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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-second session of the Assembly. In that resolution, the Assembly gave mandates to the Court and to the Bureau.¹
2. On 20 March 2024, the Bureau appointed Ambassador Hugh Adsett (Canada) as the facilitator for legal aid.
3. The facilitation held seven meetings, on 10 June, 25 July, 1 October, 29 October, 7 November and 18 November 2024.

II. Consideration of the issues by the Legal aid facilitation

4. At the first meeting, on 10 June, the representative of the Registry briefed The Hague Working Group on necessary amendments to the Court's legal framework to implement the revised Legal Aid Policy, which was effective 1 January 2024. Key changes included updating the Regulations of the Registry and the Court, potentially requiring counsel to be members of national Bars. The Court would need to modify its legal texts to ensure the establishment of a Joint Committee on Legal Aid (JCLA), bearing in mind the recommendations of the External Auditor on a Joint Committee. The existing Commissioner would be replaced by the JCLA, and the need for amendments to Regulations 67, 69 70 and possibly 71 was noted.
5. He also briefed the working group on the application of the revised Legal aid policy, highlighting positive feedback on improved salary scales and communication. The policy was being applied, but with flexibility during the transitional period, which included interim measures to protect the rights of the accused rights and maintain procedural efficiency. The Court had decided not to fund Legal Representatives for Victims at the implementation stage and was cautiously assigning complexity levels pending external review by an external consultant. Key improvements included enhanced communication between ICCBA, JCLA, and the Registrar, and increased support and security measures for legal teams. As regards payments to teams under the B+ model approved by the Assembly in 2023, there were two separate payments: living costs and an allowance. There had been progress on implementing the External Auditor's recommendations and recruiting an Indigence Assessment Officer. The working group took note of the status of implementation of the new policy and related challenges.
6. As regards the mandate concerning taxation exemptions, the facilitator acknowledged with appreciation the work of the previous facilitator Mr. Peter Nagy (Slovakia) in gathering information on States Parties' interpretation of article 18(3) of the Agreement on Privileges

¹ ICC-ASP/22/Res.3, annex I, para. 8.

and Immunities of the International Criminal Court (APIC). The representative of the Registry provided an overview of the legal framework and the history of counsel taxation, highlighting the absence of a unified position among States and noting that the first request for the payment of taxes by the host State's tax authority had occurred in 2014. The facilitator proposed that the working group address the taxation issue in 2024, noting States' varied interpretations.

7. At the 25 July meeting, the working group heard perspectives on the implementation of the new Legal aid policy from Defence Counsel, Legal Representatives for Victims and the International Criminal Court Bar Association (ICCBA).

8. A member of Defence counsel shared concerns about the new Legal aid policy, highlighting issues with reduced transportation and accommodation allowances for overseas counsel, now capped at €800–€1,200. This cut put a financial burden on overseas counsel, forcing them to self-fund additional expenses, which could impact geographical diversity in counsel representation before the Court. The policy also left Lead counsels' compensation stagnant since 2012, unlike benefits provided to support staff, which risked deterring experienced lawyers. The representative suggested transitional measures to address these cost burdens to avoid compromising representation quality. In addition, a representative of Defence support staff noted the increased benefits such as paid leave but highlighted delays in step assessments, ongoing disparities in health insurance access, especially for non-EU nationals, and challenges during reduced activity phases post-trial. Additionally, delays in the appointments of Legal Assistants and the inability to carry over leave days under the new policy were cited as further obstacles affecting Defence teams' functionality and morale.

9. A representative of Legal Representatives for Victims (LRVs) highlighted several improvements and ongoing challenges. The streamlined time registration system and predictable monthly payments had reduced administrative burdens, and for the first time in over a decade, LRV teams gained paid leave, enhancing work conditions. While resource allocation and transitional measures were generally well-received, concerns persisted over how case complexity was assessed, particularly the Registry's focus on victim count over other relevant complexity factors. Program 1 provided operational stability, but Program 3 encountered difficulties, especially in the Yekatom & Ngassona case. Budget limitations could hinder diversity by discouraging non-European counsel involvement. Concerns were raised about the €60,000 budget cap for the Reparations Implementation phase, which was deemed insufficient for meaningful victim support, particularly in complex cases like Ongwen. LRV teams emphasized the need for a balanced framework to ensure adequate support for victims while maintaining reasonable budget limits in reparations.

10. A representative of the ICCBA presented updates on the new Legal Aid Policy, noting improved collaboration with the Registry and involvement in the Joint Committee on Legal Aid (JCLA). The representative of the ICCBA said that, despite progress, key issues such as transparency and Defence team support, were not adequately addressed. A major concern involved Defence teams having to draft appeals post-judgment while contending with dual prosecution teams, an issue stalled within JCLA.

11. ICCBA also pushed for greater flexibility in policy implementation, suggesting that State Parties empower the Registry to adapt the policy. High tax rates on the incomes of Defence and Victims' Representatives (up to 40 per cent) remained problematic, and ICCBA had circulated a tax report by a Dutch expert.

12. The Registry responded to queries by affirming that JCLA's Terms of Reference had been adopted and that budget restrictions affected travel reimbursements. A United Nations former Director had been hired to help assess defence and victims counsel steps. As regards flexibility of the Registry, some issues could be interpreted flexibly but where the Legal aid policy was specific, e.g. a fixed sum of €30,000.00, the Registry could not change this. The Registry was refining unclear policy areas and would submit an implementation report by August 31.

13. At the 1 October meeting, the working group focused on the taxation issue. The facilitator informed the group of his informal consultations with delegations thereon. He recalled the mandate of the Assembly, that the Bureau consider the legal framework "with a view to achieving a common understanding among the States Parties, and to report on the

matter, with recommendations or options, in advance of the twenty-third session.”² To this end, the facilitator set out five possible options for the way forward, and sought the preliminary views of States Parties. Taking into account the views expressed, on 15 October, the facilitator circulated a non-paper titled “Options to address the taxation of defence and victims’ team members remunerated under the ICC’s legal aid system”, dated 14 October 2024, which he had prepared. The options were the following: (1) Maintain the status quo; (2) Reach a common interpretation of article 18(3) of the Agreement on Privileges and Immunities; (3) initiate a multilateral discussion to amend the Agreement on Privileges and Immunities; (4) Pay additional compensation to members of defence and victims’ counsel teams to attenuate the impact of taxation; and (5) Convert members of defence and victims’ counsel teams to P-grade staff of the Court. He requested States Parties to indicate at the next meeting which option(s) were favourable, which options they would be unable to support and if possible, their preferred option. States also received a paper setting out the responses of the Registry on statistics regarding the number of counsel subject to the Court’s Legal aid policy.

14. On 7 October, the facilitators for cooperation, Ambassador François Alabrune (France) and Ambassador Ramatoulaye Bâ Faye (Senegal), and the facilitator for Legal aid held a joint meeting, pursuant to the mandate to both facilitations contained in ICC-ASP/22/Res.3.³ Ambassador Adsett, as facilitator of the legal aid facilitation, presented the joint mandate of the legal aid and cooperation facilitation regarding financial investigations. He indicated that the meeting’s objective was to examine the framework and operations of financial investigations concerning suspects and accused individuals across various ICC organs, with the goal of offering proposals to the Assembly of States Parties for capacity-building and improvements in asset freezing. He also discussed the Bemba case, which raised concerns about asset accessibility during financial investigations. He added that Mr. Bemba, who was believed to have significant wealth, had his assets frozen following a Pre-Trial Chamber order. This prevented him from accessing funds for his defence, leading the ICC Registry to provide legal aid of around €30,000 per month. After his acquittal in 2018, Bemba was required to repay €1.8 million for his defence expenses. He noted that the case underscored challenges related to frozen assets, particularly in terms of their use for legal defence. He also highlighted broader issues regarding asset seizure following a conviction and the potential allocation of these assets, including within the legal aid framework.

15. At the 29 October meeting of the facilitation, delegations indicated their positions on the options proposed by the facilitator in the non-paper. No delegation expressed support for option 1. Several delegations indicated support for option 2, with a caveat that interim measures should be applied to counsel and external teams, so there could be a quicker solution. A view was expressed that there was lack of clarity regarding the procedure under option 2, since there were diverse views on the interpretation of the provision, which were difficult to reconcile. It was stated, further, that fiscal privileges must be provided for explicitly and could not be derived simply from an implicit interpretation of a text. A State party also noted that under its domestic law, the APIC did not provide a basis for tax exemption.

16. In the views expressed, including that of the host State, there appeared to be support for option 3, which many States viewed as legally the best way forward. In addition, it was noted that there was a clear procedure for amendment set out in the Agreement. However, concerns were expressed regarding timing in relation to option 3 since the process for entry into force of any amendment could be lengthy. A point was raised that the discussion must be respectful of the views of the host State.

17. Option 4 received no support, due to the budgetary implications. Option 5 also had no support due to the budgetary implications as well as concerns relating to the need to ensure independence of counsel.

18. The facilitator took note of the views expressed and noted that there was a trend towards support for option 3. At the same time, he noted that concerns had been raised regarding timing and an interest was expressed in exploring language to encourage an expedited process. In this regard, he noted that article 36 of APIC set out the process for a Review Conference for the purpose of amendment to the Agreement, and that the Assembly could decide on wording to address the timing of this process.

² ICC-ASP/22/Res.3, para. 92 and annex I, para. 8 (c).

³ Annex I, para. 8 (e).

19. Also at the 29 October meeting, the representative of the Registry provided an update on the Registry's report on the application of the new Legal aid policy that the Registry had submitted on 30 August, pursuant to resolution ICC-ASP/22/Res.3.⁴ The report had been presented to the forty-fifth session of the Committee on Budget and Finance (the Committee). The Committee's September review acknowledged the Legal aid policy's positive impact on working conditions of Defence counsel and Legal Representatives for Victims, confirming the implementation of several policies, such as social support and monthly living costs. The Committee emphasized the Assembly's role in approving any policy changes, noting the need for an update in 2025 on further progress of the new Legal aid policy.

20. The Registry's report addressed relevant issues, including amendments to the Court's legal framework, the Advisory Committee on Legal Texts (ACLT), and Registry's efforts regarding asset seizure. Input from the ICCBA had also been included. Key developments since the submission of the report included: Final assessments for defence and victims team members were communicated in late September, with two requests for review filed; the new letter of appointment awaited final approval; following the election of the new ICCBA President, Mr. Philippe Larochelle, the Joint Committee on Legal Aid (JCLA) will have new representatives and meet on 12 November; an increase of remuneration of three per cent had been proposed by the JCLA and agreed to by the Registry for inclusion in the budget, but the Committee on Budget and Finance (CBF) had recommended a reduction; a new step 5, if approved by the Assembly, would be absorbed by the Registry; efforts continued on the Guidelines for Legal aid, with completion expected by year-end; and the election of the ACLT Counsel representative and filling the vacancy for an Indigence Assessment Officer were underway.

21. At the 7 November meeting, the facilitator invited comments from States on the potential creation of a new step 5 in the remuneration scale for counsel, and on the potential granting of adjustment for inflation of three per cent. The meeting had before it the responses of the Registry to questions posed by the facilitator on the creation of a new step 5, as well as on adjustment of remuneration for inflation, which would mean a three percent increase in 2025.

22. As regards the creation of a new step 5, the representative of the Registry noted, *inter alia*, that the Joint Committee on Legal Texts (JCLA) had recommended the creation of a new step 5 to provide the opportunity for step increments for counsel, especially those starting at step 4. The Registrar had agreed to the recommendation and the representative indicated that the Registry would absorb the financial cost in 2025, if approved by the Assembly. The facilitator noted that the costs of the step 5 could be absorbed in 2025 but there would be budgetary implications in future for those counsel who reached that level.

23. As regards the adjustment of remuneration for inflation, a representative of the Registry indicated that the goal of the proposed increase was to avoid the previous situation under the former Legal aid policy where there had been no increases for 12 years. He noted that States Parties had not agreed to automaticity of increases for inflation in the new Legal aid policy, and had agreed that these increases would come from the JCLA. Further, this increase had been included in the Court's proposed programme budget for 2025, to account for inflation, and would represent an increase of €151,000.00. The Registry's request was based on a recommendation of the JCLA and further agreement of the Registrar. He noted that the Committee on Budget and Finance had, at its forty-fifth session, recommended that the Assembly not approve this increase for remuneration.

24. States Parties exchanged preliminary views on the new step 5 and on the increase of remuneration to account for inflation. It was decided that further discussion would be needed at the next legal aid meeting. The facilitator suggested that States should get final instructions on the creation of a new step 5 and on an adjustment of three per cent for inflation in 2025.

25. The meeting also considered the draft resolution text for inclusion in the omnibus resolution. Delegations exchanged preliminary views.

26. The facilitator suggested that at the next meeting, the facilitation would finalize the draft text. He invited delegations to submit drafting proposals to him, if necessary.

⁴ Para. 91 and annex I, para. 8.

27. At the 18 November meeting, the facilitation held its final meeting of the year to finalize the draft resolution text for legal aid, for inclusion in the omnibus resolution. On the issue of the creation of a new Step 5, States Parties expressed diverging views on the Registry's proposal. Some considered that creating a new Step 5 was justified to attract qualified legal counsel at senior levels, while others expressed concern over the budgetary implications. Delegates agreed to take note of the proposal and continue consideration of the matter next year. On the increase of remuneration to account for inflation, delegates considered that, in view of the budgetary implications, it would be more appropriate to consider the matter within the budget facilitation. The facilitator would thus send a letter to the Budget facilitator to formalize this decision. On the draft language on initiating multilateral discussions to prepare a possible amendment to the APIC, a delegation expressed the view that "preparatory meetings" should be held, as opposed to formal negotiations, given domestic considerations. Other delegations emphasized their wish to see the multilateral amendment process move forward as expeditiously as possible. With the ad referendum agreement of the delegates, the facilitator suggested to place under silence procedure language to specify that the convening of a preparatory meeting to prepare a possible amendment should take place in the early half of 2025. The remaining paragraphs of the resolution were adopted ad referendum.

III. Recommendations

1. The facilitation recommends that the Assembly request the Bureau to continue to oversee the application of the new Legal aid policy and to report thereon to the twenty-fourth session.
2. The facilitation further recommends that the Assembly request the Bureau to continue to address the question of a legal basis for tax exemptions for counsel and to prepare, in consultation with States Parties, the draft text of a possible amendment to the Agreement on the Privileges and Immunities of the International Criminal Court to address this issue, with a view to convening a Review Conference to discuss the proposal as soon as possible, as well as options or recommendations on measures that should be taken in the interim, and to report on the matter.

The facilitation proposes the following text for inclusion in the omnibus resolution:

Legal aid

Notes that it is the responsibility of the Court to present proposals to the Assembly for reform of the legal aid policy and *calls on* the Court to continuously consult with States Parties and other relevant stakeholders using existing structures in the course of drawing up these proposals;

Recalls the commitment of the Court and its States Parties to ensuring equality of arms in proceedings before the Court;

Annex I

Mandates of the Assembly of States Parties for the intersessional period

8. With regard to **legal aid**,
- a) *Takes note* of the Registry's proposal to introduce a new "Step 5" for counsel, legal representatives of victims and members of their teams, and *decides* to continue consideration of this matter in 2025;
 - b) *Stresses* the need for continuous monitoring and scrutiny of the new legal aid system and, to this end, *requests* the Court to report on the progress in the application of the new Legal Aid Policy of the International Criminal Court by 31 August 2025, 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-fourth session of the Assembly;
 - c) *Requests* the Bureau to continue to address the question of 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, and to convene a preparatory meeting in the first half of 2025, in consultation with States Parties, to prepare a draft text of a possible amendment to the Agreement on the Privileges and Immunities of the International Criminal Court to address this issue, with a view to convening a Review Conference in accordance with article 36 of the Agreement to discuss the proposal as soon as possible, as well as options or recommendations on measures that should be taken in the interim, and to report on the matter in advance of the twenty-fourth session of the Assembly;
 - d) *Requests* the Court to continue to ensure appropriate representation of counsel in the Advisory Committee on Legal Texts;
 - e) *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;
 - f) *Requests* the Bureau to continue its work on legal aid and to report to the Assembly at its twenty-fourth session;
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