

Seventh session

The Hague

14-22 November 2008

**Report of the Bureau on the different mechanisms for legal aid
existing before international criminal jurisdictions**

Note by the Secretariat

Pursuant to paragraph 13 of resolution ICC-ASP/6/Res.2, of 14 December 2007, the Bureau hereby submits a report on the issue of legal aid. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court.

Report of the Bureau on the different mechanisms for legal aid existing before international criminal jurisdictions

A. Introduction

1. The present report is submitted pursuant to the mandate given to the facilitator, Mr. Akbar Khan (United Kingdom), on the issue relating to the different mechanisms for legal aid existing before the international jurisdictions, by The Hague Working Group at its 5th meeting, on 22 May 2008.

2. In its report on the work of the ninth session,¹ the Committee on Budget and Finance (“the Committee”) was informed of the possible volume of work for legal support for the defence and the participation of victims. In response, the Committee recalled its earlier concern² at the rapidly escalating estimates of the cost of legal assistance and further noted that the Court had chosen to create a scheme of funding for the defence of indigent accused as well as a public defender’s office which, in its view, could lead to an unprecedented level of expense. The Committee stressed that, while remaining strongly supportive of the principle that indigent accused were entitled to an effective defence, it was concerned to ensure that the Court applied firm and reasonable limits to the provision of resources for the defence, believing that legal aid continued to represent an area in which there were “considerable financial and reputational risks” for the Court. The Committee emphasized the need to thoroughly and rigorously examine the claims of indigence made by accused persons and, in this regard, stated that it was essential for the Court to ensure that it utilized the resources available to it to search for assets.

3. In light of the Committee’s report, the Assembly, by resolution ICC-ASP/6/Res.2, adopted on 14 December 2007, invited the International Criminal Court (“the Court”) to “present to the Assembly at its next session an updated report on the different mechanisms for legal aid existing before international criminal jurisdictions in order to assess, inter alia, the different budgetary impact of the various mechanisms.”³

4. At the 9th and 17th meetings of The Hague Working Group, held, respectively, on 11 September and 22 October 2008, the facilitator conducted discussions in accordance with his discussion paper, dated 14 August 2008, firstly, on the Court’s interim report⁴ and, subsequently, on its revised report⁵ to the Assembly. In addition, some informal discussions on the issue were held outside the Working Group between the facilitator, Court officials, members of the Committee and NGOs. Pursuant to these discussions, Human Rights Watch submitted its written views⁶ to the Working Group on the issue of funding legal representation before the Court and its relationship with the Office of the Public Counsel for the Defence (“OPCD”).

B. Approaching the issue of legal aid

5. In approaching the issue of legal aid and the concerns raised by the Committee in the report on the work of its ninth session, the underlying approach taken by the facilitator and

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. II, part B.2.II.C.2 (j), paras. 72-74.

² *Ibid.*, part B.1.II.G, paras. 79-82.

³ *Ibid.*, vol. II, part III, resolution ICC-ASP/6/Res.2, paragraph 13.

⁴ Interim report on different legal aid mechanisms before international criminal jurisdictions (ICC-ASP/7/12), presented to the 9th meeting of The Hague Working Group.

⁵ Advance version of the Court’s revised report, dated 15 October 2008, presented to the 17th meeting of The Hague Working Group.

⁶ The message was addressed to the Working Group through the facilitator, via e-mail.

the Working Group has been to support and assist the Court in producing its report for the Assembly, not in the sense of drafting it, the responsibility for which properly lies with the Court, but rather to engage in a constructive dialogue with the Court aimed at ensuring that the report fully meets the mandate provided by the Assembly and is comprehensive and complete in its subject-matter through the inclusion and explanation of, inter alia, the following core elements:

- a) A comprehensive assessment of the different mechanisms for legal aid existing before the other international jurisdictions⁷ based on comparative financial data derived from the budgets of the other judicial institutions relating to legal aid resources, in order to assess, inter alia, the different budgetary impact of the various mechanisms;
- b) Consideration of the applicable Court rules and procedures that seek to ensure a thorough and rigorous examination of claims of indigence made by suspects/accused persons;
- c) Whether the criteria for indigence applied at the Court are reasonable in light of the practice and experience of the other international jurisdictions and if not, whether it should be amended;
- d) The impact of existing sanctions and/or the freezing of the assets of a suspect/accused before the Court when determining his/her indigence. Additionally, what is the practice and experience before other international jurisdictions on this issue and whether the approach is consistent across all the international jurisdictions;
- e) The practice and experience at the Court between the respective roles of the legal aid system and the Office of Public Counsel for the Defence (OPCD) in order to properly identify any possible overlap of functions leading to a potential duplication of funds/resources;
- f) An informed indication by the Court, where possible, of the expected trend over the next financial year (2009) in the need for additional resources for legal aid and for the OPCD; and
- g) Where feasible, what further procedural amendments/steps might be required from the Assembly and/or the Committee to ensure that the right of a suspect or accused to an effective and efficient defence is safeguarded, while upholding the integrity of the system of legal aid administered by the Registrar.

6. As regards the link between the budget and the issue of legal aid, the latter has been facilitated in close co-ordination with ongoing parallel discussions on the 2009 programme budget. In particular, the Court's interim report on legal aid was reviewed by the Committee at its eleventh session and the Committee's recommendations⁸ to the Assembly on the need to consider alternative methods of calculating indigence, as well as the desirability of establishing absolute thresholds of assets above which legal aid would not be provided, together with establishing a detailed dialogue with the Court on the legal and financial aspects for victims' participation, have all been noted in the Court's report, with a view to the issues being taken forward in 2009, subject to the views of the Assembly.

⁷ International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL), Extraordinary Chambers in the Courts of Cambodia (ECCC).

⁸ Report of the Committee on Budget on the work of its eleventh session (ICC-ASP/7/15, paras. 123-129).

C. Conclusions

7. The Working Group's unanimous view is that the Court's final report to the Assembly on the issue of legal aid provides an invaluable comparative basis for evaluating the budgetary impact and operation of the legal aid system for the defence currently operating before the Court and before the other international criminal jurisdictions. It is a thorough and detailed report which should significantly contribute to a greater understanding by the Assembly of how the Court is managing the financial and reputational risks entailed by legal aid.

8. However, as observed by the Committee in the report on the work of its eleventh session, the Court's report "focuses almost entirely on the question of legal aid for the defence and it would be useful for the Court to explain separately its plans to fund legal aid for victims"⁶ and to consider and discuss alternative methods for calculating indigence. The Working Group concurs with the recommendations of the Committee and therefore suggests that the Assembly endorse the same and consider the inclusion in the omnibus resolution of the language contained in the annex to this report.

⁹ Ibid., para. 129.

Annex

Recommendation for inclusion in the omnibus resolution

The Working Group recommends the inclusion of the following text in the resolution of the seventh session of the Assembly of States Parties on “Strengthening the International Criminal Court and the Assembly of States Parties”:

“The Assembly of States Parties

(. . .)

Welcomes the detailed report submitted by the Court to the Assembly of States Parties on the different legal aid mechanisms before the international criminal jurisdictions¹ and recommends that the Court should continue to identify any efficiencies that can be achieved in its legal aid scheme, including by ensuring that the provision of legal aid is commensurate with the level of activity at each stage of proceedings, and by regularly evaluating the relationship between the Office of Public Counsel for the Defence (OPCD) and defence teams;

Invites the Court, taking into account the comments of the Committee on Budget and Finance,² to present to the Assembly at its next session an updated report on the legal and financial aspects for funding victims’ participation before the Court, together with a further report considering alternatives to the formula currently used by the Court for calculating indigence, to include, inter alia, the consideration of the desirability of establishing absolute thresholds of asset holdings above which legal aid would not be provided.”

--- 0 ---

¹ Report on different legal aid mechanisms before international criminal jurisdictions (ICC-ASP/7/23).

² Report of the Committee on Budget and Finance on the work of its eleventh session (ICC- ASP/7/15 and Add.1, paras. 128-129).