

# **Annex**

## **Public**



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The Registry

## Explanatory Note for External Legal Teams on the Status of the Legal Aid Reform Process

The purpose of this Note is to provide defence and victims' teams with an update on the status of the ongoing reform process of the International Criminal Court's ("ICC" or "Court") legal aid system during the year 2022. The Note aims to provide, in full transparency, an overview of: 1. the review and reform process during the year 2022; 2. discussions on the review of the legal aid policy and feedback received on the proposed reform of the Court's legal aid system; and 3. the timeline ahead and ways for defence and victims' to engage in the further reform process.

The present Note is circulated among all members of defence and victims' teams *via* the following email address: ALL\_EPN@iccep.org

### I. Key Steps of the Review and Reform Process During the Year 2022

The ongoing review and reform process of the Registry's single policy document on the Court's legal aid system<sup>1</sup> ("legal aid policy" or "LAP") has been initiated with the mandate given to the Court by the Assembly of States Parties ("ASP") during its twentieth session, where it requested the Court

"to continue its review of the functioning of the legal aid system and to present, following further consultation with States Parties and all relevant stakeholders, a range of fully-costed proposals for reform of the legal aid policy for external defence and victims' teams, with full respect for the applicable principles of legal aid, for the consideration of the Assembly, through the Committee on Budget and Finance, at its twenty-first session". In producing these proposals, the ASP requested the Court "to take account of costs constraints and ensure that all options presented can be funded within existing resources, and within that context, to continue to explore constructive options conducive to a viable way forward to improve the conditions of service of external defence and victims' teams members".<sup>2</sup>

Based on this mandate and further discussions with States Parties, the Registry initiated a consultation process with all relevant stakeholders including States Parties, members of defence and victims' teams, bar associations (including the ICC Bar Association ("ICCBA"))

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<sup>1</sup> ICC-ASP/12/3.

<sup>2</sup> ICC-ASP/20/Res.5, paras 89-93, Annex I, para. 8.

and the International Bar Association (“IBA”), civil society, Court internal entities and other international criminal tribunals:

- On 11 April 2022, the Registry distributed a questionnaire on the review and reform of the LAP (“Questionnaire”) among aforementioned stakeholders, in order to receive, inasmuch as possible, a detailed picture on the functioning of the legal aid system and fields requiring reform.<sup>3</sup>
- On 25 May 2022, the Registry distributed among the aforementioned stakeholders a report on the outcome of the Questionnaire (“Report”), on which basis, targeted questions on the improvement of the LAP were developed.
- On 30 and 31 May 2022, a two-day seminar on the review and reform of the Court’s legal aid system (“Legal Aid Seminar”) was held, during which relevant stakeholders, including counsel and support team members of defence and victims’ teams, were present. During the Legal Aid Seminar, stakeholders discussed viable ways forward for a reform of different aspects of the legal aid system and guided the Registry in its reform intent.
- On 21 June 2022, the Registry shared with all stakeholders, including defence and victims’ teams, a paper on the proposed concepts of a draft legal aid policy (“Paper on Key Concepts”). In a working group meeting (“Hague Working Group” or “HWG”)<sup>4</sup> facilitated by H.E. Ambassador Carmen María Gallardo Hernández (“Facilitator of Legal Aid”) on the topic of legal aid with the presence of ICCBA, IBA, the Office of the Public Counsel for the Defence (“OPCD”), the Office of the Public Counsel for Victims (“OPCV”), and the Coalition of the ICC (“CICC”), the Paper on Key Concepts was further discussed during working group meetings with States Parties.<sup>5</sup>
- On 31 August 2022, the Registry circulated among all relevant stakeholders, including defence and victims’ teams the document on the proposed reform of the Court’s legal aid system (“Reform Proposal”), and invited said stakeholders to submit comments thereto. The Reform Proposal was also shared with the Committee on Budget and

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<sup>3</sup> Prior to circulating the questionnaire for input by stakeholders, the Registry had circulated a draft version of this questionnaire and invited participants of the Hague Working Group meeting of the Bureau of the ASP (for reference see fn 4) to submit comments on a) whether the draft questionnaire reflects all relevant topics of the legal aid policy for which reform is needed; and b) whether questions provide for sufficient options and are acceptable to stakeholders. Stakeholders present were States Parties, ICCBA, OPCD, OPCV, CICC.

<sup>4</sup> Reference is made to the Hague Working Group (“HWG”) meetings of the Bureau of the Assembly of States Parties, which take place regularly in different formats and under different facilitations. For the topic of legal aid, the Facilitator of Legal Aid organized five meetings took place in 2021 and five in 2022. HWG meetings focus on discussions between States Parties. Depending on the topic, different stakeholders may be present that are in a position to contribute to the debate. For the facilitation of legal aid, the HWG meetings took generally place with the presence of the ICCBA, IBA (at times), OPCD, OPCV, representatives of the Division of Judicial Services at the ICC (mainly the Director of Judicial Services and representatives of the Counsel Support Section (“CSS”)).

<sup>5</sup> For further information on the discussion during the HWG meetings, please consult the following section.

Finance ("CBF") for their initial review and recommendation. The Reform Proposal included:<sup>6</sup>

- The Draft Legal Aid Policy of the International Criminal Court ("Draft Legal Aid Policy"), including two annexes (annexes I and II) to be submitted to the ASP for adoption or endorsement during its twenty-first session in December 2022;
- Two amendment proposals to the Draft Legal Aid Policy (annexes III and IV) concerning the amendment of the Draft Legal Aid Policy to the early stages of the proceedings (for victims' teams) and the reparations phase (for defence teams and victims' teams for assistance in the implementation of the reparation order) to be submitted to the ASP for adoption or endorsement during its twenty-first session in December 2022;
- The Registry Guidelines on Implementation of the Legal Aid Policy of the International Criminal Court ("Guidelines") to be submitted to the ASP alongside the Draft Legal Aid Policy for adoption or endorsement during its twenty-first session in December 2022;
- The Supplementary Document on the Annual Budget for Legal Aid, including a comparison of costs between the 2013 legal aid system and the proposed system of the Draft Legal Aid Policy, as requested by States Parties; and
- An attachment with an initial review of provisions that require reform in the Court's statutory framework or other legislation or documents, and reform proposals thereto.
- On 21 October 2022, a HWG meeting with the presence of States Parties, the ICCBA, OPCD and CICC was facilitated, during which the Registry presented the key concepts of the Reform Proposal.<sup>7</sup>
- On 18 November 2022, another HWG meeting was held to discuss recommendations on a resolution for the twenty-first session of the ASP in December 2022.

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<sup>6</sup> For further information, please consult the Reform Proposal document directly which had been shared on 31 August 2022 via email (from [legalaidpolicyreform@icc-cpi.int](mailto:legalaidpolicyreform@icc-cpi.int)) with defence and victims' teams.

<sup>7</sup> Please find attached the power point presentation that had been shared with aforementioned stakeholders during the meeting .

## II. Discussions on the Review and Feedback Received on the Reform Proposal

### 1. Discussions on the Review of the Legal Aid Policy

#### a) *Prior to the ASP Mandate: Discussions on Financial Scope and Legal Representation (or Defence) Office*

Discussions on the review and reform of the Court's legal aid system are ongoing for several years. Based on the recommendations on legal aid in the Independent Expert Report ("IER")<sup>8</sup>, discussions on a further attempt to review and reform the legal aid system had re-started during the year 2021 in the framework of the HWG on the facilitation of legal aid.

As no concrete mandate had been given to the Registry to hold consultations on this topic, discussions during the HWG meetings in 2021 focused on the identification of key topics requiring reform and the wording of the paragraph on legal aid in the omnibus resolution for the twentieth session of the ASP in December 2021. In terms of the drafting of the resolution, the focus of the discussions was on two items:

- i) the possibility of the establishment of a legal representation office or defence office;<sup>9</sup> and
- ii) the financial scope of the legal aid reform.

On the first topic, the Registry presented ideas on the concept of such legal representation (or defence) office. As a group of States Parties advocated against the establishment of such office, discussions on its establishment were separated from those concerning the reform of the legal aid system.

Concerning the second topic, Registry representatives, the ICCBA, the OPCD and OPCV proposed that in line with the IER, no financial limits should be established for the purpose of a fruitful discussion on the improvement of services of defence and victims' teams. States Parties advocated for such limit by including the terms "can be funded within existing resources" and "taking into account cost-constraints" into the mandate.

#### b) *On the Basis of the Mandate received by the ASP: Discussions with the Hague Working Group ("HWG")*

Upon receiving the mandate during the twentieth session of the ASP<sup>10</sup> and the appointment of H.E. Ambassador Carmen María Gallardo Hernández as facilitator of legal aid, the Registry initiated the aforementioned consultation process and presented the outcome in the Report, the Paper on Key Concepts and the Reform Proposal.<sup>11</sup>

<sup>8</sup> Independent Expert Report, ICC-ASP/19/16, Recommendations 322-327.

<sup>9</sup> The term "defence office" refers to the proposed transformation of the Registry's existing services for the defence into a Defence Office, or as proposed, should this be combined with the existing services for legal representation for victims, into a "legal representation office".

<sup>10</sup> See above, ICC-ASP/20/Res.5, paras 89-93, Annex I, para. 8.

<sup>11</sup> See above, Part I.

Parallel to the consultation process, the Registry participated in HWG meetings organized by the Facilitator of Legal Aid,<sup>12</sup> with the presence of States Parties, ICCBA, IBA (at times), OPCD, OPCV and the CICC:

- **In a first meeting on 24 February 2022,** the Registry presented a timeline of the reform process for 2022, foreseeing, *inter alia*, the circulation of an online questionnaire among all relevant stakeholder, the holding of a seminar with said stakeholders, the consultation of the CBF and the presentation of a reform proposal to the ASP in December 2022. During this meeting, a first exchange on relevant topics for inclusion into the questionnaire took place. The Registry proposed, *inter alia*, the working conditions of support team members, including the providing of social support and protection against harassment and discrimination; the distribution of legal aid resources; remuneration of external team members; and reduction of bureaucracy. States Parties further requested to present a range of fully costed proposals during the year for their consideration, and further emphasized that they would like to comment on a draft version of the questionnaire prior to circulation for input.
- **In a second meeting on 29 March 2022,** the draft questionnaire was discussed. States Parties requested to provide for general questions allowing for the participation of stakeholders from an outside perspective. ICCBA requested to not only focus on support team members, but to address the remuneration of counsel as well.
- **In a third meeting on 22 June 2022,** the Registry presented the Paper on Key Concepts.<sup>13</sup> Comments by stakeholders on the key concepts predominantly focused on the working relationship between the Court and defence and victims' team members. States Parties raised questions regarding the budgetary impact if support team members would be provided with staff contracts and requested to explore less costive alternatives such as a regulation of adequate working conditions in the legal aid policy itself. The ICCBA shared concerns regarding the inclusion of support team members in the Court system given that it could impact their independence as well as the independent choice of counsel of their team members. ICCBA further raised concerns regarding the remuneration difference between counsel and support team members if they become staff and if at the same time the tax for external team members is not resolved. The IBA supported the staff contracts and requested to prioritize geographical and gender representation. A deadline for submission of the first draft reform proposal was set for beginning of September.
- **In a fourth meeting on 21 October 2022,** the Registry held a presentation on the proposed legal aid reform, which summarized the Reform Proposal submitted to all

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<sup>12</sup> HWG meetings during 2022 took place on 24 February 2022; 29 March 2022; 22 June 2022; 21 October 2022; and 18 November 2022.

<sup>13</sup> For details see paper on key concepts distributed by the Registry on 21 June 2022.

stakeholders on 31 August 2022<sup>14</sup> and addressed the main comments received on the Reform Proposal.<sup>15</sup> Discussions thereto focused on:

- **Involved actors in the determination of the complexity levels:** the Registry clarified that at this stage it is envisaged that the complexity levels would be assessed by (newly recruited and specialized) staff within CSS and the help of *amicus curiae* counsel, where required. The involvement of chambers will be only where a decision of the Registrar on legal aid is appealed.
- **Social support and protection against harassment and discrimination through different contract type options for support team members:** the Registry informed stakeholders that there are different contract options. Each contract option takes account of the need to provide social support and protection against harassment and discrimination. Some contract forms are coming with different challenges that would need to be addressed. For existing staff type contracts, the option of fixed-term appointments bears challenges regarding the maintaining of independence of team members and the choice of team members by counsel; the option of short-term appointments provides for challenges in terms of its maximum duration of two years. Regarding the possibility of new contract types, the Registry presented the proposed contract type "Assistance to Counsel" ("AtC") as per the Reform Proposal,<sup>16</sup> for which persons assisting counsel would remain external, but be attributed with social support for which the scope and costs would need to be discussed. The Registry clarified that the major challenge is the unsolved matter regarding the payment of taxes by external personnel. As a fourth option, the Registry presented the option of "Temporary Assistance to Counsel" ("TAC"), which described a new staff contract form with short-term or mid-term duration targeted to the specific needs of defence and victims' teams. Differences to existing staff contracts would particularly be the contract duration; specific regulations regarding the relationship of external counsel, staff support team member and the Registry, as well as possible deviations from the common staff costs where not fitting to the needs of defence or victims' teams (e.g. through limited contract duration). Given that there is no such contract form existent, the details of such contract would be subject to further discussions with the UN.
- **Geographical and gender representation:** the Registry assured that geographical distribution and gender representation is a key priority of the reform process and a strategic goal of the Registry, and will be taken into

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<sup>14</sup> Please find attached the power point presentation that was shown during this meeting and circulated by the SASP among all HWG participants.

<sup>15</sup> See in detail below, Part II.2.

<sup>16</sup> See document Annual Budget for Legal Aid within the Reform Proposal, pp 12-13.

account under each possible solution for the working relationship between Court and persons assisting counsel.

- **Update on the current state of the taxation issue:** the Registry informed States Parties that the Host State had been contacted again by the Registry regarding an alternative interpretation of article 18 of the Agreement on Privileges and Immunities as well as article 25(3) of the Headquarters Agreement. The Registry clarified that it has exhausted its communication channels and remedies to reach any progress regarding the taxation of external team members and recommended that States Parties hold multilateral discussions with the Host State on this matter.
- **In a fifth meeting on 18 November 2022,** discussions focused on the wording of the report prepared by the Secretariat of the ASP and the resolution to be incorporated into the omnibus resolution. The Facilitator of Legal Aid and the Registry requested an endorsement of the key concepts of the Reform Proposal and to continue discussions taking in mind economic realities. They strongly advocated for an adjustment of the remuneration to the Court salaries. States Parties maintained their position that a solution should be found in a budget-neutral manner by taking into account cost-constraints. The Host State agreed to a multilateral meeting on Ambassador level with States Parties regarding the taxation issue.

## 2. Feedback Received on the Reform Proposal

The Registry has received a limited number of comments on the Reform Proposal. On behalf of the legal profession, comments have been received from four defence teams, as well as from the OPCD. Further, a group of seven States Parties has submitted a document with joint questions on the Reform Proposal.<sup>17</sup>

### a) *Comments by the legal profession focused on the following matters:*

- **On the introduction of complexity levels:** concerns were expressed that the introduction of complexity levels could lead to an increase in administration costs, for example through an intensification of litigation and the risk of arbitrary application given a lack of definitions of some parameters. Further, it was expressed that complexity level 1 allocated insufficient resources for proceedings relating to crimes committed under article 5 of the Rome Statute.

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<sup>17</sup> The Registry is in a position to share these comments if so requested and agreed by those having submitted comments. Until now, the comments provided by defence teams and the OPCD have not been shared with other stakeholders as the Registry has not been asked to circulate these comments and has therefore only reflected the input received therein verbally and without revealing the authors during further discussions held on 21 October and 18 November 2022. Please note that to the knowledge of the Registry, the comments by States Parties had been shared with participants of the HWG, including the ICCBA.

- **On the amount of resources:** in general, comments reflected that allocated resources were insufficient. This particularly related to the need for defence teams to have allocated at least one associate counsel at all stages of the proceedings, even two during trial, and sufficient legal assistants that enjoy privileged visits and communications. It was also advocated for more resources for proceedings relating to crimes under article 70 of the Rome Statute and more flexibility regarding the allocation of additional means.
- **On the contract type for persons assisting counsel:** preference was given to the attribution of established staff contract types at the Court. It was requested to receive further information and clarification on the proposed AtC contracts, and to extend the maximum contract duration.
- **On restrictions to take on multiple cases:** more flexibility was requested regarding the possibility of taking on additional cases at particular stages, for example at the beginning of a case or towards the end of the case.
- **On periods of reduced activity:** it has been reflected that the foreseen periods of reduced activities are too broadly defined and would not reflect the actual needs of defence teams.
- **On the remuneration and taxation of external members of defence and victims' teams:** comments reflected that remuneration should be adjusted to current Court salary rates for the equivalent position and that taxation for defence and victims' team members should be abolished.

*b) Comments by States Parties*

A number of States Parties requested in their comments an update on the status of discussions with the Host State on the taxation of external team members. They further requested to adjust the timeline on the reform of the legal aid policy in order to have more time to consider the Reform Proposal and calculations therein, and to hold discussions thereon among States Parties.

*c) Consideration of Comments*

The comments received by stakeholders have been taken into consideration and based on these comments, those parts of the Reform Proposal requiring improvement have been identified and relevant discussion points in this regard prepared. An updated draft proposal has not yet been submitted for two reasons. Firstly, comments have shown that certain topics require further consultations with the legal profession, for example on the functionality and the parameters of the complexity level; ways to reduce bureaucracy; the adequate allocation of resources; and the work-relationship between the Court and team members. Secondly, recommendations provided by the CBF and discussions with States Parties have shown that no approval of the reform proposal can be achieved this year as States Parties have requested more time and information to consider the concepts and the budgetary impact.

### **III. Timeline Ahead and Ways for Defence and Victims' Teams to Engage in the Further Reform Process**

Given the status of the discussions with States Parties and other stakeholders, the Reform Proposal will not be approved during the twenty-first session of the ASP this year. The Registry will therefore continue to work on the details and the improvement of the Reform Proposal during the year 2023. The Registry aims at presenting a final proposal for the reform of the Court's legal aid system prior to the twenty-second session of the ASP next year. This includes the preparation of a new draft reform proposal until May for a new round of comments, as well as submissions to the CBF in July 2023 for the inclusion of the reformed legal aid system and adjusted remuneration into the Court's annual budget.

The Registry intends to have continued discussions with relevant stakeholders on the basis of the first draft Reform Proposal. In this regard, the Registry would appreciate consultations with the legal profession, particularly practicing defence and victims' team members, *inter alia*, on the functioning and the parameters of the complexity levels; the allocation of resources; the details of the work-relationship between the Court and defence and victims' team members; and possibilities to reduce bureaucracy. Such consultations are aimed to take place at the beginning of next year.