

**Twenty-second session**

New York, 4-14 December 2023

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

1. This report is submitted pursuant to the mandate to the Bureau on legal aid adopted at the twenty-first session of the Assembly.¹ In that resolution, the Assembly requested the Bureau “to continue its work on legal aid and to report to the Assembly at its twenty-second session.” The Assembly requested the Court “to continue its efforts in the reform of the legal aid system and to present, based on further consultations with States Parties and all relevant stakeholders, another proposal for reform of the legal aid policy for external defence and victims’ teams, in accordance with the mandate, taking account of the cost constraints and ensuring that the reform of the Court’s legal aid system can be funded within existing resources.” The Assembly also requested the Court to “to finalize its review of the current framework and operation of the functions regarding financial investigations on suspects and accused persons across all organs in order to make proposals to the Assembly through its relevant facilitations (legal aid and cooperation) with a view to strengthen the Registry capacity to trace, freeze and seize assets of the accused in the context of legal aid requests, while paying due respect to the rights of the accused and to ensure increased efficiency of that global framework”.

2. In addition to the mandates referred to in paragraph 1, the Assembly also requested the Court “to consider interim measures, within existing resources in the legal aid budget, to the benefit of members of defence and victims’ teams”.²

3. On 31 January 2023, the Bureau appointed Ambassador Carmen Maria Gallardo (El Salvador) as the facilitator for legal aid. Following the conclusion of the term of Ambassador Gallardo in The Hague in April 2023, the Bureau, on 10 May 2023, appointed Mr. Peter Nagy (Slovakia) as the facilitator for legal aid.

4. The facilitation held eight meetings, on 17 February, 21 March, 24 April, 22 June, 7 September, 18 October, 7 November and 20 November 2023.

II. Consideration of the issues by the Legal aid facilitation

5. At the first meeting, on 17 February, the representative of the Registry provided information to The Hague Working Group on the steps that the Registry has taken to implement the mandate of the Assembly to the Court regarding interim measures. He informed the working group that the Court had adopted an approach whereby it had agreed, on the one hand, to apply a ten per cent increase to the remuneration of all defence and victims’ team members as a temporary measure, pending the entry into force of any reformed legal aid policy. On the other hand, the interim measures also provided for compensation for maternity, paternity and adoption leave under certain conditions. The Court had also made certain recommendations to

¹ ICC-ASP/21/Res.2, annex I, para. 8.

² ICC-ASP/21/Res.2, para. 92.

Counsel and Legal Representatives of Victims regarding terms and conditions of service, e.g. that lead counsel pay the maximum remuneration to support team members as set out in the legal aid policy; that a minimum of 30 days' notice of termination of contract is given. A view was expressed whereby it was important for States Parties to safeguard the delivery of justice and, in that regard, equality of arms had to be safeguarded. Some States raised the issue of taxation of the remuneration of counsel and the facilitator noted in that regard that a multilateral discussion would be required.

6. At the subsequent meeting, the representative of the Registry briefed the working group on the progress made on the reform of the Legal aid policy.

At the third meeting, on 24 April, the representative of the Registry briefed the working group on the adjusted reform proposal of the Court's legal aid system, which was still in the drafting process at that time. The improvements on which the Court aimed to focus were: social security of defence and victims' team members, particularly compensation for paid leave and access to a mechanism against discrimination and harassment for persons assisting counsel; a better assessment of the parameters defining the needs of a team, including a better distinction between the needs of defence and victims' teams; and the reduction of bureaucracy in the administration of the legal aid system. At the same time, the system had to ensure the independence of defence and victims' team members. The key adjustments in comparison to the first reform proposal submitted in August 2022 would relate to team composition, remuneration of team members, contract types for support team members, and the complexity level system. The Court informed that it would finalize the adjusted reform proposal by June, and submit the proposal to the forty-second session of the Committee on Budget and Finance in September 2023.

7. Further, at the 22 June meeting, the representative of the Registry presented an update on the reform proposal and its budgetary impact. With the reform, the Court intended to achieve a set of goals, which were identified throughout the consultation process with States Parties and other stakeholders. These included, but were not limited to, improved working conditions for team members, including compensation of annual leave, maternity, paternity and adoption leave and sick leave, regulated working hours, compensation for relocations costs to The Hague; ensuring access to the mechanism against harassment and discrimination and an enforcement mechanism; improvement of the remuneration system through the introduction of a step system with a maximum ceiling of four steps and a monthly minimum remuneration for all team members of the core team composition; as well as the establishment of the Joint Committee on Legal aid. Those advantages were not part of the current legal aid system.

8. As a follow up to the meeting, the Registry invited States Parties and the legal profession to send comments to the Registry Update Report circulated on 15 June 2023. Upon receiving comments from a number of stakeholders, i.e. counsel for Mr. Ntaganda; the Office of Public Counsel for the Defence; the International Criminal Court Bar Association (ICCBA); and a group of counsel, the Registry presented its observations thereon. It aimed to provide States Parties with an overview of the adjustments the Registry proposed to the adjusted legal aid reform proposal, based on the comments received from States Parties and the legal profession.

9. At the 7 September meeting, the representative of the Registry made a presentation on the budgetary impact of the Second Reform Proposal, which he had presented to the Committee on Budget and Finance at its forty-second session. He outlined three scenarios and the budgetary impact of each. First, scenario A, which included the interim measures³ and a 7 % additional increase in remuneration. Scenario A formed the basis of the 2024 proposed programme budget for legal aid and reflected a decrease of 0.2% in comparison to the PPB for legal aid, including the additional resources for Mokom, in 2023. Scenario B, comprised of the interim measures, a 20 per cent monthly living cost lump-sum allowance and further adjustments on the reparation phase amounted to an increase of 4.15%. And lastly, scenario C, which would retain the current legal aid policy,⁴ with the interim measures, which would amount to an increase of more than 17%. To reflect the advantages of the proposed new legal aid policy, the Registry representative clarified that it would ensure a sufficiently large pool of team members per stage of the proceedings and complexity level;

³ ICC-ASP/21/Res.2, para. 92. See also para. 2 and 5 of this report.

⁴ ICC-ASP/12/3.

and include three programmes for a better distribution of resources, i.e. investigation and analysis; experts, language and miscellaneous; and travel and accommodation expenses, as well as compensation for relocation costs, which the Court considered also as a tangible incentive for increasing geographical representation. Another innovation of the system, which stemmed from a recommendation of the External Auditor,⁵ was the creation of the post of Indigence Assessment Officer within the Counsel Support Section, which is under the direct supervision of the Division of Judicial Services.

10. Some States expressed appreciation for the efforts to ensure greater geographical representation. As regards taxation, a query was raised regarding potential revision of the Headquarters Agreement between the International Criminal Court and the Host State and of the Agreement on the Privileges and Immunities of the International Criminal Court (APIC). The facilitator noted that this issue would be the subject of a multilateral discussion by States. At the same time, the deliberations on the reform of the legal aid policy would proceed independently from the taxation issue. In response to queries, the representative of the Registry provided further clarifications on the method of appointment of team members. He indicated that the Court recommends a letter of appointment for team members, instead of staff or consultancy contracts.

At the 18 October meeting, the representative of the Registry presented further information on the proposed reform of the legal aid system. He indicated the total 2024 legal aid budget for scenarios A⁶, B⁷ and B+.⁸ The B+ scenario was developed as a direct response to concerns by the legal profession and would foresee, in line with the recommendation of the Committee on Budget and Finance, a limited increase of remuneration for Counsel and Associate Counsel. Scenario B already provided a more secure and suitable remuneration for support team members and an improvement of the working conditions of these team members, which was one of the key aims of the reform, alongside a better representation of the indigent persons. However, in further discussions with the ICCBA it became clear that Counsel and Associate Counsel would receive a lower remuneration under the proposed system. The Registry therefore proposed to develop scenario B+ with a view to identifying a proposal under which no team member would receive less remuneration, and which could be supported by the legal profession, while at the same time staying within the budgetary framework. The mandate and role of the Joint Committee was also subject to discussion.

11. At the 7 November meeting, the representative of the Registry made a presentation titled “Registry Information on Proposed Reform of the Legal Aid System” and focused on the budgetary aspects of the draft policy.

12. He recalled that the Committee on Budget and Finance had recommended that scenario B should be implemented, as a minimum. The Registry proposed to absorb the additional costs of the B or B+ scenario, if resources would be allocated to the extent of the costs of scenario A. However, should States Parties agree to the budgetary reductions to the whole extent proposed by the Committee on Budget and Finance, i.e. a reduction of additional € 300,000, the Registry would not be in a position to absorb the costs for scenario B or B+.

13. Another factor that would influence the 2024 budget was the withdrawal of all the charges against Mr Maxime Jeoffroy Eli Mokom Gawaka pursuant to article 61(4) of the Rome Statute. On 17 October 2023, Pre-Trial Chamber II had terminated the proceedings in the case of *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka* and ordered his immediate release. Concerning the legal aid budget for 2024, there would still be a need for a reduced defence and victims’ team for approximately six months to work on the pending defence matters, as well as for victims’ teams to inform the victims on the ground.

14. At the November 7 meeting, some States indicated their support for scenario B+ of the draft legal aid policy, as long as the costs would be within the budget for 2023. Other States sought greater clarification regarding the budget for each scenario.

⁵ External Auditor: Performance audit report on legal aid 2023 (ICC-ASP/22/38).

⁶ Interim measures (= remuneration of 2013 + 10% increase) + 7 per cent.

⁷ Interim measures + 20 per cent monthly living cost lump-sum allowance + 10 per cent tax compensation.

⁸ Interim measures + 20 per cent monthly living cost lump-sum allowance + 10 per cent tax compensation + adjusted remuneration for Counsel and Associate Counsel.

15. As regards the recommendations of the External Auditor, the representative of the Registry noted that the Court had taken into account in its final draft legal aid policy the issues raised in the report. These included the improvement of the system of appointment of counsel, whereby the accused would be provided with a full list of counsel and all relevant criteria, including language or the background experience of counsel, while ensuring free choice of counsel. As regards the role of financial investigator, he noted that the exercise of the functions of the financial investigator also depends on the cooperation by States. To date, to the knowledge of the Registry, only a few states had implemented the necessary legislation in that regard. He further focused on the new role of the indigence assessment officer who will be under the direct supervision of the Division of Judicial Services and only be responsible for matters related to indigence, which will improve the process.

16. A query was raised regarding the threshold for the payment of legal aid, i.e. under which conditions a person is considered indigent. The facilitator noted that the threshold was linked to the cost of financing a defence team at the Court during the most onerous phase of the proceedings. The representative of the Registry stated that a nuclear team under the current legal aid policy costs around € 33 thousand per month.

17. In response to a query regarding the Joint Committee, the representative of the Registry noted that the Joint Committee would be composed of three members from the Registry and two members of the ICCBA, including both defence and victims' team members, as well as counsel and support team members. It would be for the ICCBA to propose these representatives. The Terms of reference of the Committee had not yet been finalized but the issue of conflicts of interest would be addressed.

18. In response to another query, the representative of the Registry noted that the proposed new system would ensure less bureaucracy, *inter alia* by discontinuing the use of timesheets for each hour under the current legal aid policy. However, the representative of the Registry stressed that less bureaucracy would not amount to less rules on oversight..

19. At the 20 November 2023 meeting, the budgetary overview of scenario B+ for the 2024 proposed programme budget for legal aid was outlined, including absorption of some costs by the Registry and the reductions resulting from the termination of proceedings against Mr. Mokom.

20. States Parties reached an understanding on the adoption of the new Legal Aid Policy of the International Criminal Court in the variant scenario B+.⁹ The budget for legal aid for 2024 would amount to € 6,417,993.00¹⁰ which reflects also a partial reduction of €100 thousand, in line with the recommendation of the Committee on Budget and Finance.¹¹

III. Taxation of defence and victims' team members

21. The issue of taxation arose at the meetings of the Legal aid facilitation. The facilitator proposed to pursue a two-track approach, on the one hand focusing on the legal aid reform and, on the other hand, on the taxation of members of external defence and victims' teams.

22. In order to have an overview of the practice of States Parties in relation to the taxation of defense and victims' team members appearing before the International Criminal Court, the facilitator, on 8 September, posed the following questions to States Parties:

- 1) Without prejudice to the personal circumstances of a person and other applicable legislation to this person in another State, please indicate whether article 18, paragraph 3, of the Agreement on the Privileges and Immunities of the International Criminal Court (APIC) itself is, or could be, interpreted and applied by your State so as to exempt residents in your State working as (associate) counsel, legal representatives for victims, and persons assisting defence counsel (together: defence and victims' team members) from taxation on the remuneration they receive from the ICC for the work carried out as part of a defence or victims' team.

⁹ Draft Legal aid policy of the International Criminal Court (ICC-ASP/22/9).

¹⁰The final amount may be subject to minor adjustments with a view to the outcome of negotiations on the overall 2024 programme budget.

¹¹ Report of the Committee on Budget and Finance on the work of its forty-second session (ICC-ASP/22/15, para. 160).

2) In case defence and victims' team members are in your State exempt from taxation on the remuneration they receive from the ICC for the work carried out as part of a defence or victims' team practising before the Court, please specify the legal basis for such exemption (APIC, national legislation etc.).

23. Responses were received from 15 States Parties. Since the issue requires further deliberations, the facilitator proposed that discussions on the matter be continued in 2024.

IV. Recommendations

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

Operative paragraphs

1. *Adopts*, effective 1 January 2024, the "Legal Aid Policy of the International Criminal Court" (ICC-ASP/22/9), thereby superseding the Registry's single policy document on the Court's legal aid system (ICC-ASP/12/3) and any interim measures taken by the Court in accordance with ICC-ASP/21/Res. 2, paragraph 92;

2. *Requests* the Court to make the amendments to the Court's legal framework necessary to ensure the effective implementation of the new Legal Aid Policy of the International Criminal Court;

3. *Stresses* the need for continuous monitoring and scrutiny of the legal aid system and, to this end, *requests* the Court to report on the application of the new Legal Aid Policy of the International Criminal Court by 31 August 2024, in consultation with members of defence and victims' teams, in order to facilitate the Assembly's review and consideration of the Legal Aid Policy at the twenty-third session of the Assembly;

4. *Requests* the Bureau to address the question of whether the existing legal framework (comprising of, *inter alia*, the Rome Statute and the Agreement on the Privileges and Immunities of the International Criminal Court) provides a legal basis for tax exemptions to be granted to defence and victims' counsel and persons assisting counsel, who are subject to the Legal Aid Policy of the International Criminal Court, with a view to achieving a common understanding among the States Parties, and report on the matter, with recommendations or options, in advance of the twenty-third session of the Assembly;

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

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

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

Annex I

Mandates

With regard to **legal aid**,

1. *Requests* the Court to make the amendments to the Court's legal framework necessary to ensure the effective implementation of the new Legal Aid Policy of the International Criminal Court;
 2. *Requests* the Court to report on the application of the new Legal Aid Policy by 31 August 2024, in consultation with members of defence and victims' teams, in order to facilitate the Assembly's review and consideration of the Legal Aid Policy at the twenty-third session of the Assembly;
 3. *Requests* the Bureau to address the question of whether the existing legal framework (comprising of, inter alia, the Rome Statute and the Agreement on the Privileges and Immunities of the International Criminal Court) provides a legal basis for tax exemptions to be granted to defence and victims' counsel and persons assisting counsel, who are subject to the Legal Aid Policy of the International Criminal Court, with a view to achieving a common understanding among the States Parties, and report on the matter, with recommendations or options, in advance of the twenty-third session of the Assembly;
 4. *Requests* the Court to continue to ensure appropriate representation of counsel in the Advisory Committee on Legal Texts;
 5. *Requests* the Court to continue its review of the current framework and operation of the functions regarding financial investigations on suspects and accused persons across all organs in order to make proposals to the Assembly through its relevant facilitations (legal aid and cooperation) with a view to strengthen the Registry capacity to trace, freeze and seize assets of the accused in the context of legal aid requests, while paying due respect to the rights of the accused and to ensure increased efficiency of that global framework; and
 6. *Requests* the Bureau to continue its work on legal aid and to report to the Assembly at its twenty-third session;
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