it is not a significant problem since the legal aid budget has been spent within the APB in most years.<sup>94</sup> However, considering the recent pressure to limit the budget increase facing the Court<sup>95</sup>, it would be desirable to use legal aid funds complying with the maximum ceiling in the ICC Legal Aid Policy and to secure budget savings. As it was quite remarkable that the amount of expenditures spent in this practice not complying with the ICC Legal Aid Policy reaches about 5.56%<sup>96</sup> of the total actual expenditures for the last five years, it is also desirable to minimize the practice of covering legal aid costs from different budgets. And because there has been no reporting or information provided on the

<sup>94</sup> The Registry offered its opinion that this operation prevents the over extensive use of the additional means system stated in the ICC LAP, which ultimately leads to an increase of the legal aid budget.

<sup>95</sup> According to the financial statements, the Court has been in the red since 2016, and due to liquidity problems, assessed contributions in advance out of deferred revenue have increased significantly over the past two years.

<sup>96</sup> (In euros)

	2018	2019	2020	2021	2022	Total
Legal aid costs covered from different budgets (A)	388,763	302,919	335,215	410,713	168,071	1,605,681
Total legal aid expenditures (B)	5,698,198	5,407,000	5,183,840	6,046,500	6,567,368	28,902,906
Ratio (A/B)	6.82%	5.60%	6.47%	6.79%	2.56%	5.56%

Source: Data submitted by the Court



non-compliant use of legal aid funds by internal decisions, budgetary oversight by, for instance, the CBF has no knowledge of this practice, it is considered necessary to disclose this actual practice of legal aid budget use in the audit report and to urge the Court to stick to the principle of budget transparency. Additionally, according to the text of the Reform of the Registry's Single Policy Document on the Court's Legal Aid System (CBF/37/17), all budgets maintain their purpose and internal control method as they are.<sup>97</sup> Therefore, the Court should provide rule basis for drawing on legal aid funds of other budget categories, such as clearly identifying its authority on transferring between budget categories in the Reform.

**Finding:** The following observations were made during the audit:

- a) The Court used the practice of covering legal aid costs from different budgets, and the total amount turned out to be 1,605,681 euros (5.56% of the total legal aid expenditure); and
- b) While the Court could reject requested missions if investigation or expense budget was depleted, 424,341 euros were over-spent according to the flexibility principle.

**Recommendation 9:** The External Auditor recommends the Court to minimize the practice of covering legal aid costs from different budgets, and where it is necessary to use other budget categories for flexibility, the Court should provide a rule basis in order to draw on the legal aid funds of other budget categories.

### 3.3. Non-appointment of the Legal Aid Commissioners as an Oversight Body

166. The role of the legal aid commissioners is to provide the Registrar with advice regarding the management of the funds allocated by the Assembly to legal assistance paid by the Court. To that effect, the commissioners are mandated to evaluate the performance of the system put in place regarding legal assistance paid by the Court; propose amendments to the system; and at the request of either counsel or the Registrar, assess whether the means requested by legal teams in their action plans are reasonably necessary for the effective and efficient representation of their client(s). The role of the legal aid commissioners could be interpreted to oversee legal aid funds management and to enhance transparency of the budget.

167. According to the ICC Legal Aid Policy section IX, the Registrar must appoint three legal aid commissioners to serve for a period of three years, which is not renewable. However, the Registrar has never appointed the legal aid commissioners since the last appointment in 2010<sup>98</sup>. It means no legal aid commissioners were appointed after the ICC Legal Aid Policy came into force in 2013.

168. The Court explained that the reason the commissioners were never appointed was because there were no proposals or external views of any independent representative body of counsel or legal association such as the International Criminal Court Bar Association (ICCBA). According to Regulation 136 of the RoR, the Registrar, after receiving the proposals and having heard the views of any independent representative body of counsel or legal association, including any such body the establishment of which may be facilitated by the ASP, shall appoint three persons to serve as legal aid commissioners for three years.

169. However, it could be inferred that the transparency and objectivity of legal aid fund management would have been enhanced if the legal aid commissioners had actually been appointed and performed the role, since it was found that legal aid funds are managed only by the internal decision within the CSS and there was no mechanism to oversee the budget use from independent perspectives as described in sections 3.1 and 3.2.

<sup>97</sup> Professional charge is included in the Team fee (Remuneration), investigation budget is renamed as Programme 1 (Investigation and Analysis or Mission) and the expense budget is subdivided into Programme 2 (Expert and Language) and Programme 3 (Travel and Accommodation Expense).

<sup>98</sup> The last appointed legal aid commissioners served a three-year term from 2010 to 2013.

170. Meanwhile, in the text of the Reform of the Court's Legal Aid Policy (CBF/39/17), the legal aid commissioners are reformed into the Joint Committee on Legal Aid. The role of the Joint Committee is to review functions in accordance with the principles and provisions of the ICC Legal Aid Policy, the Court's statutory framework, and the Registry's strategic goals.<sup>99</sup> In addition, the Committee may propose subsequent adjustments of the remuneration of counsel and associate counsel, subject to the approval of the Registrar, the CBF, and the ASP.<sup>100</sup> Accordingly, it is desirable that the Court should practically run the Joint Committee as an external and independent legal aid oversight body, should the Reform of the ICC Legal Aid Policy come into force, so that history of non-appointment of the legal aid commissioners could not repeat itself.

**Finding:** The Court has not appointed Legal Aid Commissioners since 2013. As a result, the management of legal aid funds was operated only through internal decisions within the department in charge of legal aid fund management.

**Recommendation 10:** The External Auditor recommends the Court to appoint and operate the Legal Aid Commissioners (or the Joint Committee on Legal Aid pursuant to the new Legal Aid Policy) as an independent oversight body in order to ensure transparency and objectivity in the legal aid budget use.

## VII. Conclusion

The External Auditor reviewed how the ICC's legal aid system has been functioning since 2013. While the External Auditor understands the importance of the legal aid system for the right of the accused to be represented by counsel, and it seemed the ICC strives to make its legal aid system work within its limited resources, this performance audit focused especially on the transparency and internal control of the legal aid system with an aim to improve its effectiveness, efficiency, and economy. It is hoped that the results of this audit would contribute to the development and improvement of the ICC's legal aid system.

<sup>99</sup> Submissions to the CBF and on the Full Reform of the Registry's Single Policy Document on the Court's Legal Aid System (CBF/39/17), para. 17.

<sup>100</sup> *Ibid* para. 112.

## Appendix

### Opinion of the Court on the External Auditor's Recommendations of the Draft Version

#### *Recommendation 1*

##### **Opinion of the Court:**

At the outset, and applicable to a number of recommendations herein, the Registry wishes to inform the external auditors that it in general agrees that the Court's legal aid system requires a profound reform to provide for more efficiencies. It therefore clarifies at this point, that the Court's legal aid system is under continuous review given the attempts to reform it for more than 10 years. For this reason, identified challenges in the present Draft Report are taken into consideration for the finalization of the proposal to reform the Court's legal aid system.

As for recommendation 1, the Registry, in general, agrees that the principle that the applicant must apply for legal aid should be maintained as established in the Registry's single document on the Court's legal aid system (ICC-ASP/12/3). For this reason, the proposed reform of the legal aid system will maintain this system insofar it concerns an accused before the Court. Concerning the indigence assessment for victims, by assessing the functioning of the Court's legal aid system, experts and practitioners in the field of victims' representation have concluded that the indigence assessment for victims increases the financial burden on the Registry, instead of reducing it.<sup>1</sup> Indeed, since the first participation of victims, no victim has been found to have sufficient financial means to engage legal representation. Therefore, to reduce the bureaucratic and financial burden for the Court, the reformed legal aid policy foresees that indigence of victims is presumed unless the Registrar has reason to believe that any represented victim is non-indigent based on concrete evidence. Once the Registrar initiates an indigence assessment on this basis, the burden of proof to demonstrate (partial) indigence, or provide any documentation in this regard, shifts to the respective victims or their legal representatives. As such, while expediting the indigence assessment for victims and provide for budgetary and bureaucratic efficiencies, there is still a mechanism in place to ensure to consider the means of victims if demanded (as suggested in para. 34 of the present Draft Report).

With regards to recommendation 1 b) referring to the reporting line, the Registry is in agreement, but wishes to clarify that this is already the procedure in place. It particularly re-emphasizes that the decision making on the indigence assessment has been delegated to the Director of the Division of Judicial Services ("Director DJS"). As such, the Director DJS is the appropriate authority to make decisions on the indigence assessment. As pointed out in the present Draft Report itself,<sup>2</sup> where the responsibility of the Counsel Support Section ("CSS") as the section responsible for the management of legal aid falls within the supervision of the Director DJS, any decision on the assessment of indigence should fall within his resort as well. However, the assumption in the present Draft Report that decisions on the indigence assessment were taken without consulting the Registrar is incorrect, and investigations in this regard seem to be incomplete. The Director DJS is directly supervised by the Registrar. As such, the Director DJS has a reporting duty of all matters of concern to the Registrar. This includes the reporting on any matters concerning legal aid, including decisions on the indigence assessment. The reporting on this and other matters takes place in weekly bilateral meetings and, where a decision is to be taken consultations take place with the Registry Legal Office ("RLO"), where required, on which basis a memo is prepared if required for the Registrar's decision on how to proceed. Further, the fact that the CSS is the communication channel between the counsel and the Registry, or the accused and the Registry on this matter, and may submit the decision on legal aid, this does not mean that the decision has been made by the CSS itself without consulting the required supervisors, i.e. Director DJS and, where warranted, the Registrar.

<sup>1</sup> Richard Roger's Report on the "Assessment of the ICC's Legal Aid System", para. 283.

<sup>2</sup> See present Draft Report, para. 63.

In relation to the advancement of legal aid, the Registry notes that this is a procedure set out in regulation 84(1) of the RoC.

Further, particularly to address paragraphs 36 and 39 of the present Draft Report, the Registry clarifies that within the organizational context of the Court, it has the function of providing services to the judicial proceedings. As a service provider it therefore is required to ensure that the continuousness and expeditiousness of the proceedings is not affected by the services falling within its resort. To ensure this, the Registry is at all times, and particularly if a challenge or pending issue in a Registry resort may impact the Court proceedings, in communication with the respective chamber to ensure no undue delays in the proceedings. This also applies to the providing of legal aid. As such, any advance of legal aid resources has always been either based on a direct decision by the chamber, or the Registrar's decision was a result of the outcome of the consultations with the relevant chamber (see for example: Decision on (P) Defense Request for Provisional Legal Assistance, para. 17). Both, Chamber and Registry thereby take into account the rights of the accused as enshrined in article 67 of the Rome Statute. In particular, an accused has a right to be represented by a counsel of his or her choice, as stipulated in article 67 paragraph 1 (b) and (d), and to be tried without undue delay (article 67 paragraph 1(c)). It is also noteworthy that the Chamber in the (P) decision ordered the Registry to advance legal aid resources on the basis of article 64 paragraph 2 of the Rome Statute, i.e. that "the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...]".<sup>3</sup>

For this reason, the services of the Office of the Public Counsel of the Defense ("OPCD") are limited to the initial appearance, where required, and to the legal support (for example through legal research) of the legal representation as chosen by the accused. Particularly, given that the OPCD is composed of staff of the Court, i.e., forms a permanent team, its duty is, *inter alia*, to provide its services to all practicing defense teams. For this reason, staff of the OPCD may not act as legal representation of an accused outside the scope of the initial appearance, as this may invoke conflicts of interests. Despite this, due to the limited staff resources within OPCD, there still are and have been, situations in which the staff of OPCD faces a conflict of interests and presentation through the OPCD could not be guaranteed at the initial appearance. As a result, it must be within the scope of the legal aid policy to appoint in such circumstances, duty counsel funded through legal aid, even where the indigence assessment has not yet been finalized. This is of utmost importance to ensure the rights of the accused and to prevent any delays in the proceedings.

In addition, it may be of assistance for the external auditors to keep in mind the average duration of the Court proceedings and the complexity of a case before the ICC. Taking this into account, any provisional appointment of a duty counsel until the finalization of an indigence assessment or a decision thereto, is not practicable given that only from a factual basis, the familiarization with the facts and evidence requires time and resources. With any change of legal representation this process would need to re-start and cause significant delays in the proceedings, impacting the rights of the accused and the expeditiousness of the proceedings. A discontinuation of legal representation further risks to negatively impact the attorney client relationship, which is of utmost importance to ensure fair trial rights.

There are further situations in which the advancement of legal aid resources is required despite a finding of non-indigence. This refers particularly to cases, in which the assets of a non-indigent applicant have been frozen as a result of the proceedings at the Court, the freezing affects the applicant's power to dispose freely over these assets, and the applicant therefore temporarily lacks sufficient means for legal assistance, legal aid resources shall be advanced until the unfreezing of such assets (see for example, Redacted version of "Decision on legal assistance for the accused" ((P)), -----Red, para. 108).

Lastly, in all cases where legal aid resources have been advanced, the Registry maintains the possibility to request the re-payment of advanced resources, and has successfully done so in the past as evidenced by Court records. Any decision in this regard, however, is to be made by the relevant chamber. Further, in enforcing any such decision on the recovery of legal aid resources, the Registry is reliant on the cooperation by States Parties.

<sup>3</sup> Prosecutor v. (P), -----Red, Redacted version of "Decision on legal assistance for the accused", -----, paras. 106 – 111.

In reference to the determination of indigence, the Registry wishes to specify that the determination of indigence, as any decision by the Registrar, may be subject to review by the judiciary, i.e. the relevant chamber (see, for example, regulation 135(2) of the Regulations of the Registry) or the Presidency (see, for example, regulation 84(3) of the RoC). In such judicial review proceedings, it is assessed whether the Registrar acted without jurisdiction; committed an error of law; failed to act with procedural fairness; acted in a disproportionate manner; took into account irrelevant factors; failed to take into account relevant factors; or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.<sup>4</sup> As such, the indigence assessment must provide for sufficient reasons and evidence as to why an applicant does have sufficient means, in order to justify the Registrar's decision in any judicial review proceedings. This requires a profound investigation into the applicants means including, where required, to investigate in the field or engage with national authorities. In the past, the indigence assessments provided by the Registry financial investigator ("RFI") were not considered meeting the standard required for being subject to judicial review, mainly due to the lack of cooperation of states to provide the requested information.

The above uncertainty concerning the supervision of the indigence assessment as identified by the external auditors further provided for difficulties in the assessment of the report given that no endorsement was provided.

Further, the Registry wishes to expand on the role of the VPRS that may assist the external auditors in the finalization of the Draft Report.

In general, the VPRS is not processing any applications for legal aid received by victims. This is the sole role of the CSS. Therefore, para. 20 indicating that the "Victims Participation and Reparations Section (VPRS) within the Registry is responsible for processing legal aid applications for victims", is misleading. While VPRS processes victim applications for participation and reparations; collects victims' information as to their financial means to cater for their legal representation, the section does not receive or process applications for legal aid. These go directly to the CSS.

## ***Recommendation 2***

### **Opinion of the Court:**

The Registry, in general, is in agreement with the recommendation and will identify a clear reporting line for the work conducted by the financial investigator, and to review and reform the verification process for indigence assessment.

Despite this, the Registry wishes to emphasize that any unclarity of the procedure has ultimately not directly impacted the decision-making process on an indigence assessment as submitted by the RFI. Rather, as pointed out above, and to further explain the assessment result as made in the Draft Report at para. 72, a decision making was not possible as the indigence assessment could not be considered as final by the Registrar and/or Director DJS given the lack of sufficient evidence provided therein, as specified in the Registry comments above to recommendation 1.

In general, the cross-cutting nature of functions within the Registry may give rise to overlaps between sections and divisions. Given the character of the Court and the responsibilities of the Registry, coordination on a working level is crucial.

## ***Recommendation 3***

### **Opinion of the Court:**

In addition to the Registry's comments provided above to recommendations 1 and 2, the Registry generally welcomes any suggestions to improve the mechanism in place for the recovery of legal aid resources. In addition, it would also support that a clear decision-making process on whether or not to request the recovery of the legal aid funds should be established with a set of relevant parameters to be taken into consideration.

<sup>4</sup> *Prosecutor v. (U)*, -----, Decision on the Urgent Requests of the Legal Representative of Victims for Review of the Registrar's Decision of ----- regarding Legal Aid, -----, para. 9.

The Registry wishes to add information on the mechanism in place for the recovery of overpaid legal aid resources: for the purpose of the recovery of legal aid, the Registry has set up the Asset Recovery Working Group (ARWG) within the DEO which is tasked with assessing different avenues to recover legal aid once a decision has been issued by the relevant chamber.

In light of the required coordination between the two Divisions, the group is to be expanded to include the office of the Director DJS into the discussions of the ARWG with access to the final report presenting the outcome of the discussions.

#### ***Recommendation 4***

##### **Opinion of the Court:**

The Registry is generally in agreement to find avenues to further enhance cooperation by States Parties, and is continuously trying to identify ways to improve the cooperation by States Parties, particularly where matters of legal aid are concerned. It takes the recommendation to include specific provisions on the cooperation in legal aid matters, in particular the financial investigation for verification of the indigence of the applicants for legal assistance paid by the Court and the recovery of legal assistance overpayment, into the Court's legal framework duly into consideration within the scope of the review and reform of the Court's legal aid system.

Nevertheless, concerning the second part, i.e., the mentioning of uncooperative States Parties in regular reports, the Registry wishes to bring to the attention of the auditors, that the Registry must carefully review whether such recommendation might negatively impact the willingness of States Parties to cooperate with the Court on different matters in the future. Particularly, it must be ensured that any condemning of a States Parties' unwillingness to cooperate in legal aid matters has adverse effects on the States' cooperation on matters under Part 9 of the Rome Statute.

#### ***Recommendation 5***

##### **Opinion of the Court:**

The Registry generally agrees with the recommendation 5 and welcomes any suggestions to further objectivize the assessment of candidates to the List of Counsel.

It further wishes to specify that this is taken into consideration under the reform process of the Court's legal aid system, i.e., through the establishment of the Joint Committee on Legal Aid, who could act as independent oversight, as further developed upon in the comments to recommendation 10.

The Registry further wishes to provide a clarification on para. 91 stating that "the VPRS does not confirm the availability of counsel based on the shortlist as well":

The confirmation of availability is already made *prior* to any VPRS report suggesting legal representation for a victim's group. This means, all counsel that VPRS may suggest as potential LRV in its reports are always previously checked for their availability, including OPCV ( see most recently *Addendum to "Registry Report on Legal Representation of Victims"* (-----), -----, -----, in *The Prosecutor v. (O)*, para. 18).

In the same vein, it may be of assistance for the auditors to clarify that VPRS' role is ultimately dependent on the relevant Chamber's instructions pursuant to Rule 90 RPE and how much advice/recommendations, if any, the Chamber may wish to obtain (as an example, in (L), the pre-trial chamber did not request any information from VPRS at all, while the trial chamber was then seeking again VPRS advice. This means, the most recent examples in which the VPRS was involved in the providing of very detailed information and recommendations on LRV options, do not reflect the general procedure. In concrete, each chamber decides itself on the information it requires from the VPRS in making a decision on the appointment of LRV.

## Recommendation 6

### Opinion of the Court:

The Registry is in agreement that the size of the list of counsel requires the introduction of a new management system, including the review of the information provided by counsel on the list.

The Registry, nevertheless, wishes to provide the following information that may be taken into consideration for the finalization of the audit report:

Firstly, the Registry clarifies that the CSS has a mechanism in place by which it regularly invites all counsel on the list of counsel to update their contact details referring to their good standing, criminal records, as well as contact details. This is done once a year. However, as in line with regulation 69 paragraph 3 of the Regulations of the Court, the duty to inform the Registrar of any changes to the information he or she has provided, lies with counsel. As such, counsel included in the list of counsel or applicants to the list of counsel bear the responsibility to inform the Registry through its CSS as the managing section, of any change of their contact information.

The Registry currently lacks the capacities and financial means to verify the information provided by counsel on a regular basis given the bureaucratic costs this would imply. As stated above, the Registry is in agreement that the management system should be revised, as considered within the scope of the reform process of the Court's legal aid system.

Under the reform process, and in consultation with the president of the ICCBA, it is, *inter alia*, considered, that counsel included in the list of counsel should be required to register with the ICCBA to form part of the list of counsel. This would facilitate the process of verifying contact information, where required, as it could be relied on the assistance and record of ICCBA. Further, the required qualifications to be included in the list of counsel are proposed to be adjusted. As such, with an agreement on the reform of the Court's legal aid system, during any transition period, the list of counsel is to be reviewed in its entirety to ensure compliance with the adjusted requirements.

## Recommendation 7

### Opinion of the Court:

While the Registry does not fully oppose recommendation 7, the Registry wishes to provide additional information and clarifications, particularly concerning the preceding observations to this recommendation (particularly para. 139, finding a) "the Registry does not submit the information on the overall financial implications of the options").

All VPRS reports on legal representation options already contain a section on the availability of relevant counsel (*see most recently Addendum to "Registry Report on Legal Representation of Victims"* (-----), -----, -----, in *The Prosecutor v. (O)* and funds (*see, e.g., in the same case, Registry Report on Legal Representation of Victims*, -----, -----, paras. 21, 52-54).

This means, while the Registry does not provide a detailed cost analysis and *comparison* between different options, the Registry *does* provide the Chamber with information indicating the general financial framework.

Further, the Registry wishes to emphasize that the respective Chamber is called upon to make an assessment on the best LRV arrangement mindful of *various* factors, of which a cost comparison between in-house counsel and external counsel through legal aid is one factor – and the victims' preferences according to Rule 90(1) RPE another. The Registry therefore proposes, prior to making such finding, to inquire with the relevant Chambers whether the chamber actually is of the view that they are provided with sufficient information to make an informed decision on victims' counsel (*see the Auditor's suggestion as to the Chamber's insufficient information on para. 133 of the Report*).

Finally, the external auditors may further want to take into consideration that the direct comparison between LRVs and OPCV is a very difficult undertaking and highly dynamic. This is particularly as the cost calculation itself depends on different factors, and is situation specific. For instance, external counsel in the *(J)* and *(K)* proceedings, and the *(O)* case are



of much lesser costs given that the respective counsel are remunerated 50% for the second case, as in line with the legal aid policy.<sup>5</sup> Similarly, where OPCV counsel has to be sitting through a trial proceeding, said counsel will *not* be able to cater multiple cases at once.

As a result, the Registry is of the view that a clear and authoritative comparative costing between in-house and external counsel (“financial criteria and standards” as per Recommendation 7 and para. 133 of the Report) is not possible, and also not recommendable as decisive factor for any decision making in the appointment of a legal representative of victims by the chamber.

In light of this, the Registry proposes to modify the recommendation to reflect the above, subject to the auditors’ consideration. A proposed wording is:

“The Registry should, as a standard item in its reports on legal representation of LRV to Chambers, continue to provide relevant options alongside their financial implications for the Court’s budget as far as these can be calculated.”

## ***Recommendation 8***

### **Opinion of the Court:**

The Registry generally agrees with the recommendation. In the following it provides the external auditors with further explanations for the auditors’ consideration.

In this sense, the Registry clarifies that within the budget allocated to the CSS, the Registry, as for any other section, follows due internal process as mandated by the financial rules and regulations, including the use of the official request forms. This refers to the CSS staff and non-staff costs.

Concerning the approved budget allocated for legal aid, this is to be differentiated from the budget allocated to the CSS itself. The legal aid budget, as assessed in this report, covers the costs for the legal representation of indigent accused and victims. As such, it is guided by the legal framework of the Court’s legal aid policy (LAP), which *inter alia* refers to the principle of flexibility. Despite the separation of defense and victims’ team resources in the proposed or approved programme budget, the Registry understands the earmarking of the resources for legal aid to refer to the “legal representation” for any indigent client. This is relevant as the development of situations and cases requires a certain flexibility of the use of the approved legal aid budget in order to address any change of circumstances and/or unforeseen developments in a situation or case. Given the dynamic of the case proceedings at the Court that are outside the scope of what is predictable for the Registry at the time where the proposed (legal aid) budget for the coming year is to be submitted to the Committee on Budget and Finance (“CBF”), a re-allocation of resources, where required, is important for the operability of the legal aid system.

The use of this flexibility is continuously reported to the CBF and representatives of States Parties. Indeed, this practice is acknowledged by the ASP as evidenced by the ASP’s most recent resolution, wherein it specifically requests the Registry to absorb resources *within* the legal aid budget to provide for interim measures to the benefit of team members of defense and victims’ teams (ICC-ASP/21/Res. 2, paragraph 92).

Nevertheless, the Registry is in agreement that for any adjusted legal framework for the use of legal aid resources, the flexible use of legal aid resources should be reduced. As such, the Legal Aid Reform Proposal foresees for example the introduction of maximum resources per complexity level, as well as contract types for persons assisting counsel to be remunerated on a monthly basis. Both adjustments would significantly reduce the flexible use of resources.

## ***Recommendation 9***

### **Opinion of the Court:**

In general, the Registry agrees that it is recommendable to adjust the legal aid policy in a manner that provides for more financial clarity concerning the estimated legal aid costs per

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<sup>5</sup> The same applies for legal representation in the (H) and (I) cases.



year. The finding by the external auditors supports that the current legal aid system requires reform as it does not meet the standards of judicial proceedings, and therefore not the needs of practicing defense and victims' teams anymore. To this end, the Reform Proposal of the Court's legal aid system foresees the introduction of complexity levels of the work to be performed. These complexity levels provide for maximum ceilings per stage of the proceedings, which provides for less flexibility and will therefore assist in determining the legal aid budget per year.

Further, the Registry wishes to emphasize the control mechanisms in place concerning the spending of resources. This includes among other mechanisms, the reporting of the CBF at least twice a year and continuous discussions with States Parties throughout the year.

The Registry, nevertheless, wishes to provide the following clarifications concerning the application of the current legal aid policy for consideration:

Despite acknowledging that a ceiling of resources would benefit the predictability of the legal aid budget per case and year and while addressing this within the reform process of the legal aid system, the applicable legal framework for the determination of legal aid resources is the current legal aid policy (ICC-ASP/12/3).

As per paragraph 9 of the legal aid policy, the principle of flexibility is applicable. This principle foresees that the "payment system must provide for mechanisms that are flexible enough to adapt to situations as they arise in order to preclude any paralysis prejudicial to the interests of the due administration of justice".

Therefore, both the use of additional resources is a way to cater to specific needs of the case such as unforeseen circumstances and judicial developments (see para. 72 of the LAP), and the use of the flexibility principle (i.e., using expenses budget to pay a team member) caters for this as well (see para. 44 of the LAP). As such, the investigation budget as determined in paragraph 49 for the defense is not a fixed maximum investigation budget. As evidenced by para. 50 of the LAP, "the investigation budget may be increased in response to a successful request for additional means made pursuant to regulation 83(3) of the RoC, where justified by relevant factors in the case." It follows a non-exhaustive list of parameters to be considered by the Registry. The Registry may therefore consider additional parameters as warranted by the circumstances of the case.

Moreover, the flexibility principle is a well-functioning tool for the CSS to use the limited funds available in an efficient manner. Particularly, it prevents the over extensive use of the additional means system enshrined in the LAP, which ultimately leads to an increase of the legal aid budget for the following year through the adjusted expectations.

In conclusion, in applying the legal framework for the allocation of legal aid resources, it is to be acknowledged that within the current legal aid policy, there is no indication that would limit the use of the flexibility principle.

Further, the suggested requirement to report to the HWG in the event of a transfer between expenses and fees budget might potentially make the legal aid administration process cumbersome, bureaucratic and inefficient. It is the Registry's view that such reporting line is not warranted where the transfers do not affect the amount of the totality of the allocated funds to a case or legal aid budget as such.

## ***Recommendation 10***

### **Opinion of the Court:**

The Registry is in agreement with this recommendation as far as it refers to the establishment of the Joint Committee on Legal Aid, as suggested in the Reform Proposal, with the functions as set out in paragraph 169 of the present Draft Report. The Registry is further in the process of identifying avenues to guarantee that the Joint Committee on Legal Aid operates as an external and independent legal aid oversight body, as also suggested in the present Draft Report (paragraph 169), while at the same time possessing the required expertise to fulfill the tasks as mandated.