



INTERNAL AUDIT DIVISION

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Audit of management of legal aid and defence matters at the International Residual Mechanism for Criminal Tribunals

Controls over management of legal aid and defence matters were adequate

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Audit of management of legal aid and defence matters at the International Residual Mechanism for Criminal Tribunals

EXECUTIVE SUMMARY

The Office of Internal Oversight Services (OIOS) conducted an audit of management of legal aid and defence matters at the International Residual Mechanism for Criminal Tribunals (IRMCT). The objective of the audit was to assess the adequacy and effectiveness of the governance, risk management and control processes over the effective management of legal aid and defence matters at IRMCT. The audit covered the period from January 2016 to October 2018 and included a review of: (a) assignment of counsel and determination of means or capacity of legal aid applicants; (b) remuneration of persons representing indigent accused; and (c) coordination mechanisms.

Overall, controls over management of legal aid and defence matters were adequate. Accused persons were assigned counsel according to established procedure; procedures to determine potential conflicts in assigning and remunerating defence teams were adequate; authorized lump sum allotments were consistent with the applicable policies and adequately monitored; assessment of work accounted for and reported by lead defence counsel was adequate; payment of claims during court recess in 2017 were made in accordance with accounting standards; and coordination between the Office of Legal Aid and Defence and legal officers in Registry of Arusha branch was adequate.

CONTENTS

	<i>Page</i>
I. BACKGROUND	1
II. AUDIT OBJECTIVE, SCOPE AND METHODOLOGY	2
III. AUDIT RESULTS	2-6
A. Assignment of defence counsel	2-3
B. Remuneration of assigned counsel and support staff	3-5
C. Coordination mechanisms	5-6
IV. ACKNOWLEDGEMENT	6
APPENDIX I Management response	

Audit of management of legal aid and defence matters at the International Residual Mechanism for Criminal Tribunals

I. BACKGROUND

1. The Office of Internal Oversight Services (OIOS) conducted an audit of management of legal aid and defence matters at the International Residual Mechanism for Criminal Tribunals (IRMCT).
2. The Mechanism was established by Security Council Resolution 1966 (2010) of 22 December 2010 with two branches: the Arusha branch for residual functions of the International Criminal Tribunal for Rwanda (ICTR); and The Hague branch for residual functions of the International Criminal Tribunal for the former Yugoslavia (ICTY). The Security Council decided that the Mechanism would continue the jurisdiction, rights and obligations and essential functions of ICTR and ICTY, which formally closed on 31 December 2015 and 31 December 2017, respectively.
3. The right of an accused to a fair trial is a fundamental human right and a basic principle of criminal justice. The fundamental rights of the accused are embodied in Article 19 of the IRMCT's Statute, which is further warranted in the Mechanism's Rules of Procedure and Evidence. All persons indicted by the ICTR, ICTY or the Mechanism and appearing before the Mechanism as well as all persons detained under the authority of the Mechanism have the right to be represented by defence counsel.
4. If a suspect or accused wishes to be represented by a defence counsel, the accused/suspect could either retain his/her own counsel or, if the suspect/accused lacks the means to remunerate counsel and has been found indigent by the Registrar, a counsel assigned at the expense of the Mechanism. An applicant for legal aid is a suspect, an accused or a convicted person who requires representation before the Mechanism at the pre-trial, trial, appeal, contempt of court or post-conviction proceedings. The legal aid system of the Mechanism also covers remuneration of persons who are assisting an indigent self-represented accused.
5. The Office of Legal Aid and Defence (OLAD) under the Registry is responsible for managing the provision of legal aid/assistance to suspects or accused persons and support to defence counsel. OLAD also provides support to the Advisory Panel, and Disciplinary Panel and Disciplinary Board. OLAD has 5 staff headed by a P-3 who reports to the Deputy Chief of The Hague Registry under the overall supervision of the Registrar. OLAD is assisted by two legal officers (P-5 and P-2) at the IRMCT Registry of the Arusha branch when processing the assignment of counsel, determination of means of legal aid applicants and remuneration of defence teams pertaining to the accused before the Chambers.
6. During the biennium 2016-2017 and the period January to October 2018, the Mechanism incurred expenditure in a total amount of \$2.7 million and \$1.2 million, respectively, for the provision of legal aid to indigent suspects or accused. The expenditures include defence fees, daily subsistence allowance paid to counsel during trial proceedings and other authorized travel, and legal costs for post-conviction proceedings. At the time of audit, the Mechanism was paying for the defence costs of five indigent accused in the three proceedings that the Mechanism was completing. IRMCT was also paying for the defence costs of five persons accused in contempt of court and false testimony proceedings, which started on 13 September 2018, while procedures were ongoing to determine the means or capacity of the accused to pay their defence counsel. Additionally, the Mechanism was currently remunerating defence counsel in a limited manner with regard to six post-conviction matters pursuant to judicial orders. Where a counsel has been assigned, the Registrar may withdraw the counsel if information is obtained which establishes that the accused has sufficient means to remunerate the counsel. In such cases, the Registrar may recover the cost of providing counsel from the accused.

II. AUDIT OBJECTIVE, SCOPE AND METHODOLOGY

7. The objective of the audit was to assess the adequacy and effectiveness of the governance, risk management and control processes over the effective management of legal aid and defence matters at IRMCT.

8. This audit was included in the 2018 risk-based work plan of OIOS due to the risk that potential weaknesses in management of legal aid and defence matters could negatively affect the rights of the accused or the fiduciary role of the Registry in disbursing public funds for legal aid.

9. OIOS conducted this audit from 15 September to 20 November 2018. The audit covered the period from January 2016 to October 2018. Based on an activity-level risk assessment, the audit covered risk areas in the management of legal aid and defence matters including: (a) assignment of counsel and determination of means or capacity of legal aid applicants; (b) remuneration of persons representing indigent accused; and (c) coordination mechanisms.

10. The audit methodology included: (a) interviews with key personnel; (b) review of relevant documentation; (c) analytical review of data; and (d) random sample testing of defence fees and trial daily subsistence allowance.

11. The audit was conducted in accordance with the International Standards for the Professional Practice of Internal Auditing.

III. AUDIT RESULTS

A. Assignment of Defence Counsel

Accused were assigned counsel according to established procedure

12. Rule 43 of the Rules of Procedure and Evidence provides that whenever the interests of justice so demand, defence counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. The Rules require that a duty counsel be assigned to the accused for the purpose of entering a plea in the initial appearance of an accused in proceedings before the Mechanism. The Rules also require the Registrar to maintain lists of counsel and duty counsel.

13. The Mechanism maintained an updated list of counsel in accordance with the requirements of Rule 43, which facilitated the assignment of counsel to those who applied for legal aid. The accused then selected the lead counsel from the list. Thereafter, the Registrar formally assigned the selected lead counsel to the accused. Once assigned, the lead counsel is responsible for selecting and supervising any additional defence team members, based on Article 16 of the directive on assignment of defence counsel.

14. The Directive requires the Registrar to determine whether, and to what extent, the suspect or accused is able to remunerate counsel. The determination of the means of the legal aid applicant requires time within which to completely assess the means of the applicant so that the Registrar could arrive at a conclusive decision on the indigence of the accused. However, the representation of the suspect or accused is not forestalled as the same directive allows the Registrar to assign counsel for a period not exceeding 120 days, while the Mechanism is in the process of determining the extent to which the legal aid applicant is able to remunerate counsel. OIOS noted from documents relating to assignment of counsel that the relevant procedures were complied with.

Determination of means or capacity to cover defence costs was underway

15. Chapter 2 of the Directive on assignment of defence counsel requires a suspect or accused requesting the assignment of counsel to make a declaration of his/her means on the form provided by the Registrar, which should include an attestation that the information contained therein is true and complete to the best of his/her knowledge. The Directive also requires that to the extent possible, the declaration must be certified by an appropriate authority, either that of the place where the suspect or accused resides or is found, or that of any other place that the Registrar considers appropriate in the circumstances. The suspect or accused is required to prove that s/he is unable to remunerate counsel, while the Registrar is authorized to gather information to establish whether the suspect is able to remunerate counsel.

16. At the time of audit, five persons were accused of contempt of court before the IRMCT-Arusha branch. From 11 to 14 September 2018, the accused persons requested for assignment of counsel and submitted the required declaration of means. However, the declarations were not certified by an appropriate authority as required by the Directive because the accused persons were already at the IRMCT detention facilities in Arusha and unable to obtain the needed certification from an appropriate authority. Only one of five accused was previously established by the Mechanism as indigent. The Head of OLAD explained that management will be examining the documents provided by the accused, and if needed, the government will be engaged to conduct inquiry from the appropriate authorities. The determination of means of the four accused will be conducted in collaboration with two Registry lawyers in Arusha branch, involved in processing legal aid for indigent accused in that branch. OIOS is not in a position to provide an opinion on the determination of means of the four legal aid applicants because the process was still ongoing.

Procedures to determine potential conflicts in assigning and remunerating defence teams were adequate

17. Article 16 (G) of the Directive on the assignment of defence counsel states that no counsel shall be assigned to more than one suspect or accused at a time, unless: (a) each suspect or accused has received independent legal advice from the Registrar that both have consented in writing; and (b) the Registrar is satisfied that there is no conflict of interest or a scheduling conflict, and that the assignment would not otherwise prejudice the defence of either suspect or accused or the integrity of proceedings.

18. OIOS review of the process of assignment of counsel showed that the Registry consistently requested counsel to state whether or not there would be conflict of interest or scheduling conflict in cases where the Registry had knowledge of the counsel's dual representation. For example, OLAD examined claims by defence counsel which included obtaining third party information to identify possible overlaps in hours reported to the Mechanism by a lead counsel and hours previously billed from Extraordinary Chambers at the Courts of Cambodia (ECCC), where the counsel was also representing another accused person. The lead counsel explained that the lapses in accounting for hours worked for both tribunals were not intended. The Registry reminded lead counsel that the Code of Professional Conduct requires that "Counsel should account in good faith for the time spent working on a case and maintain and preserve detailed records of time spent". OIOS concluded that procedures in determining possible conflicts of interest and scheduling conflicts when assigning a defence team to an accused were adequate.

B. Remuneration of assigned counsel and support staff

Authorized lump sum allotments were consistent with the applicable policies and adequately monitored

19. The IRMCT directive on the assignment of defence counsel provides that assigned counsel and members of their defence team practicing before the Mechanism shall be remunerated in accordance with

the remuneration scheme adopted by the Registrar. The Mechanism adopted a lump sum system in remunerating the defence team of an indigent suspect or accused at the pre-trial, trial and appeals proceedings, to give lead counsel the flexibility to decide the composition of his or her team and determine the fee levels. The defence team is paid 80 percent of the authorized lump sum and the balance is paid after assessing the propriety of claims and work performed as submitted by the defence counsel. The respective remuneration policies for pre-trial, trial and appeals provides a mechanism for authorizing the amount of lump sum for each defence team; adjusting the amount of lump sum, if needed; invoicing and paying the defence team; submitting necessary documentation to support payment of the defence team; and authorizing travel, amongst other requirements.

20. OIOS' review of 76 invoices amounting to \$605,551 out of 643 invoices paid under the lump sum remuneration scheme and relevant supporting documents and information showed that controls were in place as detailed below:

(a) Lump sum allotments were authorized in accordance with the prescribed remuneration policies. In cases when the lump sum amount is based on the complexity level of a case (Level 1-difficult; Level 2-very difficult; and Level 3-extremely difficult), the Registry took into consideration the written submissions of lead counsel regarding the complexity of the case and consulted the Chambers prior to deciding the complexity level for a specific case. Any upgrade of complexity level or adjustment in the lump sum allotment were also decided upon, based on written submission of lead counsel justifying the request for upgrade or adjustment in lump sum allotment. The existing policies prescribed certain factors to consider in deciding upgrade of complexity level and adjustment in previously authorized allotments.

(b) For each defence team, OLAD staff consistently monitored the following aspects: (a) authorized amounts of lump sum; (b) payments made against the authorized lump sum; and (c) payments made to each defence team member. Monitoring allowed OLAD staff to: ensure that payments to each defence team did not go beyond their authorized allotments; and reconciled payments made to each defence team member when assessing the propriety of claims for the remaining 20 percent of the authorized lump sum. In doing so, OLAD utilized the reporting facilities of Umoja and continued to use the Financial Tracking System (FTS) to manage the available and required funds for the defence teams and monitor the payments made from allocated funds. The OLAD finance assistant reconciled reports obtained in Umoja with the reports from FTS. In addition, OLAD maintains an excel based overview of authorized allotments and payments to each defence team member, which facilitated processing of defence fees. The Head of OLAD, who approves requests for payment, verified the status of allotment and prior payments to each defence team member from the allotment overview.

21. OIOS concluded that lump sum allotments were authorized in accordance with the applicable policies and OLAD staff adequately monitored the payments.

Assessment of work accounted for and reported by lead defence counsel was adequate

22. The Mechanism, as a fiduciary of public funds spent for legal aid of indigent accused or suspects, is required to assess the propriety and accuracy of claims submitted by the defence teams. The existing policies on remuneration of defence counsels and teams require the lead counsels to account for the hours of work of defence counsel and teams in representing an indigent suspect or accused. The lead counsel is required to submit documents to the Registry, to support the accounting of hours worked such as work plans; daily time records with details of work performed for the hours billed; and progress and end-of-phase reports. In the case of stipends, the lead counsel is required to submit pro-forma invoices detailing the defence team members to be paid and the amount to pay each team member. The code of professional conduct for defence counsel appearing before the Mechanism also require that counsel should account in good faith for the time spent working on a case and maintain and preserve detailed records of time spent.

23. Twenty-four invoices (\$221,327) out of 76 (\$605,551) reviewed were paid for hourly, recess, end-of-phase claims and trial daily subsistence allowance. OIOS noted that the Registry consistently assessed the propriety and accuracy of the claims of defence lead counsel. This was accomplished by reviewing all documents submitted by lead counsel, comparing hours claimed for trial and counsel's visits to accused with respective court calendar and detention unit's records. Out of the 24 invoices, 15 percent of the claims did not clearly substantiate the work performed of representing the accused before proceedings in the Mechanism. Registry either deducted the equivalent unsubstantiated hours of work billed from the payments made to the counsel or requested additional information from the lead counsel. In cases when the lead counsel was required to submit a work plan, Registry also compared the hours billed and supporting details of work performed, with the defence work plan. The remaining 20 percent of the allotment for lump sum or invoice for billed hourly work was paid to the defence team, only after Registry assessed all documents submitted by defence lead counsel and reconciled the billed hours with previous payments.

24. Based on existing remuneration policies relating to lump sum payment, the Registry may decline to pay part or all of the end-of-phase payment if there is reason to believe that irregularities have occurred in the work or conduct of the defence team, or that a substantial amount of work performed by the defence was unreasonable or unnecessary. OIOS noted that OLAD scrutinized the claims submitted by lead defence counsel and found instances of anomalies in the claims which resulted in deductions from defence claims or refusal to pay remaining amounts from defence allotments. For example, the amount of \$8,011 was deducted from an end-of-phase claim, while the remaining amount of \$102,405 from an allocation in another case was not paid due to anomalies found in these claims. Based on OLAD's consistent review process of claims and supporting documents submitted by defence teams, OIOS concluded that controls were adequate.

Payment of claims during court recess in 2017 were made in line with accounting standards

25. The remuneration policy on trial proceedings allows payment of six or more consecutive non-sitting days, during court recess, because these are not normally included in revised duration for recalculation of lump sum. The policy requires the defence teams to keep detailed information regarding the work of the defence during court recess and submit this information with the end-of-phase payment. If the claims during court recess are reasonable, the Registry would add the claims to the payment of the end-of-phase payment. The Registry decided in early 2018 to require lead counsel in on-going re-trial proceedings to submit their claims for the work performed during court recess in 2017. This allowed the Mechanism to recognize defence claims during the 2017 court recess to accrue in the year of occurrence in accordance with the International Public Sector Accounting Standards.

C. Coordination mechanisms

Coordination between OLAD and legal officers in the Registry of Arusha branch was adequate

26. OLAD, which is based in The Hague, centrally manages the provision and payment of legal aid at the Mechanism. However, two legal officers (P-5 and P-2) in Registry-Arusha branch are also involved in processing and deciding the requests for assignment of counsel, determination of means of legal aid applicants, assessing the requests of allotment, and examining the claims of defence teams relating to indigent accused in IRMCT-Arusha branch. There was adequate coordination through exchanges of communications between OLAD staff members and the two legal officers in Registry-Arusha branch, which facilitated the processing of transactions and ensured consistent application of the Directive and respective policies on remuneration. OLAD also used a common drive to share and store records and

documents on processing legal aid which contributed to the efficient processing of assignment of counsel and remuneration of defence teams. OIOS concluded that coordination between OLAD and Registry, Arusha branch was adequate.

IV. ACKNOWLEDGEMENT

27. OIOS wishes to express its appreciation to the management and staff of IRMCT for the assistance and cooperation extended to the auditors during this assignment.

(Signed) Eleanor T. Burns
Director, Internal Audit Division
Office of Internal Oversight Services

APPENDIX I

Management Response

From: Asa Rydberg [REDACTED]
Sent: Monday, December 31, 2018 2:24 PM
To: Agness Chilinda [REDACTED]
Cc: Brent Daniel Hicks [REDACTED]; Crispian Smith [REDACTED]; David Falces [REDACTED]; Marites Sese [REDACTED]
Subject: RE: Re: Response to draft audit report on audit of legal aid

Dear Ms. Chilinda,

Thank you for your message. We confirm the factual accuracy of the draft audit report.

It has been a pleasure to work with you and your staff.

Best regards, Åsa Rydberg van der Sluis

Åsa Rydberg van der Sluis (Ms.)
Deputy Chief, Registry Hague branch
International Residual Mechanism for Criminal Tribunals (IRMCT) [REDACTED]