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# Assessment of the ICC's Legal Aid System

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# PART I

## I. INTRODUCTION

### A. Mandate

**1.** Richard J Rogers ("the Expert") was engaged by the Registry of the International Criminal Court ("ICC" or "Court") to undertake an assessment of the ICC's Legal Aid System ("LAS").[1] Attachment A is the Expert's CV.

**2.** The Expert's Terms of Reference included the following:

> The Contractor shall undertake a comprehensive consultation with relevant stakeholders involved in (or affected by) the ICC's legal aid system (LAS) for defendants and victims […] The Contractor shall research the legal aid systems in three other UN assisted criminal tribunals, including the overall financial costs of defence and victim support [...] The Contractor shall draft a report aimed at improving the functioning (efficiency and effectiveness) of the LAS for defendants and victims. The analysis and recommendations shall take account of any relevant judicial decisions issued by the ICC and be guided by the following considerations:
>
> a. The need to ensure the fair trial rights of defendants, including the equality of arms;
>
> b. The importance of effective victims participation in the ICC, including independent legal representation;
>
> c. The need for responsible and efficient use of public funds.

[1] During its 12th session, the Assembly of States Parties adopted Resolution 8. Annex I, paragraph 6(c) reads: "With regard to Legal Aid […] *requests* the Court to, in support of the on-going reorganization and streamlining of the Registry, engage independent experts to reassess the functioning of the legal aid system and to report on its findings to the Bureau within 120 days following the completion of the first full judicial cycles. Such reassessment should pay special regard to the determination of indigence and the resources required for the legal representation of victims, including the ability of counsels to consult with victims".

**3.** The Terms of Reference required the Expert to submit a report "Assessment of the ICC's Legal Aid System" ("Report") containing an analysis of the current LAS and recommendations for improving the efficiency and effectiveness of the LAS for both defendants and victims.

**4.** It is worth noting that this Report is not part of the Registry's *ReVision* project. The Expert's mandate is restricted to an assessment of the LAS—it does not cover the broader structural issues relating to the Office of Public Counsel for Defence ("OPCD"), the Office of Public Counsel for Victims ("OPCV"), and the Victims Participation and Reparations Section ("VPRS").

### B. Consultation and Comparison

**5.** To compare the cost of the LAS at the ICC with the cost of legal aid at similar tribunals, the Expert sent a questionnaire to the relevant actors in the registry and / or defence office at the International Criminal Tribunal for former Yugoslavia ("ICTY"), the United Nations Mechanism for International Criminal Tribunals ("MICT"), the Special Tribunal for Lebanon ("STL"), and the Extraordinary Chambers in the Courts of Cambodia ("ECCC") (collectively "other tribunals"). Attachment B is the questionnaire sent to the other tribunals.

**6.** As part of the consultation process, the Expert met with staff in the ICC Registry (including staff in the CSS, OPCD, OPCV, and VPRS sections) as well as the President's office.

**7.** The Expert also met with independent lawyers engaged in international cases at the ICC and the other tribunals, including the recently elected President of the International Criminal Court Bar Association ("ICCBA"). In addition, the Expert distributed a questionnaire (in English and French) to counsel, legal assistants, and case managers who had been, or are engaged in cases at the ICC. The questionnaire made clear that 'sufficient resources' means "the minimum

level of resources that are reasonable and necessary for an effective defence, not the ideal level." Over 25 independent lawyers provided their views in person or through the questionnaire. Attachment C and D are the questionnaires sent to independent lawyers.

**8.** The above actors were extremely helpful and provided essential information and insight into the challenges relating to legal aid management at the ICC and the other tribunals. The Expert would like to thank all those who took the time out of their busy schedules to assist.

**9.** The Expert also took careful note of the *Report on the Assessment of the Functioning of the International Criminal Court's Legal Aid System* by the International Criminal Justice Consortium's ("ICJC") independent legal aid experts. The ICJC's report outlined the views of ICC staff, independent counsel, NGOs, and highlighted many of the main issues of concern. The initial research and insight offered by the ICJC experts provided a valuable foundation for this Report. Attachment E is the ICJC's Report.

### C. Preliminary Points

**10.** The LAS is a complex system and needs to be understood in its proper context. A few basic points are worth noting from the outset: First, the ICC Registry must be in a position to account for spending on legal aid; lawyers must expect to justify their expenditure and accept financial monitoring by the Registry. This does not mean, however, that CSS staff and lawyers should be burdened by administrative demands that add little or nothing to the financial accountability process. Unnecessary red tape wastes rather than saves resources. The LAS should be smart and efficient.

**11.** Second, since the LAS is publicly funded, only those funds that are reasonable and necessary to ensure the effective representation for defendants or victims should be granted under the LAS. Lawyers cannot expect the LAS to offer the level of resources sometimes provided in privately paid cases. However, there is a minimum level of legal aid under which high quality counsel will stop accepting cases and / or will be unable to provide adequate representation. Dipping below this level would be a false economy because quality lawyers can play a crucial role in safeguarding an efficient process. For example, there have been several cases where quality defence lawyers have been instrumental in weeding out weak cases at the confirmation stage, which resulted in huge resource savings (resources that might otherwise have been wasted on full trials ending in acquittals). Similarly, the better lawyers are less likely to waste time on irrelevant questions, pointless motions, or ill-conceived appeals. Underfunding legal aid to the point where good lawyers will not accept cases would likely result in higher overall costs and / or lower productivity.[2]

**12.** Lastly, the legal aid budget should be seen in its financial context. At the ICC, the legal aid budget for the defence in 2016 was €4,521,000.[3] Although this sounds large, it is only 3.25% of the total ICC budget for 2016 (over the last five years it has averaged a mere 2%). And it is less than 10% of the budget allocated to the Office of the Prosecutor ("OTP"). Therefore, whilst it is

[2] Describing every reduction in legal aid as 'savings' does not give the full picture. To assess the Court's 'value for money', the productivity must be considered alongside the absolute costs – what do donors 'get' for their money. A court that administers 10 (fair) trials for €100 million is better value than a cheaper court that administers three (fair) trials for €75 million. When productivity is considered, the greatest threats to the ICC's efficiency have been (i) poorly prepared prosecutions during the teething years of the first prosecutor and (ii) slow and inefficient judicial processes. The solution to these productivity problems is not simply to cut the budget, but rather to ensure that efficient systems are in place and that the ICC's administrators, prosecutors, defence lawyers, and judges are of the highest quality and dedicated to the task at hand. Currently, this is evidently not always the case.

[3] This was an increase from €2,866,400 in 2014, and €2,355,600 in 2015.

important for the LAS to be efficient and 'good value', legal aid is not an area where significant overall savings can be made. For example, shaving a huge 20% off the defence budget would save donors a mere 0.65% of the total financial burden. (By way of comparison, the defence legal aid budget at the ECCC is around 10% of the total court budget, at the STL it is around 7%.)

## II. SUMMARY

**13.** For ease of reference, the Report follows the structure of the Registry's Single Policy Document on the Court's Legal Aid System, dated 4 June 2013, ("Single Policy Document"), but separates the discussion of legal aid for defence from victims (Parts II and III of the Report, respectively). The recommendations have been drafted using the "should" form. This is just a matter of style—the Registry may wish to accept some recommendations and reject others.

**14.** The Report endeavors to find the right balance between financial accountability and efficient financial management; it seeks to reduce unhelpful or unnecessary administrative requirements and to inject predictability and transparency. It aims to outline the *minimum* resources necessary for independent counsel to provide effective representation for defence and victims within the context of mass atrocity cases.

**15.** Implementation of all the recommendations would develop the LAS for defence as follows:

### A. List System and Resources

#### *i. List System and Assignment of Counsel*

- The lawyers' list application process would be streamlined—reducing the

documentation requirements and imposing deadlines for review;

- The process for selecting / assigning counsel would be developed to ensure greater fairness and transparency—persons requiring lawyers would choose from a reduced list of counsel based on criteria provided by them. The process would be monitored;

- A legal services contract and pay slips would be introduced.

### *ii. Team Composition*

- Counsel would continue to act alone up to the initial appearance;

- Following the initial appearance, the core team would include a counsel, a legal assistant, a case manager and an associate counsel. The associate counsel would be assigned on a part time basis until the confirmation of charges, at which point the team would be engaged full time, until closing arguments;

- After the closing arguments and before judgment team members would be granted a (significantly) reduced ceiling of hours to complete necessary tasks;

- The appeal and reparations stages would apply a lump sum system whereby lead counsel would determine the team composition within the allocated budget.

### *iii. Investigation and Expert Budget*

- A new 'investigation and expert budget' would be created to cover expenses related to the substance of the case (field investigations, experts, translation etc)—the level of budget would be set according to the

complexity of the investigation. A locally hired resource person would be assigned, on a part-time basis, before the confirmation of charges until the end of trial.

### *iv. Additional Means*

- The current 'Full Time Equivalent system' for assessing additional means would be replaced by one based on the overall complexity of the case—cases would be ranked at the start of the process and additional resources, if any, would be pre-determined and allocated automatically at each stage.

### *v. Remuneration*

- The fee levels for defence team members would be recalculated using the equivalency principle and taking proper account of staff benefits, professional costs, and income tax—the fee levels would be set within the range established at the other tribunals. Fee levels below this range would be augmented. A standard amount for professional uplift would be factored into the hourly / monthly fee rates, removing the need for a separate calculation;

- Minimum fees levels for legal assistants and case managers would be introduced, according to their years of experience;

- Persons hired locally for field missions would be paid a 'fair and reasonable' rate according to local conditions;

- The Registry would seek to establish a tax-free agreement with the Host State to cover independent counsel and consultants thereby minimising (or even eliminating) the need to raise fee levels.

### *vi. Expenses Budget*

- The expenses budget would be redefined (and reduced) to cover only case-related personal costs (primarily travel and accommodation)— counsel and associate counsel would be paid a fixed monthly amount for expenses for the period of their engagement, significantly reducing the administrative burden.

## B. Procedure for Monitoring Fees

The LAS would apply three types of procedures for fee claims:

- ***Hourly timesheets:*** This would be applied during periods where greater monitoring is required. This includes much of the pre-trial phase (up to the confirmation of charges or three months before trial) and periods of reduced activity (such as lengthy postponements of trial or between closing arguments and judgement). Maximum hourly ceilings would be introduced according to the stage, taking into account the complexity of the case. Team members would be paid for actual hours worked.

- ***Fixed monthly fees:*** This would be applied during periods where minimal monitoring is required. This includes the latest stages of pre-trial and throughout trial until closing arguments. Action plans and detailed timesheets would be dispensed with. Team members would be paid a fixed monthly fee. Exceptions would apply in periods of reduced activity or where team members are absent for significant periods.

- ***Lump sum per stage:*** This would be applied during stages where the work requirement is relatively predictable, irrespective of duration. This includes the appeal and reparations stages. Action plans and detailed

timesheets would be dispensed with; a team composition plan would be required. The lump sum would be assessed according to the complexity of the case.

## PART II: LEGAL AID FOR DEFENCE

### III. COMPARISON CHARTS

**16.** This section provides a comparative analysis of the defence expenditure at the following tribunals: ICC, ECCC, ICTY, MICT, and STL. The information used to conduct the analysis was obtained from two main sources: (i) responses to a questionnaire sent to each tribunal and (ii) publicly available legal aid policies.[4]

**17.** Since the tribunals apply different legal aid systems, it has been necessary to adapt the financial data to create comparable indicators. In some cases, it was not possible to establish a figure, in which case the tribunal in question was omitted from the chart.

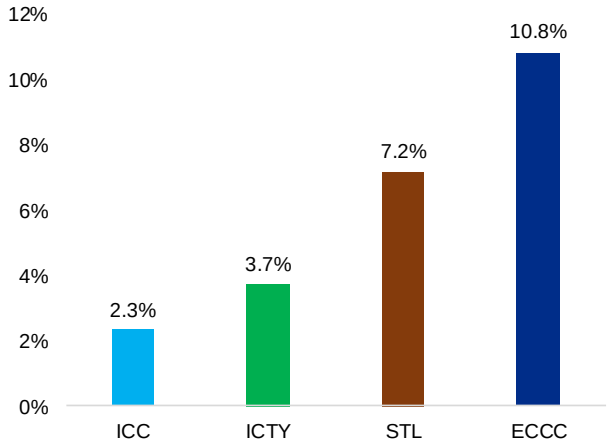
**18.** These figures represent estimates / averages based on available information—they are not accurate to the penny. Nevertheless, they are sufficiently precise to provide important comparative information and to inform the assessment of the LAS at the ICC.

❖

**19.** Figure 1 shows the legal aid dedicated to defence relative to the overall tribunal budget. As an average over the last five years, the ICC has spent a lower proportion on defence compared to the other tribunals.

[4] All the figures presented in the study are in Euros (€). Information provided in USD (US$) was converted using an average exchange rate for August 2016 of 0.901 with information from UN Treasury.

**Figure 1. Defence spending as a percentage of total court budget**[5]

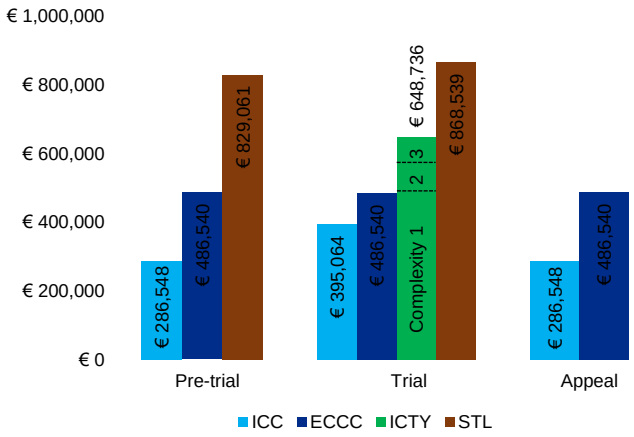



**20.** Figure 2 shows the average yearly cost of a case, per stage. Again, the ICC spending is significantly lower than the other tribunals.[6]

[5] These percentages were obtained by dividing the total annual defence legal aid budget (average of the previous five years) over the annual budget of the tribunal.
At the ICTY, the spending on defence has decreased dramatically in recent years due to the gradual closure of the court. For example, whilst the legal aid spending has averaged US$ 8,890,810 over the last five years, at its height it was up to US$ 30,000,000 per year. Therefore, in this chart, the defence spending as a percentage of the total of the ICTY budget is far lower than it would have been in previous periods.

[6] Figures for ICC, ECCC, and ICTY were obtained directly from the tribunals and correspond to the average cost of legal aid paid to a single defence team, per stage. At the STL, the figures correspond to the maximum total cost of the team according to the LAP and the UN salary rates.

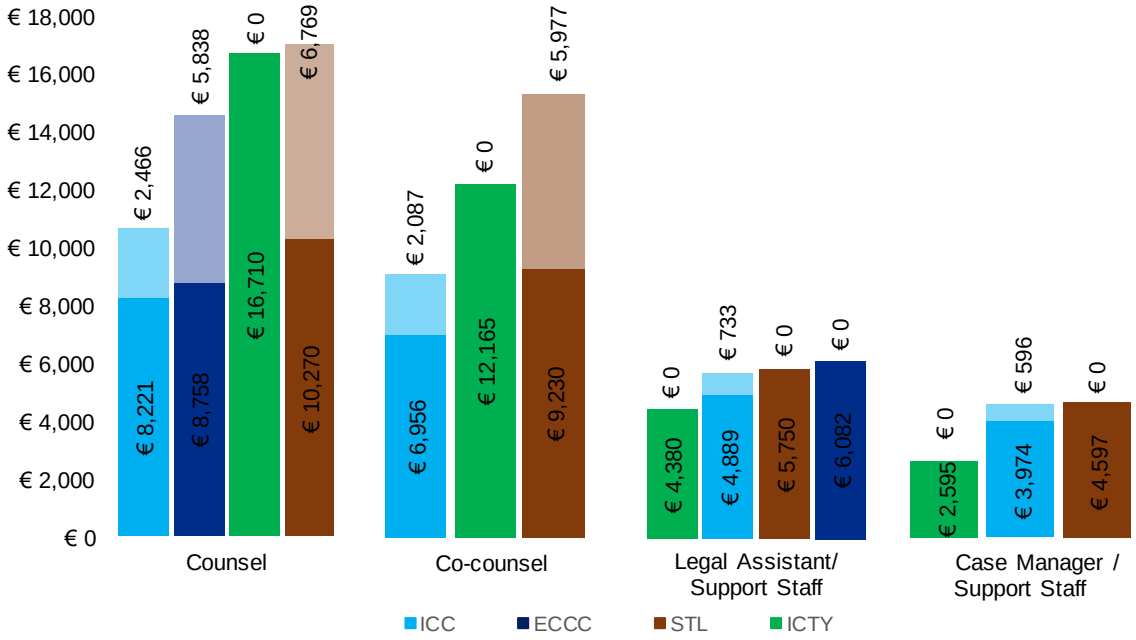
**Figure 2. Average yearly cost of a case by stage**[7]




**21.** Figure 3 shows the basic monthly fee level for each member of the defence team (in solid) and the *maximum* additional amounts for professional uplift/taxation (in transparency), which combined correspond to the total fees received ("fees received"). The figures do not include DSA or other expenses (these are included in Figure 4). When comparing the ICC with the other tribunals, the largest disparity is observed in the fees of counsel and co-counsel, while the fees of other team members are more balanced.

[7] For the STL, the figures for pre-trial stage at STL were calculated on the assumption that counsel claimed the maximum of 130 hours per month. At trial, the figures for counsel and co-counsel were obtained directly from the LAP. The appeal stage at the STL is not included.
For the ICTY, the trial stage at the ICTY is classified by complexity of the case levels. The graph indicates with dotted-line levels 1 and 2, and the total size of the bar corresponds to level 3. At ICTY, the trial figures include 10 months of DSA, for 22 days per month, for two lawyers, at a rate of €206 per day.
The pre-trial and appeal stages at the ICTY were not included—the figures from the ICTY's lump sum and maximum hourly ceiling systems do not lend themselves to comparison in this chart.

**Figure 3. Monthly fee levels during trial—basic fee & professional uplift**[8]




**22.** Figure 4 contains the maximum fees received by counsel and co-counsel working full time during trial (in solid) and the amount allocated towards expenses (in transparency). A similar conclusion can be made: counsel and co-counsel at the ICC continue to lag behind the other tribunals.

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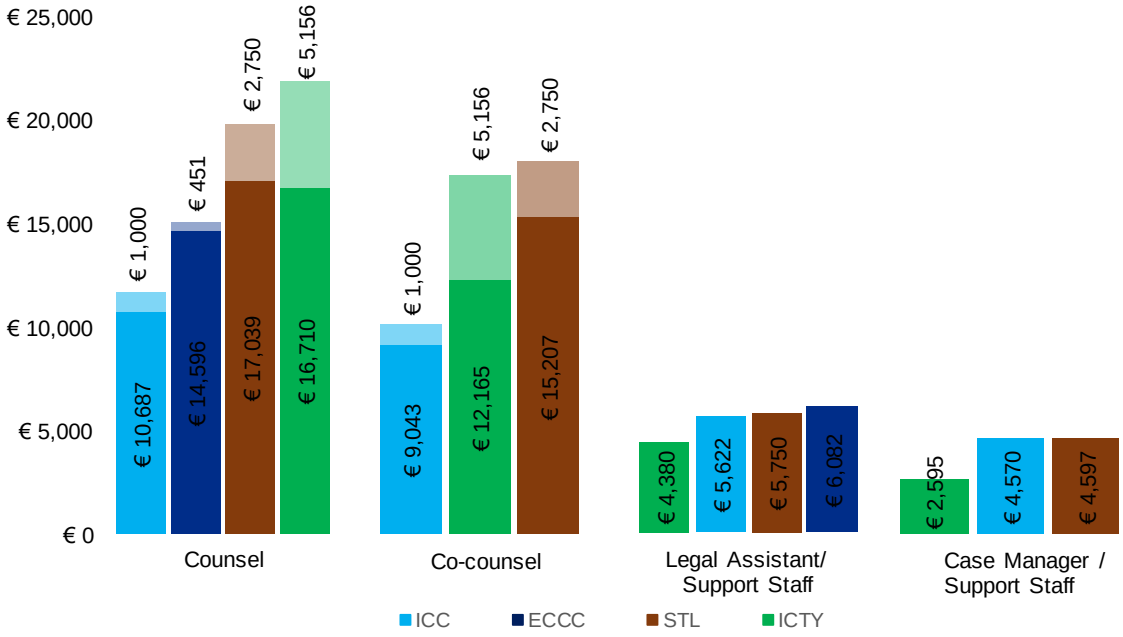
[8] The basic fee for counsel at the ECCC was obtained assuming that the professional uplift had been increased by 40%.
Since the ICTY applies a lump sum per stage system (except for appeals), certain assumptions had to be applied to allow for a reasonable comparison. First, the fees for counsel and co-counsel assume that they are paid the equivalent of the highest hourly rate at 150 hours per month. For legal assistants and case managers, it was assumed that their hourly rates are the highest and lowest hourly rate paid to support staff—€29.20 and €17.30 respectively—at 150 hours per month. In practice, lead counsel can decide what fee to pay support staff and, therefore, how much of the lump sum he or she takes as a fee.
The basic fees for staff level P1 to P3 of the STL were obtained from the UN Salary Rates, using the Net Single Fee at the highest step. For counsel and co-counsel, the maximum hourly rates were obtained directly from the LAP. The uplift was calculated using a professional uplift of 20% and a 40% of tax uplift.

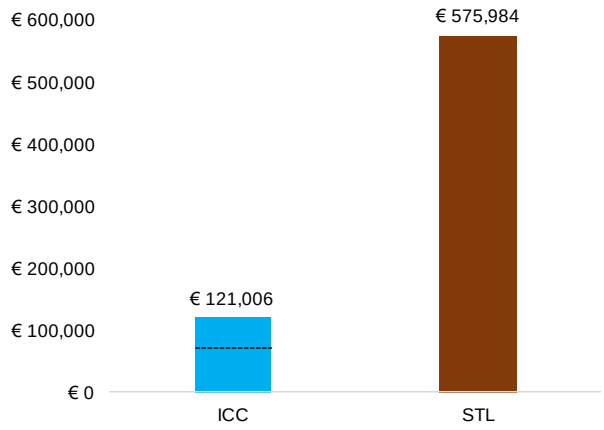
**Figure 4. Monthly fee levels during trial—fees received & expenses**[9]




**23.** Figure 5 gives an indication of the investigation and expert budget. Again, the ICC allocates less funding for defence investigations and experts than the STL.

[9] For the ICC, it was assumed that counsel & co-counsel receive €1,000 per month each for personal expenses from the expenses budget (which provides €3,000 per month for the team).
For DSA at the ICTY, it was assumed that counsel & co-counsel receive 22 days per month during trial at 75% rate.
For the STL, the figures were obtained directly from the LAP. Counsel and co-counsel receive an additional €750 for case-related expenses and €2,000 for travel per month.

**Figure 5. Investigation and Expert budget, for a four-year process**[10]




**24.** The comparison demonstrates that the defence expenditure at the ICC is considerably lower than comparable tribunals. The ICC spends less on defence as a percentage of the total tribunal budget; it spends less per case, per year, at every stage; and it pays counsel and assistant counsel less than their counterparts in other tribunals. Additionally, defence teams at the ICC are provided with a lower budget for investigations and experts.

[10] The ICTY and MICT were not included as the amount spent on investigations varies on a case-by-case basis (lead counsel determines the needs as part of the lump sum).
The figure for STL is equivalent to one full time investigator P3 at the highest step for four years during pre-trial and trial. This does not include any further travel or DSA expenses. An additional €300,000 has been factored in for expert consultants (€75,000 for pre-trial and €225,000 for three years of trial).
The figure for ICC corresponds to €73,006 for the total investigation budget (dotted line) plus €48,000 for experts and translations (estimated at €1,000 per month (from the 'expenses budget') for a four year process).

## IV. INDIGENCE DETERMINATION

### A. The ICC System

**25.** The LAS covers the costs of legal representation of indigent persons (those who lack sufficient means). The system is designed to allow the person requesting legal assistance to honour his or her obligations to dependents. Each person applying for legal aid completes a financial information form outlining his or her assets, income and financial commitments. The Registry assesses the likely cost of the defence case and applies a formula to determine what contribution the person should make, if any, to his or her defence.

**26.** In theory, the financial information form commits the person claiming legal aid to full cooperation with the Court. A financial investigator is mandated to investigate the matters declared on the form (there is one investigator available to cover all the cases). The Registry may seek additional information from the suspect, but aims to make a provisional determination within a month.

### B. Analysis

**27.** Due to the nature of post-conflict societies, it is notoriously difficult to assess indigence for defendants accused of war-related crimes. The lack of legal and financial structure in unstable regions means that money and assets are easy to hide and difficult to trace. Nonetheless, the ICC should make every effort to identify assets and ensure that those who have sufficient funds contribute to the cost of their own defence. The current system would benefit from the following developments:

**28.** ***Better cooperation:*** According to the financial investigator within CSS, several states have not cooperated fully with the financial investigation into assets. For example, some states have failed to provide information on bank accounts or

assets, or have refused to freeze assets that have been identified by the ICC. Closer support by relevant states would assist the financial investigation.

**29.** ***Updated written policy:*** The Single Policy Document is now out of date and incomplete. Due to the lessons learned to date, new procedures, approaches, and calculations have been developed. The Single Policy Document should be updated as a priority to ensure transparency, consistency in application, and the retention of institutional knowledge.

**30.** ***Providing information:*** In several cases, defendants refused to provide the information requested by the CSS with no meaningful consequences. This sets a bad precedent that others may follow. CSS should take a tougher stance and, after sufficient and clear warning, withhold legal aid from those who are intentionally uncooperative.

**31.** ***Obligations to dependents:*** Under the current system, the assessment of a defendant's financial obligations is often based on notional rather than actual costs. For example, if there are no official statistics for the cost of living in the relevant country / city, then the ICC looks to the International Civil Service Commission's DSA rates (for stays over a month) for that city and assumes this to be the financial obligation to *each household member*. If, for example, a defendant has eight dependants living in his residence, his assessed obligation (if there are no official statistics) would be 8 x DSA rate x 30 days, which could amounts to tens of thousands per month. Clearly, this would not reflect the real costs. The policy should be revised to ensure that the assessment of financial obligations is realistic.

### C. Recommendations

- The Registry should seek to create better working relationships with

relevant state actors to ensure cooperation in the financial investigation of assets;

- The CSS should draft an updated indigence policy document incorporating the new procedures, approaches, and calculations;
- The CSS should give clear warning to legal aid applicants who refuse to provide financial information and, subject to judicial direction, be ready to withhold legal aid to those who are intentionally uncooperative;
- The CSS should develop a means of assessing a person's financial obligations to his or her dependents that closely reflects the real costs. UN DSA rates should not be used to replace official statistics.

## V. TEAM COMPOSITION

### A. ICC System

**32.** At the ICC, the core team is assigned to work together throughout the proceedings, except on two instances: (i) prior to the first appearance before the Pre-Trial Chamber and (ii) between the conclusion of the closing statements and the judgment. The core team is made up of:

* 1 Counsel
* 1 Legal Assistant
* 1 Case Manager

**33.** In addition to the core team, one associate counsel is normally assigned from confirmation of charges to closing statements. Under Regulation 83, the Registrar has the discretion to appoint the associate counsel at an earlier stage—from the initial appearance—if justified.

**34.** The usual composition of the core defence team is illustrated below:

| Post / Stage | Start of Proceedings | First Appearance | Confirmation of Charges until End of Evidence | Closing Statements | Judgment | Decision on Appeal |
|---|---|---|---|---|---|---|
| Counsel | X | X | X | X | X | X |
| Legal Assistant | | X | X | | X | X |
| Case Manager | | X | X | | X | X |

| | | | | | | |
|---|---|---|---|---|---|---|
| Associate Counsel | | | X | | | |

**35.** Based on the Court's flexibility principle, counsel may use the resources to structure the team in various ways so long as the monthly budget cap is not surpassed. For example, instead of hiring one legal assistant on full salary, counsel may choose to hire two legal assistants on half salary (this issue is dealt with under Minimum Fee Levels para 157-160 below).

**36.** In addition to the above composition, further resources may be made available if justified under the "additional means" criteria (see paras 94-96).

### B. Comparison

**37.** How does the ICC team composition compare to the other tribunals?

#### *i. ECCC*

**38.** At the ECCC, the core team is assigned when the suspect is formally notified of the investigation until the end of the trial. In other words, the core team is engaged *prior to or immediately after* the initial appearance. The core team remains engaged throughout trial and again in the event of an appeal. The core team is made up of:

* 1 National Co-lawyer (Cambodian lawyer, at 50% of international fee rate)
* 1 International Co-lawyer (10+ years experience)
* 1 International Legal Assistant (5+ years experience)
* 1 Case Manager (Cambodian junior, at 50% of international fee rate)

**39.** The varying levels of work intensity at the different stages of the process are dealt with in two ways: First, by varying the hourly ceiling of the co-lawyers. The legal assistant and case manager remain full time. In practice, the co-

lawyers may claim 110 hours maximum per month between the initial notification of the investigation until the formal charging. Thereafter, the hourly maximum is increased to 150 hours until the end of the case with reductions in times of low intensity (such as waiting for judgment).

**40.** Second, by using the consultancy budget to boost the team. This budget becomes available after formal charging during the investigation, and throughout trial. In practice, the two co-lawyers may build any combination of team up to a budget of US$242,000 per annum (which includes the cost of the core international legal assistant and the case manager).[11]

**41.** This system allows the core team to remain engaged in the case (with at least one international legal assistant and a case manager working full time), whilst reducing the burden on legal aid through lower hourly ceilings for co-lawyers in times of lower intensity.

**42.** It is worth noting that the fees of all national lawyers (e.g. national co-lawyer and case manager) are 50% of the fees for an equivalent international lawyer.

### *ii. STL*

**43.** At the STL, a standard defence team is composed of:

[11] For purposes of illustration, it is possible for the co-lawyers to recruit six support staff as follows:

* 1 International Legal Consultant at Level 4 with a salary of US$6,750 per month or US$81,000 per annum
* 1 International Legal Consultant at Level 2 with a salary of US$4,000 per month or US$48,000 per annum
* 2 International Legal Consultants at Level 1 with a salary of US$2,500 each per month or US$60,000 per annum for both
* 1 Cambodian Case Manager at the rate of US$2,670 per month or US$32,040 per annum
* 1 Cambodian Evidence Analyst at Level 1 with a salary of US$1,250 per month or US$15,000 per annum
* This would entail a total salary commitment of US$236,040 per annum.

* 1 Lead Counsel (P5 salary level)
* 1 Co-counsel (P4 salary level)
* 1 Legal Officer (P3)
* 1 Case Manager (P1 or P2)
* 1 Investigator or Analyst (P3)
* 1 Interpreter or Evidence Assistant Reviewer (P1 or P2)

**44.** This composition commences after the initial appearance or, in the case of absentia trials, when the judge authorises the trial in absentia.[12] From the initial appearance until three months before trial, counsel and co-counsel can claim up to 130 hours per month and are paid on an hourly rate. From three months before trial until closing arguments, counsel and co-counsel are paid a monthly fee equivalent to full time work. From the end of trial until judgement, counsel may claim between them up to 40 hours per month.

**45.** The four junior team members are paid a full time monthly fee from the initial appearance until the end of trial.

**46.** During the sentencing and appeal phases, the core team is maintained with the exception of the investigator.

**47.** On a case-by-case basis and upon the lead counsel's request, this pre-determined team composition may be altered, as long as the allotted funds and resources remain the same. In practice, some legal officers have been given the status of (third) counsel with advocacy rights.

[12] See STL Legal Aid Policy for Defence Section 4.

### *iii. ICTY/MICT*

**48.** The ICTY and MICT apply a lump sum system at the pre-trial and trial stage, which aims to give lead counsel maximum flexibility to decide the composition of his or her team and determine the fee levels. At the appeal stage, lead counsel is granted a maximum number of hours for counsel, co-counsel and support staff (and paid on the basis of actual hours worked).

## C. Consultation

**49.** Defence team members raised two main concerns: First, under the current LAS, the associate counsel is assigned too late in the process. Lawyers accepted that, at the very early stage, one lead counsel was sufficient. However, most were of the view that associate counsel should be assigned after the initial appearance to help prepare for the confirmation hearing. As one experienced counsel put it: "Given that the [confirmation] hearings can lead to non confirmation, and has done so in six cases, it is plainly a false economy not to provide the defence with the means to help make them as effective as possible."

**50.** Second, once assigned, the core team should remain throughout the process, even if on reduced hours. Teams found it disturbing and counter-productive to increase and decrease the core team at different stages, especially when several tasks remain after the closing statements, such as organisation of the case file, witness management, and redactions.

## D. Analysis

**51.** At the ECCC, the core defence team is composed of two counsel and two assistants (one legal consultant, and one case manager). At the STL, in addition to two counsel and two assistants, the core team includes an investigator and an interpreter. At the ICTY/MICT, the lump sum is more than sufficient for a team of four. In all the other tribunals, the core team is engaged at the time (or

just after) the initial appearance until the end of trial. At the appeal stage, all the other tribunals recognise the need for the involvement of two counsel, as well as junior team members.

**52.** At the ICC, the defence team lacks the assistant counsel for much of the process. The resource needs over and above the core team are addressed through applications for additional resources (see paras 94-96). However, this process has proved time-consuming and frustrating for both defence counsel and CSS alike. Where the assignment of additional team members is justified in (almost) all case, it would be more efficient (and no more expensive) to assign them as of right, rather than at the discretion of the CSS. The following analysis reflects this approach:

**53.** ***Initial Appearance to Confirmation:*** At the ICC, it is crucial that defence teams are properly prepared for the confirmation hearing. This is not only important from the perspective of ensuring a fair hearing for the suspect, but also from a broader perspective of efficiency and cost saving. The defence plays a crucial role in identifying weak cases. Six cases have failed to make it through the confirmation stage. This process of 'weeding out' weak cases before they become immersed in a costly trial has significantly reduced the burden on the overall ICC budget.

**54.** Whilst it may not be necessary to engage an associate counsel full time (i.e. 150 hours) before the confirmation hearing, it is reasonable to engage an associate counsel from the point of the initial appearance with a reduced ceiling of billable hours. For example, associate counsel could have a ceiling of 25-40 hours per month, depending on the complexity of the case. This is sufficient to provide senior level support to lead counsel for the confirmation hearing, and enables the associate counsel to get up to speed on the evidence.

**55.** ***After the closing arguments and before judgment*:** A full team cannot be justified at this stage. In fact, there is no justification for any team member to be engaged on a full time basis. However, there is still some work for the defence that requires attention and, therefore, team members should be granted a (significantly) reduced number of hours per month. For example, lead counsel and associate counsel could share between them up to 25 hours, while legal assistant and case manager could share up to 75 hours.

**56.** ***Appeal:*** In the event of an appeal, it is reasonable for an associate counsel to assist counsel, at least on a part-time basis. However, since this Report recommends a lump sum per stage system for the appeal, lead counsel would determine the composition.

**57.** The above additional resources should be added to the core team and assigned as of right. Any needs over and above these resources should be addressed through the discretionary budgets—'additional means' and 'investigation and expert budget'. These additions would not add significantly to the LAS budget and, due to the enhanced capacity to weed out weak cases before confirmation, may in fact lead to overall savings for the overall ICC budget.

### E. Recommendations

- At the time of the initial appearance, in addition to the current core team (lead counsel, legal assistant, case manager), the LAS should permit the assignment of an associate counsel with a reduced ceiling of billable hours (for example, 25-40 hours maximum per month);

- After the closing arguments until judgment, the LAS should permit the team to claim a significantly reduced number of hours to complete necessary tasks. For example, lead counsel and associate counsel could be

allocated up to 25 hours per month between them, whilst the legal assistant and case manager could share up to 75 hours;

- The lump sum allocation for the appeal should take into account the need for an associate counsel, at least on a part time basis;

- Additional resources beyond the above should fall under the discretionary budgets of 'additional means' and 'investigation and expert budget.'

## VI. INVESTIGATION AND EXPERT BUDGET

### A. ICC System

**58.** At the ICC, each defence team is provided with a basic investigation budget of €73,006 for the entirety of the case. This is designed to cover 90 days of investigation.

**59.** The amount of €73,006 is determined as follows:

* 1 Professional Investigator, with a cost of €26,895
* 1 Assistant Investigator / Resource Person, with a cost of €12,141
* €20,970 for the daily subsistence allowance
* €13,000 for travel costs

**60.** The investigation budget aims to enable an effective defence by identifying potential witnesses or acquiring relevant evidence for an average of 30 prosecution witnesses.

**61.** The system allows for the core budget to be increased on the basis of objective criteria. For instance, for each extra witness called by the prosecution, the equivalent to half-days can be added to the investigation. Moreover, travel costs can also be increased based on days of additional investigation.

**62.** At the ICC, the cost of experts is covered by the 'expenses' budget (although there is some flexibility between the two budgets). This budget of €3,000 per month must also cover the personal expenses of the team.

### B. Comparison

**63.** How does the investigation budget compare with other tribunals?

#### *i. ECCC*

**64.** At the ECCC there is no investigation budget for defence teams. This is because it applies a civil law system whereby the investigating judge investigates both for and against the defence. In fact, the defence is not permitted to conduct investigations beyond preliminary inquiries.

#### *ii. ICTY/MICT*

**65.** At the ICTY and MICT, there is no separate investigation budget as the cost of the investigator is part of the lump sum. It is difficult to determine the amount that defence teams dedicate to investigators, given that it varies on a case-by-case basis. Each lead counsel decides how many investigators are hired as well as their fees.

**66.** Under certain circumstances, investigators can receive DSA for investigative travel, provided that the destination for the investigative trip is further than 100 km from where the investigator resides.

**67.** It's worth noting that there is a separate allocation of €1,000 per month for client-counsel translation and an expert budget to cover 150 hours in pre-trial and 300 hours in trial (the fee rate depends on the expert's years of experience).

#### *iii. STL*

**68.** At the STL, the funds allocated towards investigation depend on the phase of the proceeding. Throughout the pre-trial and trial phases, an investigator is

included as part of the defence team. With a monthly fee of around €5,750 per month, this amounts to €69,000 per year. For field investigations, a separate travel budget and DSA is available.

**69.** In addition, there is a specific budget for 'expert consultants' of €75,000 for the entire pre-trial phase and €75,000 *per year* during trial.

**70.** During the sentencing and appeal stages, the investigator is not part of the defence team. Instead, fixed sums of €10,000 and €15,000 are allocated, respectively.

**71.** Therefore, assuming the pre-trial lasts for one year and the trial for three years, this would result in a total investigative *and* expert budget per team of up to €576,000 (€276,000 for investigators fees, plus up to €300,000 for 'expert consultants'). This does not include travel and DSA.

### C. Consultation

**72.** CSS staff and independent counsel agreed that the basic investigation budget of €73,006 for the entire case was an arbitrary figure that was oftentimes inadequate. This meant that CSS staff and counsel had to spend considerable time negotiating what additional resources were necessary and reasonable.

### D. Analysis

#### *i. Consolidating the investigation and expert budgets*

**73.** Under the current LAS, expenses related to the substance of the defence are divided between the 'investigation budget' and the 'expenses budget'. The 'expenses budget' also covers personal expenses of counsel.

**74.** The LAS would benefit from redefining the investigation budget and the expenses budget to create a clean split between:

(i) Expenses related to the substance of the defence (primarily field investigations, experts, translation), and

(ii) Expenses related to the purely personal expenses of defence team members (such as travel and accommodation unrelated to field investigations).

**75.** The current investigation budget should be combined with the budget for experts and translation (currently part of the expenses budget) to create a new 'investigation and expert budget.' The reduced expenses budget should cover the expenses related purely to the personal expenses of defence team members. The savings should be moved over to the new 'investigation and expert budget'. This consolidation should have the following advantages:

**76.** ***Reduced red tape***: If the recommendations concerning the (reduced) expenses budget were adopted (see paras 178-182), the personal expenses would no longer require prior approval or proof. Rather, a certain amount would be distributed automatically, reducing unnecessary administration. Conversely, the expenses under the investigation and expert budget would still require detailed justification.

**77.** ***Flexibility*****:** Defence teams would have a clearer sense of their total (minimum) budget for expenses related to the substance of the defence. This would allow counsel to plan better the use of funds for substantive issues and to create priorities.

**78.** It would remove the unfortunate choice between requesting funds for personal expenses (such as an apartment in The Hague) and substantive defence expenses (such as translation), both of which are currently part of the €3,000 expenses budget.

### *ii. Level of Budget*

**79.** Whilst difficult to compare with the ICTY and ECCC, the current ICC allocation is low compared to the STL (the only easily comparable tribunal). And experience at the ICC so far suggests that the budget is inadequate for cases requiring complex investigations. That being said, the budget might be adequate (or even generous) for smaller cases where investigations are straightforward.

**80.** Unlike the other tribunals, the ICC cases vary enormously in terms of witness location. A witness in Georgia is likely to be easier to locate and interview than a witness in the Democratic Republic of the Congo. It is thus very difficult to give a one-budget-fits-all figure. The more complex cases may require considerably more budget than the amount currently budgeted per case. Simple cases might require less. Therefore, a new basic investigation and expert budget should be set according to the complexity of the investigation and issues requiring experts.[13]

**81.** Furthermore, each team should be allocated a locally hired resource person, with local knowledge and language skills, attached to the team *for the majority of the process*. As a general rule, this local field investigator should be appointed two to three months prior to the confirmation hearing and continue throughout the remaining pre-trial and trial phases, at least on a part time (10 days per month) basis. The minimum fee levels (see para 161) should not apply to resource persons who are hired locally to carry out field investigations (they

[13] *See* Single Policy Document, paras 49-50.

should be paid a 'fair and reasonable' rate according to local standards).[14] The investigation and expert budget should reflect these additional costs.

### E. Recommendations

- The CSS should create a new 'investigation and expert budget' to cover expenses related to the substance of the case—primarily field investigations, experts, and translation;
- Other professional and personal expenses of the legal team (such as travel and accommodation unrelated to field investigations) should remain under a reduced 'expenses budget' (see paras 178-182);
- The savings from the reduced expenses budget should be moved into the investigation and expert budget;
- A new standard investigation and expert budget should be set according to the assessed complexity of the investigation;
- The investigation and expert budget should be increased to cover the cost of a resource person, hired before the confirmation until the end of trial, on a part-time basis (at local fee rates);
- Counsel should be encouraged to plan how best to utilise the investigation and expert budget and should be offered flexibility in terms of priorities and fee levels for field staff;
- The current system for augmenting the investigation budget using objective criteria should be developed further to take into account the

[14] This should align with the UN's payment of locally recruited staff. Under the "Flemming Principle" compensation for locally recruited staff should reflect the best prevailing conditions found locally for similar work.

likely complexities of defence investigations.

## VII. ADDITIONAL MEANS

### A. ICC System

**82.** At the ICC, additional means (resources) over and above the basic team composition may be granted depending on the nature of the case, at any stage in the proceedings.

**83.** In order to recruit additional staff beyond the basic team composition, a point system called Full Time Equivalent ("FTE") is employed, such that:

* For each FTE accumulated, the team is entitled to recruit one additional legal assistant; and for each three FTE, the team is entitled to recruit one additional associate counsel.

Teams accumulate points based on the following criteria:

* For each count submitted by the prosecutor: 0.025 FTE (1 FTE = 40 counts)
* For each person submitting an application for participation in the proceedings: 0.005 FTE (1 FTE = 200 persons)
* For each victim or group of victims whose application for participation in the case is accepted by the Chamber: 0.02 FTE (1 FTE = 50 victims)
* For every 3,000 pages added to the case file by other participants: 0.1 FTE (1 FTE = 30,000 pages)
* For each 3,000 pages submitted by the Prosecutor: 0.1 FTE (1 FTE = 30,000 pages)

**84.** The Registry may set a limit on the amount of additional means allocated, if the amount is considered disproportionate (for example, if 10,000 victims join the case).

### B. Comparison

**85.** How does the ICC system compare to the other tribunals?

#### *i. ECCC*

**86.** At the ECCC, the additional means is dealt with by way of a consultancy budget to boost the core team. It becomes available to each team after the formal charging of the suspect.

**87.** Assuming the core team is composed of two co-lawyers, one international legal consultant (with 5+ years experience) and a case manager, the remaining consultancy budget would be an additional US$128,000 per annum.

**88.** These additional means remain available until the end of trial, and may be renewed at the appeal phase.

#### *ii. ICTY/MICT*

**89.** At the ICTY and MICT, additional means are less likely to be required because the lump sum system takes into account the complexity of the case. However, the Registry may authorise, on a case-by-case basis, the adjustment of allotment of hours or lump sums. Sums may only be adjusted if there is a substantial and unexpected increase in the work necessary during each phase. The request for adjustment needs to detail the reasons for additional work, specific tasks that need to be carried out and the timeframe.

**90.** Where a case is subsequently ranked at a higher complexity level, the Registry shall adjust the lump sum accordingly. In some cases, the lump sum can be adjusted without a change in the level of complexity, based on an unforeseeable increase or decrease in the amount of work performed by the defence team.

### *iii. STL*

**91.** At the STL, additional resources in the form of personnel or means can be awarded based on the complexity of a case. These resources must be requested by counsel.

## C. Consultation

**92.** CSS staff and lawyers alike felt that the FTE system for assessing the need for additional resources was overly complex, time-consuming and difficult to understand. Several lawyers were of the view that the criteria did not properly reflect the realities of criminal work. And that the purely quantitative criteria do not account for the qualitative aspects of a criminal process. For example, one additional prosecution witness may require an hour, a day, or a week of extra work. One cannot assume that each witness and / or each 100 pages of documents carries the same weight.

**93.** The current system is time consuming not only because it demands complex mathematical calculations, but also because it tends to necessitate multiple applications and negotiations between CSS and lawyers as the nature of the evidence develops. As one lawyer put it: "The entire ICC Legal Aid Policy involves far too much Registry discretion. Everything is a negotiation on the basis of unwritten rules. This is unfair and wastes tons of time."

## D. Analysis

**94.** It is important to maintain an objective system to provide additional resources over and above to the core team. However, rather than applying the FTE equation each time the work load changes, the CSS should develop a transparent system to identify the 'complexity' of the case at the start of the proceedings. The complexity assessment should include quantitative and qualitative criteria. Cases should be ranked according to complexity and,

assuming the workload demands it, lead counsel should be provided with a set resource budget to engage staff, over and above the core team, upon justification. The additional resources should be allocated according to the various stages, for example, X per month following the confirmation hearing, Y per month during trial, etc.

**95.** If the nature of the case changes *significantly*, counsel should be able to apply for his or her case to be re-assessed (on an exceptional basis). To help develop the complexity criteria, CSS should work with the ICCBA and be guided by the ICTY experience.

**96.** Note: If the ICC introduces a lump sum system for the appeal and reparations stages (as recommended), the additional resources would be factored into those calculations.

**97.** Replacing the FTE system with a 'case complexity' system would carry significant advantages. It would:

* Reduce the administrative burden on both CSS staff and lawyers;
* Allow qualitative criteria to be factored into the assessment;
* Provide more transparency in the assignment of resources as levels will be set according to complexity, rather than negotiated with every change;
* Enable defence teams to plan their work better as the resource levels per stage will be known well in advance.

### E. Recommendations

- Replace the current FTE system for assessing additional means by one that relies on the overall complexity of the case;

- With the assistance of ICCBA, the CSS should develop transparent criteria

for ranking cases according to complexity;

- The maximum level of additional resources required at each stage, if any, should be pre-determined according to the complexity and provided upon justification;

- Decisions rejecting requests should be properly motivated.

## VIII. REMUNERATION

### A. ICC System

#### *i. Basic Fee Levels*

**98.** At the ICC, the basic (pre-uplift) remuneration system is currently set as follows:

| Category | Net base salary |
|---|---|
| Counsel | €8,221 |
| Associate counsel | €6,956 |
| Legal Assistant | €4,889 |
| Case Manager | €3,974 |

**99.** For duty and *ad hoc* counsel, the fees are broken down to an hourly / daily/ monthly rate as follows:

* Upper limit of €86.53 per hour (applies when working in his/her place of residence)

* Upper limit of €649 per day (applies when working outside his/her place of residence) and

* €8,221 per month

### *ii. Professional Uplift*

**100.** The basic fee is increased by a percentage to cover the cost of professional charges (for example, bar fees, chambers fees / office expenses, pension, health care, income and other taxes, etc.) that are *directly related* to a legal representation before the ICC.

**101.** Counsel may receive an increase up to a maximum of 30% of the base salary. Legal assistants and case managers may receive up to 15%.

**102.** The resulting fees after *maximum* uplifts are as follows:

| Category | Max. Percentage Compensation for Charges | Max. Total Monthly Payments |
|---|---|---|
| Counsel | 30% | €10,687 |
| Associate counsel | 30% | €9,043 |
| Legal Assistant | 15% | €5,622 |
| Case manager | 15% | €4,570 |

**103.** For the Registry to determine who is eligible for compensation, team members must provide supporting evidence to demonstrate the actual payment of

charges. CSS staff must then verify the documentation and make the calculations for each individual team member.

**104.** The compensation package also includes a separate budget to cover personal (case related) expenses, up to a maximum of €3,000 per month per team. Counsel and associate counsel can use this fund to claim costs accommodation. However, this fund must also cover expenses such as experts and translation. For the sake of comparison, it will be assumed that counsel and associate counsel receive an additional €1,000 per month to cover their expenses, during trial. This takes the maximum compensation of counsel and associate counsel for fees and expenses to €11,687 and €10,043, respectively (many will receive less).

### *iii. Multiple Cases*

**105.** A special regime applies when counsel are engaged in more than one ICC case of an indigent defendant. Counsel is limited to no more than *two* simultaneous cases under the LAS. When a counsel is already representing an indigent client and is appointed to a second case, the following fees system applies:

| First Case | Second Case |
|---|---|
| €8,221 per month (paid full) | €4,110.5 per month (paid half) |

### *iv. Reduced Activity*

**106.** Counsel or team members are not remunerated the full lump sum monthly fee during phases of reduced activity.[15] When activity during proceedings is

[15] See, Supplementary report of the Registry on four aspects of the Court's legal aid system, para 40. "Non-exhaustive examples of periods where activities are reduced include the period between closing statements rendered at trial and the decision of the Chamber; stay, suspension or

reduced, lump sum payments cease and remuneration is determined on the number of hours actually worked, with a monthly cap. Each member of the defence team must submit a timesheet detailing the work undertaken. In order to get paid, the CSS must first determine whether the work is justified and reasonable.

### B. Comparison

**107.** How do the ICC fees levels compare to the other tribunals?

#### *i. ECCC*

**108.** For the purposes of comparison, we shall consider only the fees of the foreign lawyers and assistants at the ECCC (national lawyers are aid at 50% the rate).

**109.** At the ECCC there is a basic fee rate for international co-lawyers, which is increased according to (i) the number of years experience and (ii) proven professional costs leading to 10-40% increase.

**110.** In practice, fees have been set at US$97-108 per hour. The resulting range of monthly fees is the following:

* High intensity / full time (150 hours per month) = US$14,550 – US$16,200
* Low intensity / part time (110 hours per month) = US$10,670 - US$11,880

**111.** This is augmented by a standard fixed US$500 per month for expenses throughout the process. This makes the total maximum compensation of foreign counsel US$16,700 per month when working full time.

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other protracted delays in the proceedings; and the waiting period after an appeal against the confirmation of charges by a Pre-Trial Chamber."

**112.** International legal assistants are paid at four fee levels, depending on years of experience, at a rate of US$2,500, US$4,000, US$5,500, and US$6,750 monthly. Those with more than five years experience receive US$6,750.

**113.** The ECCC does not apply a lump sum per stage system. Counsel are paid according to the actual hours worked, with the assumption that, during trial, counsel work full time (150 hours).

### *ii. ICTY*

**114.** The ICTY uses a lump sum system during the pre-trial and trial stages, with a great deal of discretion for lead counsel to determine fees for junior staff. At the trial phase, the monthly fees are set according to the lump sum and then paid for the actual duration. At the appeal stage, the lead counsel is granted a maximum number of hours for counsel, co-counsel and support staff at set hourly rates. All phases take into account the complexity of the case.

**115.** The ICTY applies hourly rates, which are used for the appeal stage and also to calculate the lump sum at other stages. The hourly rates are calculated based on years of professional experience as follows:

* Counsel: paid at 4 fee levels, at a rate of €81.10 (0-9 years), €91.90 (10-14 years), €101.70 (15-19 years), and €111.40 (+20 years).
* Co-counsel: €81.10 (fixed rate)
* Support staff: paid at 3 fee levels, at a rate of €17.30 (0-4 years), €23.80 (5-9 years and €29.20 (+10 years)

**116.** There is no further increase for professional charges.

**117.** The actual amount paid to teams varies depending on the complexity of the case and on the phase of the proceeding: (i) pre-trial, (ii) trial, and (iii) appeal.

The lump sum award is based on the number of counsel (and team) hours that are considered necessary for the particular case, as follows:

| *Complexity of the case* | **Pre-trial (per stage)** | | **Trial (per month)** | | **Appeal (per stage)** | |
|---|---|---|---|---|---|---|
| | Max. number of hours | Cost per defence team | Max. number of hours | Cost per defence team | Max. number of hours | Cost per defence team |
| Difficult | 1,402 | ⁄ 156,178 | 295 | 32,809 | 2,100 | ⁄ 172,290 |
| Very difficult | 2,410 | ⁄ 268,460 | 356 | 39,659 | 2,600 | ⁄ 215,660 |
| Extremley difficult | 3,923 | ⁄ 437,048 | 417 | 46,508 | 3,600 | ⁄ 302,400 |

1/The maximum number of hours and total amount for pre-trial and trial considers the fee level for counsel with maximum level of experience.
2/The maximum number of hours of the appeal stage correspond by 66% to a Counsel with maximum level of experience, and by 33% to support staff with maximum level of experience.

**118.** In addition to the lump sum in the above table, counsel and co-counsel receive DSA of either €275 per day (for first 60 days) or €206 per day (after the first 60 days), on top of fees. Up to twenty-two days can be claimed per month during trial.

**119.** Therefore, if at trial the lead counsel paid himself (the equivalent of) the highest fee rate for 150 hours per month, he or she would receive €16,710 in fees. In addition, assuming he was in The Hague and working full time, he or she would receive DSA at €4,532 per month. Applying these assumptions, the total compensation would be €21,242 per month.

### *iii. MICT*

**120.** The LAS at the MICT is very similar to that at the ICTY. The hourly fee rates are the same, but the allocation of hours (and therefore the lump sum) has been increased for the pre-trial and appeal phases, as follows:

| *Complexity of the case* | **Pre-trial (per stage)** | | **Trial (per month)** | | **Appeal (per stage)** | |
|---|---|---|---|---|---|---|
| | Max. number of hours | Cost per defence team | Max. number of hours | Cost per defence team | Max. number of hours | Cost per defence team |
| Difficult | 1,761 | / 196,131 | N/A | N/A | 2,901 | / 253,406 |
| Very difficult | 3,017 | / 336,127 | N/A | N/A | 3,288 | / 296,564 |
| Extremley difficult | 4,904 | / 546,353 | N/A | N/A | 4,064 | / 382,970 |

1/The maximum number of hours and total amount for pre-trial considers the fee level for counsel with maximum level of experience.
2/The maximum number of hours of the appeal stage correspond by around 75% to a Counsel with maximum level of experience, and by around 25% to support staff with maximum level of experience.
3/Figures converted from $US to Euros (/) using an average exchange rate of 0.901 during August 2016, with information from UN Treasury.

**121.** The main difference is that the appeal stage applies a pure lump sum per stage system, rather than an hourly ceiling and payment according to the actual hours worked. The DSA policy remains the same as the ICTY.

### *iv. STL*

**122.** At the STL, the hourly rates are worked out to correspond to the equivalent UN staff salaries—lead counsel being P5 and co-counsel P4. The legal officers and case managers are generally hired as UN staff—legal officers as P3 and case managers as P1 / P2.

**123.** For counsel and co-counsel the basic fee is then increased to take account of (i) professional uplift of up to 20%, (ii) taxation of up to 40%, and (iii) expenses. In practice, almost all counsel receive 20% professional uplift and between 30-40% tax uplift. On top of this, all counsel and co-counsel receive a monthly €750 for other personal (case-related) expenses.

**124.** From the initial appearance until three months before trial, counsel and co-counsel can claim *up to* 130 hours per month. Starting from three months before trial until the closing arguments, counsel and co-counsel are paid a full

time monthly fee. Meanwhile, from initial appearance onwards, the legal officer and case managers are paid a full time monthly fee.

**125.** Therefore, counsel and co-counsel with the *maximum* uplifts during pre-trial (stage 1) claiming a maximum of 130 hours per month would receive:

* Lead Counsel: hourly €133; monthly €17,290
* Co-counsel: hourly €119; monthly €15,457

**126.** Thereafter, until the end of trial, counsel and co-counsel with *maximum* uplifts for professional charges and tax would receive monthly fees of:

* Lead Counsel: € 17,789[16]
* Co-counsel: € 15,957

**127.** On top of this, counsel and co-counsel receive a standard €2,000 per month for travel if working full time in The Hague (from which they must pay their travel). This takes the monthly total for the highest paid counsel to:

* Lead Counsel: €19,789
* Co-counsel: €17,957

**128.** In addition, counsel and co-counsel receive a lump sum of €5,000 when they move to The Hague.

### C. Consultation

**129.** Senior ICC staff in the CSS and OPCD were of the view that defence counsel remuneration under the current LAS was insufficient.

[16] These figures were obtained from Table 8 of the Legal Aid Policy for the Defence, Special Tribunal for Lebanon, available at <https://www.stl-tsl.org/en/STL-Documents/Library/Internal-Regulatory-Documents/Administration-of-the-Defence/1190-legal-aid-policy-for-defence>.

**130.** In preparation for this Report, 25 or so lawyers were interviewed or responded to the questionnaire. They were in complete agreement that the fees for counsel and assistant counsel were unreasonably low. As one senior lawyer put it: "The reduction of the defense budget and payment to defense teams was unfair, arbitrary, humiliating and demotivating." Another stated: "The Revised Fee Scheme was a scandalous revision of legal aid, done without proper consultation, that cut already modest remuneration for counsel to a level that will significantly effect the ability of the Court to attract counsel of standing."

**131.** Regarding the fees for legal assistants and case managers, most felt that they were fair, but that the systems for expenses and professional uplift should be revised.

**132.** The system for assessing the level of professional uplift came in for particular criticism. CSS staff found it frustrating and time consuming, particularly the requirement that only expenses which "are directly related to a legal representation before the ICC." This has proved difficult to interpret and led to multiple conflicts. Lawyers referred to the system as "unfair and opaque."

## D. Analysis

### *i. The Applicable Principle*

**133.** The basic principle applied to find the right level for lawyers' fees at the UN assisted tribunals is that independent lawyers (and legal assistants) should be paid at a rate that is (to the extent possible*) equivalent to their counterparts in the prosecution*. So a lead counsel fee would match the salary of a P5 prosecutor, an associate / co-counsel would match a P4, a legal assistant with a P3, and a case manager with a P1/2. This is not only 'fair', but also reflects the need to ensure an effective defence by attracting quality lawyers.

**134.** Despite applying the same principle, the fee calculations have varied significantly from court to court. This is partly due to the different 'add-ons' that are applied to augment the basic salary, such as expenses, professional uplift and tax reimbursement. This considerable difference in fees exists despite the fact that (i) the salaries of prosecutors between courts are the same and (ii) the main donors—and therefore the taxpayers footing the bill—are from the same (relatively small number of) states. The charts at paras 22-23 illustrate this variation between courts.

**135.** For example, the highest fee level (with maximum uplifts) for lead counsel at the STL is €133 an hour, which amounts to €19,789 per month when engaged full time at trial, when standard expenses are included. The highest fee level with uplift and expenses for lead counsel at the ICC is around €11,687 per month. This is a difference of around 70%. This begs the question, why are the ICC counsel fee rates so much lower when they are supposedly based on the same principle?

### *ii. The 2012 Calculation*

**136.** Following the *Decision of the Bureau on Legal Aid* in 2012 (ICC-ASP-2012) the salaries for independent counsel were reduced by around 25%. Under the 2012 system, the fees were based on the net salary of a staff member employed by the Court, rather than the gross salary.[17] The 2012 reduction was justified thus:

> The implementation of the Court's legal aid system in practice demonstrated that the reference to gross remuneration was not justified, as payment was duplicated by the granting of compensation for professional charges as described below. The difference between the gross salary and the net salary of a staff member employed by the Court is accounted for by the total deductions applicable to Court officials, which

[17] The net salary is the gross salary minus 'staff assessment' and the staff members pension contribution. Staff assessment is a form of internal income tax.

are irrelevant and duplicate the regime applicable to independent counsel. The amount of tax paid by counsel on their remuneration under the legal aid system has moreover proven to be recoverable through the compensation for professional charges scheme described above. The gross fee basis was hence no longer considered to be a relevant or reasonable criterion and is to be replaced in future situations and cases by a net fee payment scheme according to the conditions set out in the Decision of the Bureau.[18]

**137.** In other words, the 2012 calculation (apparently) considered that the professional uplift awarded to counsel on top of the basic fee was sufficient to compensate for (i) staff entitlements and benefits, (ii) the costs of being self-employed, and (iii) income tax. As shown below, the professional uplift—which is 30% (for counsel) and 15% (for junior team members)—is not a sufficient compensation for all these factors.

### *iii. How to Determine Equivalence?*

**138.** It is impossible to reach an exact level of equivalence between prosecution staff and independent lawyers because, to some extent, we are comparing apples with pears. However, with a closer look at the full salary and entitlements package of ICC staff, it is possible to make a fair approximation.

#### *a. Staff entitlements, benefits, pension*

**139.** Like most civil servants, much of the compensation package for ICC staff comes in the form of entitlements and benefits. These increase significantly the real value of the basic salary and should be factored into any calculation aiming to achieve equivalence. Taking a P5 as an example (and applying approximate figures), these are likely to include:

* Pension: The organization doubles the contribution of the staff member. For a P5, the staff contribution is around €1,000 per month (this is

[18] Single Policy Document, para 84.

deducted to reach the net salary) and the ICC contribution is around €2,000 per month;

* Repatriation grant accrual: This is around €500 per month for a P5 and paid on separation;

* Education grant: This covers 75% of private school fees for dependents under 25 in full time education. For a staff member with two children in private school or university, this is likely worth at least €1,500-2,000 per month;

* Other: Dependency allowance, shipping allowance, home leave, six weeks vacation, and health care subsidy.[19]

**140.** Whilst it is difficult to measure the exact financial value of these benefits, they are likely to add another €4,000-5,000 per month on top of a P5 net (tax-free) salary. In other words, they augment the staff net salary figure of €8,022 by around 50%.

**141.** The ICC's own budget documents confirm this estimation: In the 2017 budget proposal, Annex IV gives the Standard Salary Cost for a P5 as €121,600 (net average salary) with an additional €49,500 for benefits (called 'common staff costs'). Therefore, the budgeted total cost for a P5 is €171,100 per annum or €14,258 per month.

**142.** The value of these staff benefits and entitlements should be factored into the determination of fee level, at least to some extent.

*b. The costs of being self employed counsel, including income tax*

**143.** Most courts have increased the equivalent staff salary to compensate counsel for the cost of being self-employed. At the STL, the maximum is 20% for costs and 40% for tax, totaling up to 60%. At the ECCC, it is a maximum of 40%. At

[19] For the full list, see https://careers.un.org/lbw/home.aspx?viewtype=SAL.

the ICC it is a maximum of 30% (reduced from 40% in 2012). Therefore, the maximum uplift varies from 30-60%.

**144.** As well as the burdens, there are also some financial benefits for independent counsel. A major benefit is the possibility to work on more than one case or project at a time. It is common for counsel at the ICC and other courts to be simultaneously engaged in another case (either a domestic case or international), at least during the preparatory stages. This benefit should be balanced against the burden of being self-employed.

### *iv. Establishing the Right Fee Levels*

**145.** Although it is impossible to determine the precise fee level that achieves equivalence to ICC staff, it is apparent that the current ICC rates are now too low. The ICC's current maximum 30% uplift does not compensate sufficiently for staff entitlements, tax, and the costs of being in independent practice.

| **Illustrative Example:**<br>**Net Income of Lead Counsel vs. P5 Prosecutor** |
|---|
| An ICC lead counsel working full time with maximum uplift will be paid a monthly fee of €10,687, plus 1000 expenses = €11,687. From this he or she must pay professional costs at, say, 20%. He is left with €9,349. From this he or she must pay income tax of, say, 30%, which results in €6,544 per month.<br><br>Meanwhile, for a P5 prosecuting counsel with a starting point of €8,220 per month (net fee) and an increase of around 50% (for benefits and entitlements), the real value of his or her salary package is around €12,330 per month, tax-free. This is almost double the fee (with expenses) of a lead counsel engaged at the ICC, once costs and tax have been deducted. |

**146.** If the ICC seeks to reward defence counsel at an equivalent rate to their counterparts in the prosecution, the defence fees should be recalculated to take proper account of the benefits and costs outlined above.

**147.** There are many possible methods for calculating fee levels to reach equivalence with prosecutors of the same level. All are approximations. One practical method is to use the counsel fee rates established at the other tribunals as a benchmark. These courts have all applied the same principles in establishing the fee levels (equivalence) and have the benefit of 20 years of experience in establishing the correct fee rates. Considering that prosecutors in all the courts are paid according to the same salary scale, there is a strong argument that defence lawyer fees should also be *within the range* of established fees (even if the resultant fees are at the lower end of the range).

**148.** Using the maximum fee levels at the ICTY, ECCC, and STL, the following table shows the average fees when all tribunals are considered (first column), as well as the fees in the least generous legal aid system (second column). The calculation uses the maximum fee levels and professional uplift, but does *not* include expenses or DSA. It assumes the monthly fee at ICTY / MICT represents 150 hours.[20]

| **Position** | **Average (max) Fee Hourly/Monthly** | **Lowest (max) Fee Hourly / Monthly** |
|---|---|---|
| Lead Counsel | €107/€16,115 | €97/€14,596 |
| Co-counsel | €91/€13,686 | €81/€12,165 |
| Legal Assistant | €34/€5,047 | €29/€4,380 |

[20] The average and lowest hourly fees were estimated by dividing the monthly fees (as previously outlined throughout this Section) over 150 hours. Monthly and hourly rates may differ slightly as the hourly rate has been rounded.

| | | |
|---|---|---|
| Case Manager | €25/€3,735 | €24/€3,570 |

**149.** Even using the lowest (maximum) fee rate as a basis, the fee levels of counsel and assistant counsel at the ICC would need to be augmented to fall within the range.

### *v. Professional Uplift—differing or consistent levels?*

**150.** The STL, ECCC, and ICC have required counsel to prove professional costs (and, at the STL, tax liability), which has often led to lawyers receiving different levels of uplift. At the ICTY, the uplift is factored into the hourly fee level—there is no separate calculation—therefore lawyers with the same years of experience receive the same fee rate.

**151.** To assess the level of uplift for each lawyer, the CSS require counsel to submit proof of professional expenses related to their representation. The list of expenses includes barristers' chambers rent, law firm contributions, bar council fees, pensions, tax, etc. The CSS works out the total expenses as a percentage of the monthly basic fee, and then augments the basic fee by that percentage (up to a maximum of 30% for counsel and associate counsel, and 15% for legal assistants an case managers). Lawyers who pay more receive a greater uplift.

**152.** Calculating individual levels of uplift is time-consuming and can lead to an unfair result. A better system is to provide the same uplift to all independent lawyers who are performing the same role (for example, X% of all counsel and Y% for all case managers). Why? Because professional expenses may also derive a benefit to that individual lawyer. For example, contributions to a pension scheme do not disappear, rather, the money is paid back to the lawyer at a later date; the percentage of fee paid by a French or Dutch lawyer into their

law firm, (generally) allows them to share in the end of year profits; the 'rent' paid by barristers to their chambers, allows them to use the office and to be 'clerked', etc. By compensating lawyers for expenses that already derive a benefit is unfair on the lawyers who choose not to make those professional investments.

**153.** In reality, all independent lawyers must manage their practice and make provision to address the financial insecurity of being self-employed. That cost should be compensated (in part) to create equivalence with the prosecution salary package. But it is neither sensible nor fair nor efficient to compensate individual lawyers at different rates according to the actual costs incurred.

**154.** A much more efficient and fairer system is simply to factor-in the uplift into the hourly and monthly fee rates and dispense with a separate calculation for professional uplift. Individual lawyers should be left to manage their own law practice and personal finances as they see fit. This approach would help minimize the burden on the CSS and eradicate the conflicts that have plagued this process.

### *vi. Hourly and Monthly Rates*

**155.** Assuming a new monthly rate is established according to the above analysis, an hourly rate should then be calculated. A practical option is to assume that 'full time' represents 150 hours per month. For example, with a monthly fee of €15,000, the hourly rate would be €100.

**156.** This hourly rate can be used for duty and *ad hoc* counsel as well as in periods when lawyers are paid for actual hours worked. If this Report's recommendations pertaining to the pre-trial phase are adopted, the hourly rate will become essential (see paras 218-228).

### *vii. Minimum Fee Levels*

**157.** The LAS applies its (so-called) 'flexibility principle' which aims to allow lead counsel to "utilize the resources provided to structure the team in a manner that both best serves the interests of the indigent client and is compatible with the judicious financial use of legal aid funds. For instance, the resources made available under the Court's legal aid system for one legal assistant can be used to recruit several team members who are instead remunerated at a lower monthly rate than the system has foreseen, provided the maximum monthly cap is not surpassed."[21]

**158.** Flexibility has its benefits, but should not provide a license to exploit junior team members. Many lawyers (both junior and senior) voiced concern that the system was being abused and that some lead lawyers had chosen to hire several junior lawyers for the price of one, thereby reducing fees to below a livable wage (whilst maintaining their own fees at the highest level). The ICC should not permit public funds to be (mis)used in this way.

**159.** The CSS should introduce minimum fees levels for case managers and legal assistants according to their years of experience. For example, at the ECCC, there are four fee levels—US$2,500, US$4,000, US$5,500, and US$6,750 monthly—corresponding to their years of experience (those with 5+ years receive US$6,750). The ICC should adopt a similar system.

**160.** Lead counsel should have the flexibility to hire team members with less experience—and therefore less cost than the standard rates—so long as they respect the minimum fee levels and remain within the overall budget.

[21] Single Policy Document, para 44.

**161.** Since the fee levels and living costs are radically different in countries where investigations take place, the minimum fee levels should not apply to investigators and resource persons who are hired locally to carry out field investigations. Lead counsel should simply be required to pay a 'fair and reasonable' rate according to local standards.[22]

### *viii. Tax-Free Earnings for Lawyers and Consultants*

**162.** An increase in the fee levels of counsel and assistant counsel would increase the burden on the legal aid budget. Although the increases would not have a major overall effect on the ICC budget (the defence legal aid budget in 2016 was only 3.25% of the total), it is worth exploring ways to minimise the burden on donors.

**163.** One way could be to amend the host state agreement and make the fees of independent counsel (and other defence team members) tax-free. This would have the affect of increasing the value of the counsel fees by around 30%-40% (tax varies in different countries), which can be factored into any re-calculation of fees. Removing the tax burden may reduce—or even eliminate—the need to augment fees levels for counsel and assistant counsel.

**164.** The Expert did not have the capacity to explore this issue thoroughly as it would require detailed consideration by a Dutch and/or international tax lawyer. However, according to *preliminary information* received (not to be relied on), there does seem to be a workable solution, utilising the double tax treaties between states. For example, if the Host State (Netherlands) agreed to exempt independent lawyers and consultants from Dutch national income tax for ICC fees, this exemption would (in most cases) exempt lawyers from paying tax on

[22] This should align with the UN's payment of locally recruited staff. Under the "Flemming Principle" compensation for locally recruited staff should reflect the best prevailing conditions found locally for similar work.

their ICC income in their state of residence. This is because the ICC work is undertaken out of a 'fixed base' and, therefore, provides an exception to the general rule that persons are taxed in their state of residence, on their worldwide income. The ICC Registry should give further consideration to this issue.

## E. Recommendations

### *i. Fee levels*

- The fee levels for defence team members should be recalculated with the aim of achieving a level that is reasonably equivalent to the salary package of their counterparts in the prosecution. Proper account should be taken of staff benefits, professional costs, and income tax;

- The fee levels should be within the range established at the other tribunals;

- The fee levels should be augmented to reflect the results of this calculation (subject to a tax-free agreement being reached).

### *ii. Professional Uplift*

- Defence team members conducting the same role should automatically receive the same uplift for the costs of being a self-employed lawyer. This uplift should be factored into the hourly and monthly fee rates. Since no separate calculation would be required, the CSS would no longer require proof of actual professional expenses.

### *iii. Minimum Fee Levels*

- The CSS should introduce minimum fees levels for case managers and legal assistants according to their years of experience. Lead counsel

should retain the flexibility to hire team members with less experience—and therefore less cost than the 'standard' rate—so long as they respect the minimum fee levels and remain within the overall budget;

- With regard to investigators and resource persons hired locally for field missions, lead counsel should be required to pay a 'fair and reasonable' fee rate that represents the best prevailing conditions found locally.

#### *iv. Taxation Agreement*

- To minimise the burden on donor funds, the ICC Registry should attempt to reach an agreement with the host state to exempt independent lawyers and consultants from paying tax on ICC income. (Such an agreement would minimize, or even eliminate, the need to raise fee levels).

## IX. EXPENSES

### A. ICC System

**165.** At the ICC, the legal aid policy provides a maximum expenses budget of €3,000 monthly. The budget must cover travel (to and from The Hague) and accommodation expenses of counsel and associate counsel. The provision for automatic DSA whilst in The Hague was (rightly) withdrawn in 2012. (Note: Under the investigation budget, team members may receive DSA for field missions.) Miscellaneous expenses such as office supplies, translation costs, and preliminary expert advice are also included in this budget. All expenses must be pre-approved by the Registry and receipts submitted to prove expenditure.

**166.** The monthly allotment is not automatically provided to the defence teams. Rather, it is held by the Registry and provided to teams once the expenses have

been approved and deducted. Unused funds for a given month can be transferred to future months.

**167.** Duty and *ad hoc* counsel are entitled to reimbursement of expenses, such as costs of travel, accommodation, visas and vaccinations, as long as they do not exceed the maximum monthly allotment of €3,000.

### B. Comparison

**168.** How does the ICC system compare to the other tribunals?

#### *i. ECCC*

**169.** At the ECCC, foreign co-counsel receive a standard fixed amount of US$500 per month to cover basic expenses throughout their engagement, whether or not they are physically in Cambodia. There is no separate DSA provision.

**170.** Travel is budgeted separately. All flights by counsel to and from Cambodia are covered by the DSS but must be pre-approved. In practice, the DSS budgets for four round trips per year for foreign counsel.

**171.** Legal assistants and case managers do not receive a separate amount for expenses. However, their flights to and from Cambodia are paid at the start and end of their first and final contract.

#### *ii. ICTY/MICT*

**172.** At the ICTY and MICT, travel and DSA are covered by the Registry and are subject to prior approval. The current DSA rate for The Hague is US$304 (€275).

**173.** Counsel and co-counsel are entitled to DSA provided they are not normally residents in The Hague. Once a member of the defence team has claimed 60 days DSA, his or her DSA rate is reduced by 25%. During pre-trial, counsel are entitled to three days every month, for either lead or co-counsel. During trial,

counsel may claim up to 22 days DSA per month providing they work at least four hours per day.

#### *iii. STL*

**174.** At the STL, the lump sum for travel and DSA is €2,000 per month for counsel (recruited from outside The Hague), and working on a full time basis. Counsel and co-counsel also receive a monthly fixed amount of €750 for other expenses.

**175.** In addition, counsel receives a €5,000 one-off payment when they relocate to the Netherlands for the proceedings.

### C. Consultation

**176.** The CSS staff expressed frustration at the time spent on processing claims for expenses.

**177.** Lawyers felt that the current €3,000 budget was insufficient to cover all the expenses that fall under this category.

### D. Analysis

**178.** The systems provided at the ICTY and STL are much more generous than at the ICC. Whilst the STL system provides reasonable compensation for expenses, the DSA system applied at the ICTY is overly generous (counsel and co-counsel often receive over €4,500 per month in DSA during trials, which can last several years). The ICC should aim to find the right balance, bearing in mind the recommendations *vis-à-vis* the remuneration levels (see paras 157-160).

**179.** The current ICC expenses budget covers an inelegant mix of (i) professional expenses (such office costs / stationary), (ii) expenses related to the substance of the case (such as experts, translation, and (iii) case related personal costs (such as travel and accommodation). This leads to confusion and risks

undermining the quality of defence, as counsel may choose to pay for accommodation rather than an expert or translation. These expenses should be separated as follows:

* Professional expenses—such as 'office costs' / stationary (see para 140 of Single Policy Document)—should not be included in this budget at all. These expenses should already be covered by the uplift for professional charges.

* Expenses related to the substance of the case—such as experts, translation—should fall under a redefined and augmented investigation and expert budget.

* Case related personal costs—such as travel and accommodation—should remain under the expenses budget.

**180.** Since counsel and associate counsel will—almost inevitably—use the entire budget, there is little advantage in pre-approving every expense or requiring proof. (Note: these requirements should be maintained for the investigation and expert budget). Rather, like the STL and ECCC, a monthly amount should automatically be added to the compensation package for counsel and associate counsel, during the period of engagement.

**181.** During the pre-trial and post-trial phases, this amount should be around €750 per month, for each counsel engaged (reduced when the engagement is less than full time). During the trial stage, this should be around €1,500 for each counsel engaged. Any 'savings' should be moved over to the new investigation and expert budget.

**182.** These amendments are likely to have little or no effect on the overall legal aid budget. However, they will reduce the administrative burden on CSS and lawyers. They will also create an appropriate distinction between substantive expenses and personal expenses.

### E. Recommendations

- Redefine the expenses budget so that it covers only case-related personal costs, primarily travel, and accommodation;

- Expenses related to the substance of the case—such as experts and translation—should fall under the investigation and expert budget;

- Counsel and associate counsel should be paid a fixed monthly amount for expenses for the period of their engagement. During the pre-trial and post-trial phases, this amount should be around €750 per month, for each counsel engaged full time. During the trial stage, this should be around €1,500, for each counsel engaged. The provisions requiring counsel to obtain pre-approval and prove expenses should be removed;

- The 'savings' from the expenses budget (€3,000 minus the amount paid) should be moved into the investigation and expert budget.

## X. ADMINISTRATION OF THE LAS: PROCEDURES FOR PAYMENT OF LEGAL FEES

### A. LAS Administration—Overview

#### *i. Consultation*

**183.** Whilst the defence counsel and legal assistants recognised the considerable burden placed on CSS, the vast majority of them were dissatisfied with the administration of the LAS. In response to the Questionnaire: "In general terms, do you feel that the LAS has been administered fairly, efficiently and effectively?" All respondents, without exception, answered in the negative. Lawyers felt deeply frustrated by what they considered to be a fundamental lack of understanding of defence work on the part of CSS management. Almost all stated that they wasted many hours justifying requests for resources that

were obviously necessary, and most felt that the CSS acted arbitrarily, favoured some counsel over others, and lacked transparency.

**184.** For their part, the CSS staff felt over-burdened by tedious, labour intensive tasks and complained about the lack of modern IT system to help administer fees. Some CSS staff recognised that many of the administrative procedures were unnecessary and / or inefficient, but stated that these were imposed on them by other sections, such as Finance / Human Resources. Register staff outside the CSS complained that it was difficult to know "what goes on" within the CSS and how it functions.

**185.** A diplomat interviewed by the Expert felt that the Registry / CSS provided insufficient detail on how the legal aid budget was spent—diplomats only received a global figure. Several interviewees felt that this lack of information had made the legal aid for defence "an easy target" for the budget cuts in 2012.

### *ii. Analysis*

**186.** Whilst CSS has staff who are clearly skilled, dedicated and hard working (including the acting head of the legal aid unit), the section as a whole lacks vision, direction, and strategic management. The LAS procedures are bureaucratic, lacking in transparency, and—at times—irrational. As a result, the section's relationship with counsel and junior team members seems to be strained (at least with those interviewed). The inefficiencies have wasted time—both for CSS staff and lawyers—on administration that adds little or nothing to the financial monitoring and on unnecessary administrative disputes.

**187.** The frustration of CSS is thus understandable. Administering legal aid can be a thankless task, but particularly when the section lacks forward planning, is overburdened, and lacks a modern IT accounting system. Many counsel still

submit handwritten timesheets, which must be assessed and entered manually into the CSS system. It is difficult to know whether and to what extent the CSS is understaffed because the current LAS procedures are overly burdensome. Streamlining these procedures will increase the efficiency, enabling CSS to administer more teams with the same staffing levels. If and when the recommendations have been implemented, it will be easier to determine the resource needs of the CSS.

**188.** The frustration of lawyers is also understandable. Whilst the CSS should not be a 'push-over' when faced with defence team requests for resources, it should at least start by appreciating defence needs. Currently, this is lacking.

**189.** CSS would benefit from ensuring that key staff members have practical experience working on international crimes cases, in order to "ensure that team members are effectively providing professional services [...] before payment is released."[23] Staff lawyers who have undertaken investigations, drafted legal documents, and analysed evidence, would be in a better position to assess properly the resource needs of a legal team, and to develop an efficient and effective LAS over time. A concrete understanding of what resources a defence team requires (and does *not* require), would help ensure that legitimate resource requests are processed speedily and—importantly—that unreasonable requests / claims are rejected swiftly. It would also reduce the number of disputes and thus save time for the lawyers, CSS, and relevant judicial chambers. If the LAS evolves to include assessments of case complexity, this enhanced capacity will become essential.

[23] Single Policy Document, para 124.

**190.** The CSS has previously been involved in training sessions for counsel and assistants on substantive issues. This responsibility should move to the OPCD in conjunction with ICCBA.

#### *iii. Recommendations*

- CSS should re-invent its management style with the aim of being more responsive to Registry requests, and more service-oriented towards lawyers;
- CSS should provide more detail in budgetary documents on how the legal aid is spent to ensure that the ASP, diplomats, judges, and others are better placed to make decisions on the LAS;
- The Registry should provide CSS with a new IT system (with training) to administer the budgets and fee claims;
- The qualification requirements for key staff of CSS involved in assessing resource needs of a legal team should include substantive experience working on international crimes (or other complex criminal) cases;
- The responsibility for training counsel should be passed to the OPCD and ICCBA.

### B. List System

#### *i. ICC System*

**191.** Like the other tribunals, the ICC has a list system whereby counsel and legal assistants who seek to represent defendants through the legal aid system, must first apply and be accepted onto a pre-approved list. The ICC list of counsel

currently has over 600 lawyers. The list is then (in theory) provided to indigent defendants to select their counsel.

### *ii. Consultation*

**192.** The majority of counsel surveyed felt that the *application process* for the list was overly burdensome. Many complained that it could take over one year for their applications to be processed. CSS staff also complained that the applications took too much of their time to process.

**193.** Many lawyers were concerned at the lack of transparency in the process for selecting counsel—whether for suspects or witnesses—including duty and *ad hoc* counsel. Many questioned how counsel were selected and on what criteria. They described the system as "opaque." Both CSS staff and defence teams were of the view that the defendants had not selected their counsel from the full list of lawyers—rather they had selected counsel who had been recommended (for example, by another defendant), or one who had directly contacted the defendant or his family (sometimes before arrest). It was suggested that certain counsel must have received confidential information about upcoming arrests—leaked from the OTP—allowing contact with the suspect before arrest.[24]

### *iii. Analysis*

#### *a. The Application Process*

**194.** The system for administering applications should be streamlined. Taking over six months to process an application is unacceptable and gives a bad 'first impression' of the ICC. Some of the documentation that must be submitted with the application is overlapping or unnecessary. To reduce the burden on lawyers and CSS staff alike, the documentation requirements should be

[24] The Expert is not in a position to confirm this allegation, but the CSS should be alive to this issue and be prepared to investigate.

reduced to what is, in the vast majority of cases, necessary. For example, there will be very few circumstances in which a birth certificate will be required *in addition to* a passport and a certificate of good standing. And professional liability insurance should not be required to be on the list (the requirement should kick-in once selected). If necessary, the CSS can request further documentation on a case-by-case basis.

**195.** The CSS's review panel should be replaced with a more efficient system. For example, one CSS administrative staff conducts a 'first review' of the application (and requests any missing documents from the lawyer) then one CSS professional staff makes a 'second review,' confirming or rejecting the finding of the first reviewer. In the (rare) cases where the first and second reviewers disagree, a final review by the head of CSS may be required.

*b. Assignment of Lawyers*

**196.** According to CSS, defendants claiming indigence are provided with a folder with CVs of all the 600 or so lawyers on the list. After time to review, the defendant notifies CSS of his or her choice of counsel. CSS then contacts the selected lawyer, verifies availability, and assigns him or her to the case. However, in practice, defendants rarely (if ever) select from the list, but rather on the basis of another personal connection or recommendation.

**197.** Providing defendants with the entire list of 600 counsel is counter-productive. Given such an overwhelming choice it is unsurprising that defendants prefer to select a lawyer who has been recommended or who has been in touch with his or her family. A recommendation can be helpful (and free choice of counsel must be respected) but it should not completely replace the list system, as it seems to have done. Instead, CSS should introduce a system whereby defendants are provided with a much-reduced list of lawyers (25 or so) who

meet a set of criteria provided by the defendant. It is essential that the reduced list be compiled in an objective and transparent way, guarding against cronyism. So far as possible (and within the set of criteria provided by the defendant) this list should include lawyers from a range of jurisdictions and respect a gender balance. The CSS should consider excluding lawyers who are currently engaged in an ICC, based on a lack of availability. A fresh 'reduced list' should be compiled for each new defendant. The ICCBA could assist develop this process to ensure that it is fair and transparent.

### *iv. Recommendations*

#### *a. The Application Process*

- The list of documents to be submitted with an application to the list should be revised and reduced;

- The CSS should set an internal deadline of two months for dealing with new applications. Applications that have not been dealt with within this deadline should be considered 'constructively dismissed' and open to an immediate internal appeal;

- The CSS should replace its 'review panel' with a more efficient system.

#### *b. Assignment of Lawyers*

- The CSS should introduce a system whereby indigent defendants are provided with a reduced list of lawyers who meet a set of criteria provided by the defendant. This system should apply to other persons requiring representation through the LAS, such as certain witnesses.

- The system should be fair, transparent and open to monitoring (for example, by the ICCBA).

### C. Legal Services Contract

#### *i. ICC System*

**198.** At the ICC, there is no legal services contract. According to the CSS, the 'contract' is between the client and the lawyer, although this is not in written form.

#### *ii. Comparison*

**199.** At the ECCC and STL, lawyers assigned to represent suspects under legal aid sign a 'legal services contract', which details the terms of the engagement. Other team members (international legal assistants, case managers, consultants) work under UN consultancy contracts (e.g. ECCC, STL) or staff contracts (e.g. STL).

#### *iii. Consultation*

**200.** Lawyers expressed frustration about not having a contract or some form of 'pay slips.' Not only did this leave the terms of employment ill defined, but it also left defence team members struggling to open bank accounts and to rent apartments in The Hague.

#### *iv. Analysis*

**201.** The contract to provide legal services under the LAS should be between the ICC (the Registry) and the individual defence team members (not between counsel and client). The CSS should introduce a written contract with provisions clarifying the roles of responsibilities of both parties. The terms of the contract can, to a large extent, be borrowed from the other tribunals.

#### *v. Recommendations*

- The CSS should introduce a legal services contract to be signed by each lawyer and legal assistant who is assigned to represent defendants under

the LAS;

- The CSS should provide standardised official payment slips to each defence team member detailing the amount paid per month.

### D. Pre Trial Fee Claims

#### *i. ICC System*

**202.** At the ICC, before each phase, or every six months, counsel must submit an action plan for approval detailing all the upcoming activities for the team. At the end of the six-month period, counsel submits an implementation report, stating what actions have been undertaken.[25]

**203.** At the end of each month, counsel and each team member submit a monthly timesheet detailing the work done. Notwithstanding the number of hours itemised in the timesheets, the team members are paid the same 'monthly lump sum' according to a pre-agreed monthly fee. Therefore, team members are not paid according to the actual number of hours worked / claimed.[26]

**204.** There are two exceptions to the monthly lump sum system: First, periods of 'reduced activity.' During these periods, remuneration is determined on the basis of hours actually worked up to a monthly ceiling, based on detailed timesheets. Examples of periods of reduced activities include the period between closing statements and the trial judgement; a stay, suspension or other protracted delays in the proceedings; and the waiting period after an appeal against the confirmation of charges by a Pre-Trial Chamber.

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[25] Single Policy Document, para 22.

[26] If Counsel or a team member is appointed after the first of the month a pro rata calculation of the monthly lump sum is applied to that month.

**205.** Second, when counsel are assigned in two ICC cases, paid under the LAS. In these instances, counsel fees for the second case will be capped at 50% of the full fee.

### *ii. Comparison*

**206.** How does the ICC system compare to those at the other tribunals?

#### *a. ECCC*

**207.** At the ECCC, before the start of each month, co-lawyers submit a monthly action plan with the number of hours predicted to be worked for each category of tasks. This action plan is provided in a standard format with a list of 10 different task categories. The action plan is pre-approved by the DSS before the month starts.

**208.** At the end of the month, co-lawyers must submit hourly timesheets noting the hours worked and on which task. The DSS pays hours *actually worked* that it deems necessary and reasonable within the maximum limit (110 or 150 hours depending on the stage)—it may reduce the hours claimed that are considered unnecessary or unreasonable.

**209.** Other team members (legal assistants, case managers) do not have to complete action plans, but submit daily work reports. At the end of their contracts and before renewal (usually every six months), the co-lawyers must confirm they are satisfied with their performance.

#### *b. ICTY / MICT*

**210.** The ICTY has opted for a lump sum system for the entire phase. A fixed amount is allocated for the first two sub-phases; the amount allocated in the

third sub-phase is dependent on case complexity.[27] The lump sum is divided by the number of months (predicted) and distributed monthly. If the stage extends longer than predicted, the lump sum does not increase.

**211.** For monitoring purposes, lead counsel must submit a 'work plan' at the start of the phase and progress reports every four months thereafter. At the end of the pre-trial phase, an 'end of stage report' must be submitted with timesheets for each team member outlining the tasks undertaken. Although defence team members are not paid on an hourly basis, this helps to ensure that team members who have been paid have, in fact, been working on the case.

**212.** The system is designed to provide lead counsel with maximum flexibility in the use of resources. Counsel is responsible for the efficient management of resources but has all flexibility to request the assignment of members of the defence team in a manner that best suits the needs of the team. The MICT has maintained this system.

*c. STL*

**213.** Counsel must submit a 'General Case Approach' document to cover the entire pre-trial phase. Counsel must then submit an update to this document every three months. The defence office will approve work considered to be necessary.

**214.** During the pre-trial period stage 1 (from assignment until three months before trial), counsel and co-counsel work on an hourly basis and can claim up to 130

[27] The 'complexity' takes into account the following factors:

* The position of the Accused, including within the political/military hierarchy;
* The number and nature of counts in the indictment;
* Whether the case raises any novel issues;
* Whether the case involves multiple municipalities (geographical scope);
* The complexity of legal and factual arguments involved; and
* The number and type of witnesses and documents involved.

hours per month. Unused hours can be carried over to subsequent months (up to 175 hours can be claimed in a given month using carried over hours).

**215.** Counsel must submit an invoice that details the numbers of hours of worked on each task. The defence office pays counsel and co-counsel for hours *actually worked*.

### *iii. Consultation*

**216.** Most CSS staff felt that action plans and timesheets were necessary at the pre-trial stage to monitor properly the legal aid spending.

**217.** Lawyers' had differing opinions. Several preferred an ICTY system of a lump sum for the entire stage with maximum flexibility and minimum administration. Others recognised that action plans and timesheets were "a necessary evil" at the pre-trial stage. One view that remained consistent amongst lawyers was that the LAS involves far too much CSS discretion—"everything is a negotiation on the basis of unwritten rules."

### *i. Analysis*

**218.** The current system of six monthly action plans, monthly timesheets, and an automatic monthly lump sum payment, has several shortcomings.

**219.** The greatest concern is that the system does allow for proper financial accounting. Under the current system, each defence team member completes a monthly timesheet, with minimal detail, showing the number of hours worked and on what tasks. The CSS pays each team member a standard 'monthly lump sum' representing one month's payment. The Single Policy Document provides this justification:

> The rates detailed in the above table are paid monthly as fees to team

> members. With the exception of the professional investigator and the resource person, payment for the other team members is based on the assumption that each team member guarantees a full-time commitment to the case to which he or she has been appointed. This lump-sum payment policy has been set primarily with the interests of suspects, accused persons and victims in mind, and secondly, to reasonably justify a lump-sum payment scheme. (Para 81)

**220.** What is most problematic is that the same monthly lump sum is paid irrespective of the number of hours actually worked or claimed. In other words, if lawyer X submits a timesheet in January showing that he or she worked 150 hours, and a timesheet in February showing that he or she worked 15 hours, the CSS will pay the same monthly lump sum for both January and February. The CSS confirmed that, so long as the team member can show that he or she has worked some hours ('even one hour'), then he or she is paid the entire monthly lump sum. This renders the hourly timesheets pointless and can lead to overpayment.

**221.** Another concern is that the policy is based on the often incorrect "assumption that each team member guarantees a full-time commitment to the case to which he or she has been appointed." There will be occasions during pre-trial when all team members are working full time. But there will be many phases when they are not, particularly lead counsel. In fact, many counsel juggle cases with other international tribunals. And some counsel have second or third cases at the ICC. This is not a problem in itself—experienced counsel can manage effectively several teams when not in trial—but this reality should be factored into the LAS.

**222.** The ICC should introduce a system similar to the STL. Under that system, counsel submit a broad action plan at the start of the pre-trial phase, which is updated every three months. The defence office approves work that is

considered reasonable and necessary. At the end of each month, counsel submit hourly timesheets detailing the work done and the number of hours worked on each task. Lawyers are paid for the work actually done, up to the maximum ceiling, for work that is deemed reasonable and necessary.

**223.** At the later stage of the pre-trial phase (such as at the confirmation of charges or three moths before trial), the system of automatic monthly payments could commence, as outlined below for the trial stage.

**224.** The main advantage of this system is that it provides for greater accountability at the pre-trial stage where work levels can vary considerably. Lawyers are paid for work actually done, rather than an automatic monthly lump sum that (often incorrectly) assumes lawyers are engaged full time. The CSS would need to determine the maximum hourly ceilings according to the stage in the process: at the ECCC, it is 110 hours in the early pre-trial stage and 150 in later pre-trial stage; at the STL, it is 130 in the early stages and full time from three months before trial.

**225.** For counsel engaged on more than one case under the LAS, the automatic (50%) payment for the second case would no longer apply. Instead, the counsel would submit timesheets for each case and be paid according to hours worked, up to a maximum ceiling (combining both cases).

**226.** The main disadvantage of paying for hours actually done is that it increases the administrative burden on both CSS staff and lawyers. However, considering that many other recommendations in this Report reduce the administrative burden (notably the recommendations to remove the requirement for timesheets during trial and appeal), this extra burden would be manageable.

**227.** One way to minimise the administrative burden would be to pay the legal assistants and case managers in full, without the need for timesheets, providing they work at the seat of the Court.

**228.** This system will likely reduce the cost of legal aid. The amount of savings will depend on the maximum ceiling set by CSS.

#### *iv. Recommendations*

- Replace the current 'monthly lump sum system' with an hourly timesheet system modeled on the system applied at the STL during pre-trial stage 1;
- Lawyers should be paid according to the number of hours actually worked (once approved), on each case;
- The CSS should determine monthly maximum hourly ceilings according to the stage of the case;
- Detailed timesheets should not be required for legal assistants and case managers who work at the seat of the court.

### E. Trial Fee Claims

#### *i. ICC system*

**229.** The system of actions plans, implementation plans, monthly timesheets, and monthly lump sum payments described in the pre-trial section is applied throughout trial, except during periods of reduced activity.

#### *ii. Comparison*

**230.** How does the ICC system compare to those at the other tribunals?

*a. ECCC*

**231.** At the ECCC, once trial has started, as a general rule lawyers are no longer required to submit an action plan or a detailed hourly timesheet. Rather, at the end of each month lawyers simply submit a 'fee claim' for 150 hours. Extra hours above 150 are not compensated. This fee is paid until the end of trial.

**232.** As an exception, if there is a break in trial longer than 30 days lawyers have been required to revert back to the action plan and hourly timesheet system and are paid for the actual hours worked.

**233.** Other team members (international legal assistants, case managers, and other consultants) continue with the same system as pre–trial, namely, they are paid a fixed fee.

*b. ICTY / MICT*

**234.** The ICTY applies a lump sum system for the entire phase. The monthly amount is based on the case complexity. A lump sum amount is distributed monthly. If the trial extends longer than predicted, the monthly lump sum is, as a general rule, continued until the end of trial. (As an exception, if the trial is postponed and no work is required, then the lump sum may not be extended for that period).

**235.** There is no requirement for a 'work plan' at the start of the trial phase or for progress reports. However, at the end of the trial, counsel must submit an 'end of stage report' with basic timesheets for each team member outlining the tasks undertaken.

**236.** The MICT has maintained this system.

*c. STL*

**237.** During the trial stage (and stage 2 of the pre-trial phase) all defence team members are paid a monthly fee representing full time work. To receive full payment, counsel must attend the STL for at least 11 days per month (50% of the time), otherwise his or her fees are adjusted accordingly to the days spent at the STL.

**238.** Counsel and co-counsel will be paid at the end of each month upon submission of a monthly invoice. When counsel work at the STL, detailed timesheets are not required. When counsel work away from the STL, they must provide greater detail.

### *iii. Consultation*

**239.** Senior staff in the CSS considered that action plans and timesheets were unnecessary once trial had started. However, they had been required to maintain this system by other sections within the Registry (such as Finance).

**240.** Independent lawyers were largely in agreement that action plans and timesheets took up too much time and, in any event, the CSS were in no position to verify the reasonableness of the work done.

### *iv. Analysis*

**241.** Once trial has started, requiring counsel and legal assistants to provide detailed action plans and to complete detailed hourly timesheets is—as a general rule—an unnecessary administrative burden. These requirements do not help the CSS to manage the LAS. This is because, at the trial stage, the workloads of counsel and legal assistants are evident from the trial process itself—it is a full time job for the entire team.

**242.** In practice, the CSS rarely rejects the actions plans submitted by teams at the trial stage or questions the timesheets. As with the pre-trial stage, the 'lump sum' monthly fee is paid whatever hours are claimed on the timesheet.

**243.** Therefore, as a general rule, action plans and detailed timesheets for all team members can be dispensed with once the trial has started, until the closing arguments. Instead, team members should be required to submit a simple 'monthly fee claim' with a declaration that they have continued to work full time on the case. Each team member should then be paid the agreed monthly fee.

**244.** There may be two exceptions to this general rule: First, during periods of reduced activity, e.g. when trial is postponed for an extended period. If this postponement is greater than two months, the teams should go to a system of hourly timesheets, being paid on the basis of hours actually worked (starting from the third month of postponement). For postponements of less than two months, the CSS should apply a reasonable assumption that the team continues its preparation for the rest of trial on a full time basis.

**245.** Second, when core team members are not present at the ICC for extended periods during trial. The CSS should determine the nature of the 'extended period' (at the STL, it is 50% of the time). During such periods of absence, team members should go to a system of hourly timesheets and be paid for hours actually worked.

**246.** These changes will decrease the administrative burden on both CSS staff and defence teams, without increasing the legal aid budget.

**247.** The CSS should consider introducing this system at the later stages of the pre-trial phase, such as following the confirmation of charges or three months before trial.

### *v. Recommendations*

**248.** Once trial has commenced;

- Remove the requirement for defence team members to submit action plans;
- Remove the requirement for defence team members to submit detailed hourly timesheets, subject to the two exceptions (below). Instead, team members should submit basic invoices;
- Pay team members the monthly fee according to the agreed monthly lump sum rate, representing 150 hours of work;
- If a trial is postponed for more than two months, require the team members to submit hourly timesheets (from month three). Payment should be on the basis of the hours actually worked;
- If core team members are not present at the ICC for extended periods during trial, require the team members to submit hourly timesheets and pay on the basis of actual hours worked
- The CSS should consider introducing this system also at the later stages of the pre-trial phase, such as following the confirmation of charges or three months before trial.

### F. Appeal Stage Fee Claims

#### *i. ICC System*

**249.** The system of actions plans, implementation plans, monthly timesheets, and monthly lump sum payments described in the pre-trial section is applied throughout the appeal phase, except during periods of reduced activity.

#### *Comparison*

##### *a. The ECCC*

**250.** Once the notice of appeal is filed, teams continue on a monthly full—time basis (therefore, the amount of fees will ultimately depend on the duration).

##### *b. The STL*

**251.** The STL has designed a lump system for counsel and co-counsel with three stages. The amount of lump sum awarded to counsel does not depend on the duration, but on whether it is an appeal against sentence or conviction, acquittal, or both. The legal assistant, case manager and interpreter continue to be hired on a full time basis.

##### *c. The ICTY / MICT*

**252.** The ICTY system allocates a maximum number of hours for counsel and the support team for the entire phase, based on the complexity of the case. In other words, it applies a maximum ceiling of available hours. The team is required to submit timesheets and is paid on the basis of actual hours worked, up to the ceiling. In most cases, the teams reach the maximum ceiling.

**253.** Complexity is determined on the basis of the following factors:

* The position of the accused, including within the political or military hierarchy;
* The number and nature of the grounds of appeal;

* Whether the Office of the Prosecutor and/or any co-accused has filed an appeal, to the extent their appeal affects the accused;

* Whether the appeal raises any novel legal issues that have not been addressed by jurisprudence, and the nature of such novel legal issues;

* The complexity of the legal and factual issues involved;

* The length of the trial judgement;

* The number and type of documents, exhibits and witnesses relevant to the Appeal;

* Whether new evidence will be heard or admitted on appeal;

* The sentence imposed by the Trial Chamber; and

* Any other factor lead counsel deems relevant to facilitate the Registry's decision.

**254.** The MICT has adopted a full lump sum per stage system. The teams are paid the lump sum regardless of the actual hours worked. Lead counsel can distribute the lump sum as he or she sees fit. The lump sum is determined on the basis of complexity, using the twenty years experience at the ICTY and ICTR to assess the correct level of resources required.

### *ii. Consultation*

**255.** The CSS staff and lawyers alike were in favour of a total lump sum system for the appeal phase.

### *iii. Analysis*

**256.** Compared to the pre-trial and trial stage, the type and amount of work required for an appeal is *relatively* predictable. This makes it suitable for a lump sum payment for the entire appeal, providing there is the possibility to increase or decrease the lump sum in exceptional circumstances. This is the model adopted at the MICT and STL.

**257.** There are several advantages of a total lump sum system for appeal:

* Reducing the administrative burden on the CSS and lawyers;
* Allowing greater budgetary control and predictability;
* Encouraging defence teams to use their funds carefully and to be more efficient.

**258.** To amount of total lump sum should be determined by the size and complexity of the case. The complexity principles applied at the ICTY / MICT can be adapted and applied at the ICC.

**259.** Since there have been few ICC cases, it is difficult to assess the level of funding required for a given appeal. Accordingly, guidance may be sought from the experience at the ICTY and ICTR and adapted accordingly.

**260.** The total lump sum system should retain some level of flexibility, both to increase and decrease the total fund, as circumstances demand. These would include, for example, an increase if the prosecution seeks to amend the appeal by adding more grounds; or, a decrease if the defence withdraws its appeal.

**261.** A total lump sum need not mean a total lack of accountability. Lawyers and legal assistants alike have expressed concern that providing lead counsel with complete control over funds can lead to exploitation of junior team members. The ICC has a responsibility to ensure that this does not happen. Therefore, once the total lump sum level has been set, lead counsel should be required to submit a 'team composition plan' outlining the team members and their proposed fee levels. This plan should be approved by the CSS before any funds are released. Fee levels of team members should remain with the limit set by CSS for the pre-trial and trial phases (see paras 157-160).

### *iv. Recommendations*

- Introduce a total lump sum system for the appeal stage. The amount should be based on the size and complexity of the case, following the criteria used at the ICTY;

- The total lump sum system should retain some level of flexibility, both to increase and decrease the total fund, in exceptional circumstances;

- The CSS should require counsel to submit a 'team composition plan'—outlining the team members and their proposed fee levels—to be approved by CSS (ensuring minimum fee rates for junior staff).

## G. Reparations Stage Fee Claims

### *i. ICC System*

**262.** The system of actions plans, implementation plans, monthly timesheets, and monthly lump sum payments (described above in the pre-trial section) is applied *mutatis mutandis* throughout the reparations phase, except during periods of reduced activity.

### *ii. Analysis*

**263.** The reparations stage requires significant input from the victims' teams but less work from the defence. Like the appeal phase, the type and amount of work required for reparations is *relatively* predictable, making it suitable for a lump sum payment for the entire phase. Again, there should be some flexibility, with the possibility to increase or decrease the lump sum in exceptional circumstances. And lead counsel should be required to submit a 'team composition plan' for approval, with the team members and their proposed fee levels.

**264.** To amount of total lump sum for this phase should be determined by the complexity of the case, using prior experience at the ICC.

#### *iii. Recommendations*

- Introduce a total lump sum system for the reparations stage. The amount should be based on the likely hours required by the defence team;
- The total lump sum system should retain some level of flexibility, both to increase and decrease the total fund, in exceptional circumstances;
- Require counsel to submit a 'team composition plan'—outlining the team members and their proposed fee levels—to be approved by CSS (ensuring minimum fee rates for junior staff).

### H. Article 70 Cases

**265.** As a general rule, Article 70 cases will require considerably work than cases brought under Article 5. The level of resources should be reduced accordingly, whilst maintaining some flexibility. This should be achieved by:

- Limiting the team composition—in many cases, a counsel and a field investigator should be sufficient during the pre-trial phase, depending on the allotment of hours. At trial, a single counsel should be sufficient.
- Allocating fewer hours for the monthly ceiling during the pre-trial stage;[28]
- Allocating a significantly reduced lump sum for the appeal phase.

[28] Hourly/monthly fee levels should remain the same.

**266.** Since there has been few Article 70 cases to date and they have the potential to vary considerably in terms of size and complexity, the CSS should maintain a flexible approach.

## I. The Role of the OPCD

### *i. ICC System*

**267.** As international criminal tribunals have developed, it has become generally accepted that an internal defence office serving the interests of the defence is a necessary part of the institutional structure. Defence offices have acted as the voice of the defence both internally and externally, commented on rule amendments, provided substantive legal input on issues of general importance, represented suspects prior to the assignment of lawyers, assisted defence teams on substance, and acted as the institutional memory for the defence. Defence offices may thus have an impact on legal aid spending. At the ICC, the OPCD acts as the internal defence office.[29]

### *ii. Consultation*

**268.** Amongst independent counsel interviewed for this Report there was a general consensus that the OPCD had provided valuable assistance to counsel—particularly in the early years of the ICC—and had successfully carved out a reputation for independence. There was also a feeling that 'it could do more' to assist teams, such as collating and summarising relevant decisions more effectively. Independent lawyers were of the view that bolstering the OPCD's resources would not (and could not) have the effect of reducing the legal aid

[29] The question of whether the current mandate of the OPCD should be combined with the administration of the defence LAS is beyond the scope of this Report. Clearly, such a broader mandate is possible, as demonstrated by the STL and ECCC. Whether it is preferable is another, more complex, question.

burden since very few responsibilities could be delegated to non-team members.

**269.** The Bureau,[30] ICC staff, and defence counsel all expressed a desire for greater transparency in the work of the OPCD.

### *iii. Analysis*

**270.** Whilst any substantive defence office necessarily needs to be independent on issues of substance, this does mean that it should be 'unaccountable'. On the contrary, an independent defence office will bolster its standing with stakeholders if it details its services and outlines its ongoing tasks and accomplishments, on a regular basis. This can easily be done without revealing confidential information. Enhanced transparency would also facilitate defence teams' access to OPCD's services and encourage suggestions for improvement.

### *iv. Recommendations*

- The OPCD should aim to be more transparent by providing greater details of its services, on-going tasks, and accomplishments on a regular basis.

[30] *See*, e.g., ICC-ASP/12/29 Report of the Bureau on legal aid.

# PART III: LEGAL AID FOR VICTIMS

## I. INTRODUCTION

### A. LAS for Victims—Overview

**271.** Legal aid for indigent defendants is mandatory (subject to the right to self-representation). However, the provision of legal aid for indigent victims is discretionary—indigent "victims may receive assistance from the Registry, including, as appropriate, financial assistance."[31] The Registrar (in consultation with the Chambers, where appropriate) shall determine the type of assistance.[32]

**272.** In practice, the Pre-Trial and Trial Chambers have applied their discretion to mandate several models for victims' representation. These have included a combination of different team compositions using external counsel and consultants, in conjunction with OPCV staff acting as counsel and assistants. The models included representation for individual victims/groups as well as 'common legal representatives.' In some cases and at certain stages of the proceedings, the lead victims' representative encompassed an external counsel acting with the support of external consultants and OPCV assistants. In other cases, an OPCV lawyer led the team with the support of external consultants and OPCV assistants. In early cases, the representation of victim applicants (usually represented in court by OPCV up to the confirmation of charges) and victim participants (usually represented by external counsel after the confirmation of charges) was more or less distinguished. Until recently, OPCV did not lead the representation of victim participants at trial. In current cases, the OPCV is now mandated to lead the representation of victims throughout

[31] Rules of Procedure and Evidence, Rule 90(5).

[32] Regulations of the Court, Regulation 83(2).

the entire process, including during trial, appeal, and reparations stages.

**273.** It is not necessary to detail all the different models applied at the ICC. Suffice to say that the system is still evolving and there is no set model. There are no sufficiently established principles that would enable one to predict which model will be mandated in a given case. There are two parallel financial systems to support victims at the Court—one managed by the CSS through the LAS for external counsel and contractors, and the other managed through the OPCV's budget. In most cases, teams have drawn from both sources.

**274.** Finding the right system for victims' representation is not an easy task. There are few useful precedents if any. And each case tends to present new challenges. It is not surprising that judges have tested a range of models and that the Registrar's ReVision process has attracted a variety of views.

### B. Part III Limitations

**275.** The Expert's mandate is confined to an assessment of the LAS—its efficiency and effectiveness. It does not include advice to judges on the best model for victims' representation, or advice to the Registrar on the structural issues debated during the ReVision process.

**276.** Furthermore, with so much fluidity and unpredictability, it is not possible to provide specific recommendations on all aspects of the LAS for victims. Rather, the Report will address some of the main challenges that have arisen in cases so far, and provide a set of general recommendations. Many of the recommendations included in Part II of this Report (LAS for defence), may be applied, mutatis mutandis, to the LAS for victims.

**277.** What seems certain is that a more stable and predictable model for victims' representation (whatever that may be) would facilitate greater efficiency for

the LAS. It would help the CSS to develop its own processes and plan its budgets. It would enable victims' teams—whether headed by external counsel or the OPCV—to organise their work more effectively. A predictable model would help alleviate the apparent competition between external counsel and the OPCV; it would promote better-working relationships between all those dealing with victims' issues. Moreover, perhaps most importantly, an established model would allow actors to give victims a clearer sense of what to expect from the ICC proceedings and to manage better their expectations.

## II. CONSULTATION

**278.** Read together, external lawyers, legal assistants, case managers, and ICC staff interviewed for this Report raised four main concerns. Firstly, that there were too many ICC sections working on victim issues and the parameters of their responsibilities were not sufficiently clear.

**279.** Secondly, the evolving and unpredictable nature of victims' representation has led to an unhealthy competition between external counsel and the OPCV, primarily relating to the issue of who should lead the representation and manage the teams. External lawyers thought (rightly or wrongly) that the OPCV had attempted to usurp the role of external counsel by taking unfair advantage of its institutional connections. The head of OPCV was of the view that victims' teams benefit from the inclusion of external lawyers from the situation country, but not necessarily to lead the teams.

**280.** Thirdly, external lawyers expressed that they were not granted sufficient information on the available budget to plan their work and teams accurately. They complained about the lack of transparency in the allocation of resources and clarity on the role of field assistants (i.e. what work they could be paid for).

These lawyers also expressed a lack of clarity on what kinds of field expenses entitled them to receive reimbursements. Accordingly, they had to fight for "every little cost," the reimbursements were sent months after the event, and they did not include any specification as to which costs were being reimbursed.

**281.** Lastly, in general terms, lawyers were concerned that the CSS failed to appreciate fully the role of victims' teams, especially the fieldwork necessary to keep victims properly informed. Consistent with the view of defence lawyers, victims' lawyers found their dealings with the CSS to be frustrating and timewasting.[33]

## III. INDIGENCE DETERMINATION

### A. Discussion

**282.** The process for assessing the indigence (or otherwise) of victims has not been consistent. Different approaches have been applied in various situations. In some early cases, once the victims completed their initial application forms (with VPRS), their representatives were required to go back out into the field to ask the victims (numbering in the hundreds or thousands) to complete complex financial disclosure forms. In later cases, an expedited process was introduced, but it still required Court resources to collect and assess the financial information of victims to determine indigence.

**283.** Those interviewed for this Report agree that the assessment of victims' indigence has been a waste of time and resources. The Expert agrees. In almost

[33] A former case manager stated: "By way of example, as a case manager, I spent between 60 and 80 per cent of my time dealing with legal aid requests, reports, queries and exchanges with CSS. That was not the description of my job, but needed to be done. At certain points in time, the whole team spent more than half of its time dealing with CSS. That was in my view a major waste of resources and a sign of misadministration." One senior lawyer put it: "Dealing with CSS was the most frustrating experience of my professional life".

all cases that come before the ICC, the process of assessing victims' indigence is likely to cost considerably more than could be saved by requiring non-indigent victims to contribute to the cost of representation. Since the primary purpose of assessing indigence is to reduce the financial burden on the LAS, the process amounts to a false economy and an unnecessary drain on donor funds.

**284.** There are several reasons why this process is unlikely to provide any financial benefit in the context of ICC victim participation. Firstly, all (or almost all) victims are likely to be indigent. Secondly, in the rare cases where there are non-indigent victims, their assessed proportion of the legal aid bill is unlikely to be greater than the cost of assessing indigence of all the victims.[34] Thirdly, if victims are assessed to be non-indigent and asked to pay significant amounts towards the groups' legal aid bill—with no promise of getting the money back in reparations—they may well choose to withdraw their application.

**285.** Apart from the resource burden of collating information and assessing indigence, the financial disclosure process may be insulting (or even re-traumatizing) to victims of mass atrocities, the vast majority of whom are desperately poor. Asking destitute refugees in sub-Saharan Africa to reveal the value of their properties and declare the extent of their share ownership is, at best, insensitive, and does not give a good impression of the ICC's contextual understanding.

**286.** For the above reasons, the ICC should apply a presumption of indigence for all

[34] By way of example, if the assessed cost of legal representation was €500,000 for the case and the size of the group was 100 victims, the assessed contribution for each non-indigent victim would be €5000. If the size of the group was 1,000 persons, the assessed contribution for each non indigent victim would be €500. The cost of paying ICC staff or contractors to meet with hundreds or thousands of victims in the field to complete of forms, to assess the data, to make further investigations as necessary, and to make any decisions on indigence (by judges or others), would cost many times more than the contribution gained.

victims of mass atrocity cases and discard the requirement for victims to complete financial disclosure forms. Instead, a simple declaration of indigence should be part of the victims' initial application to participate (obtained by VPRS). In the unlikely event where there is a relatively small group of victims and some or all appear to be non-indigent, the ICC could require financial disclosure and make an assessment on a case-by-case basis. The approach applied at the STL could serve as a model.[35]

### B. Recommendations

- The Registry should apply a presumption of indigence for all victims and dispense with the financial disclosure requirements in favour of a simple declaration as part of the victims' initial application;

- The Registry should retain the possibility to request financial disclosure in exceptional cases where the case involves a relatively small group of victims, and there is a reason to believe that some or all are non-indigent.

## IV. ESTABLISHING AN OVERALL BUDGET

### A. Discussion

#### *i. Rationale*

**287.** Establishing a projected overall budget for victims' representation in a given case is challenging. Not only do the resource needs vary according to the type of evidence, number of victims, and nature of the applicable judicial orders. However, the often hybrid nature of victim teams—utilising both ICC staff and external consultants—adds further difficulty to the calculation.

**288.** The CSS, given the experience of several cases and OPCV's current budget,

[35] See STL's Legal Aid Policy for Victims' Participation.

should be in able to provide a 'normal' projected budget—per case, per stage—for an external common legal representative for victims and his or her team, paid under the LAS. This overall budget should be revisable according to the specificities of each case.

**289.** With this projection, the CSS could provide the external victims' representatives with an overall budget. Counsel could then plan with better accuracy the composition of his or her team (including the workload and fees) as well as the field expenses. It would also lessen the administrative burden on CSS and victims' teams, reduce disputes over resources, and add to the efficiency and effectiveness of the representation.

### *ii. Calculating an Overall Budget*

**290.** The standard victims' team composition outlined in Single Policy Document provides: (i) a single counsel up to confirmation of charges; (ii) a counsel and a case manager from confirmation until the end of trial; and (iii) a counsel, a legal assistant, and a case manager for the reparations stage. In addition, each victims' team receives an investigation budget of €43,752 for the entirety of the case.[36] In practice, the investigation budget has often proved insufficient and (in some cases) the CSS has paid the field assistants from a separate budget. When a common legal representative for all victims is assigned, the Single Policy Document suggests (with specifying) that greater resources may be applied.

**291.** According to the head of OPCV, a 'normal' team composition for an OPCV team consists of the following:

[36] The Single Policy Document also refers to the assignment of a field assistant "paid on an hourly basis up to a maximum of €4,047 per month and deducted from the investigation budget allocated to the team."

* Pre-Trial: 1 Counsel; 1 Legal Assistant; 1 Case Manager; 1 Field Counsel (on a consultancy contract)
* Trial: 1 Counsel; 2 Legal Assistants; 1 Case Manager; 1 Field Counsel
* Appeal: 1 Counsel; 1 Legal Assistant; 1 Case Manager; 1 Field Counsel
* Reparations: 1 Counsel; 2 Legal Assistants; 1 Case Manager; 1 Field Counsel

**292.** Whilst the normal OPCV team is stronger than the team envisaged by the Single Policy Document, the OPCV team covers two live cases (presumably only one that requires full-time presence in court). The head of the OPCV recognised that, in most cases, an additional field assistant or investigator, as well as a psychologist, may be required during the reparations stage. The related expenses for the OPCV team are budgeted each year to reflect the resource projections for casework during the following year. These include consultancy fees for field counsel, travel and DSA, and general operating expenses.

**293.** The OPCV projections can inform the resource needs for cases paid under the LAS. Assuming that the OPCV's normal team composition combined with projected expenses is the appropriate level (for most cases), the CSS could use the latter as a basis for establishing the overall budget for cases where the common legal representative is an external counsel, and the LAS pays the team.[37] To do so, the Registry can estimate the cost, per stage, of the OPCV team composition along with the related projected expenses.[38] The total budget would include the actual costs of ICC staff (this should include salaries plus

[37] This discussion shall assume that all chambers will appoint a common legal representative (with accompanying team), rather than permitting several individual teams.
[38] According to the 2017 Budget proposal Annex IV, the total budget requested for OPCV was €1,836,900. It is not clear from the budget how many cases this covers.

common staff costs[39]), as well as consultancy fees for field counsel, travel and DSA, and general operating expenses (using the OPCV's budget projections from previous cases). The total amount would then be halved to account for the fact that the OPCV team covers two live cases.[40]

**294.** Whilst the above-suggested calculation would not fit perfectly within all the models that have been applied to victims' representation to date (not least because the OPCV and external counsel have, in several cases, been responsible for different stages of the same case), it would at least provide a budgetary starting point from which to work. It is worth noting that establishing an overall budget is not the same as creating a lump sum system.

### *iii. Planning the Expenditure*

**295.** With an overall budget to work from, the lead victims' representative should submit a detailed action plan to the CSS at the start of each stage. The CSS should ensure that the plan establishes the right balance between court work and fieldwork, and includes realistic cost estimates considering the number and distribution of victims.[41] The action plans should include the following categories:

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[39] For example, a P5 ICC staff is budgeted at €14,258 per month. The net salary + common staff costs per grade are the following:

* P-5: 121.6 + 49.5 = €171.1 per annum
* P-4: 102.1 + 41.6 = €143.7 per annum
* P-3: 87.3 + 35.5 = €122.8 per annum
* P-2: 70.9 + 28.8 = €99.7 per annum
* P-1: 70.9 + 28.8 = €99.7 per annum

[40] When external teams utilise OPCV assistants, the overall budget should be reduced accordingly.

[41] This presupposes that the CSS has the substantive knowledge of victims' representation to provide meaningful input. The fourth recommendation under the Part II section "LAS Administration–Overview" would help to ensure that this know-how is in place.

* Team composition of The Hague team
* Team composition of the field team
* Field expenses

**296.** The plans should detail the fee levels and hourly ceilings per month, for each team member. The minimum fee level principles outlined in paragraphs 157-161 (above) should apply. The field expenses should outline all costs associated with the field presence, including the travel of team members, the field office, the expenses paid to victims, and other operating costs. The plans should include a reasonable contingency budget for unforeseen expenses.

**297.** Flexibility is key. In addition to the above 'normal' overall budget, victims' representative should have the possibility to apply for additional means if the workload requires. Equally, if CSS has reason to believe that the case requires less work than a 'normal' case, it should consider reducing the overall budget upon written justification.

### B. Recommendations

- The CSS should calculate a 'normal' overall budget per case, per stage, using as a basis the OPCV's normal team composition and projected expenses;
- The CSS should apply this overall budget to cases where the common legal representative is an external counsel with a team paid under the LAS;
- The lead victims' representative should submit a detailed action plan to the CSS at the start of each stage outlining the projected work and costs for (i) The Hague team, (ii) the field team, and (iii) field expenses;

- The CSS should ensure that the plan establishes the right balance between court work and fieldwork, and includes realistic cost estimates considering the number and distribution of victims.

## V. INVESTIGATIVE BUDGET / FIELD BUDGET

### A. Discussion

#### *i. Redefining the field budget*

**298.** As with the LAS for defence, the LAS for victims would benefit from redefining the current parameters of the 'investigation budget' and the 'expenses budget' to create a clean split between:

(i) Expenses related to the substance of the victims' representation (primarily field work and translation); and

(ii) Expenses related to the purely personal expenses of victims' team members (such as travel to/from and accommodation in The Hague).

**299.** Furthermore, as one counsel pointed out: "The term 'investigative budget' makes no sense. The LRV [legal representative of victims] does not have a mandate to investigate. Investigation is exclusively the province of the OTP."

**300.** The current investigation budget should be combined with the budget for translation (currently part of the expenses budget) and replaced by a new 'field budget' to cover:

* The field team
* Field expenses (including travel of counsel to the field)

**301.** The reduced expenses budget should cover the expenses related purely to the personal expenses of the victims' team in The Hague.

### *ii. Level of budget*

**302.** As mentioned, the Single Policy Document provides for an investigation budget of €43,752 for the entirety of the case. This figure seems to be arbitrary and established at a time when the ICC had far less experience in victims' representation.

**303.** The field budget should be calculated on a case-by-case basis and as part of the overall budget. This budget should take into account a range of factors, including, applicable court orders (particularly those relating to communicating with victims), number and geographical distribution of victims, organization of victim groups, spoken languages, means of transportation, security concerns, whether the team can use the ICC field office, and the costs of office space.

**304.** Each case is likely to require a minimum of one field assistant engaged throughout the proceedings; other cases will require several. At certain stages, teams may need to allocate a high proportion of their budget to the fieldwork. At other times, teams may focus more on the court work. The CSS should collaborate with the victims' team to establish the right balance.

**305.** Since the resource requirements for fieldwork can vary from case to case, the lead victims' representative should have the possibility of applying for additional means.

## B. Recommendations

- The CSS should create a new 'field budget' to cover expenses related to the fieldwork (and translation) of the victims' team;

- Other professional and personal expenses of the victims' team in The Hague (such as travel and accommodation) should remain under a

reduced 'expenses budget';

- The level of field budget should be calculated as part of the overall budget on a case-by-case basis, taking into account the specificities of the representation required. The CSS should work with victims' teams to establish the right balance of resource allocation.

## VI. ADDITIONAL MEANS

### A. Discussion

**306.** Whilst it is important to establish a 'normal' overall budget, the resource needs will vary from case to case. The Single Policy Document states:

> The possibility of providing additional resources for the legal representation team could be considered in the following non-exhaustive cases: for instance, when the number of victims in the group exceeds on average more than 50; when the reparation proceedings involve the need to request protective measures pursuant to Article 93(1) of the Statute; when the Chamber has decided that it will determine the extent of any damage; costs associated with consulting their clients during the trial with a view to keeping them informed and seeking their instructions.

**307.** Relying on experience from previous cases, the CSS should further develop this list with both quantitative and qualitative criteria. The process for addressing requests for additional means should be transparent and decisions rejecting such requests should be properly motivated.

### B. Recommendations

- The CSS should develop a set of principles for assessing requests for additional means applying both quantitative and qualitative criteria;

- Decisions rejecting requests should be properly motivated.

## VII. REMUNERATION AND EXPENSES

### A. Discussion

**308.** The issues pertaining to remuneration and personal expenses discussed under Part II of this Report (LAS for defence) are equally relevant to victims' teams.

### B. Recommendations

- The assessment and recommendations relating to Remuneration and Expenses for counsel, legal assistants, case managers, and locally hired field staff should be applied, mutatis mutandis, to the LAS for victims (the lead victims' representative should be considered equivalent to 'counsel' on a defence team).

## VIII. ADMINISTRATION OF THE LAS

### A. Discussion

**309.** Whilst the LAS for victims must necessarily remain flexible as the system evolves, there is room to provide greater detail and clarity in many respects. The current Single Policy Document is an inelegant mix of legal aid policy for defence and victims. In large part, the provisions for victims are adapted from the LAS for defence; sometimes they appear more as an afterthought than a carefully considered policy.

**310.** Fourteen years after the ICC opened its doors, a legal aid policy dealing exclusively with victims' representation is long overdue. The CSS should draft such a policy, relying on the Court's experience to date, and circulate it for comments. The STL's Legal Aid Policy for Victims' Participation could serve as a good starting point. The new legal aid policy for victims should address the following categories: general principles, indigence, legal aid decisions, entitlement and requirements, and contracts, remuneration, and rates. To the

extent possible, the policy should provide clear guidance on the topics that have caused disputes in cases up to now, including the role and responsibilities of field assistants.[42] It should provide a simple, transparent, and trackable system for the reimbursement of expenses.

### B. Recommendations

- The CSS should draft a Legal Aid Policy for Victims' Participation, relying on the Court's experience to date, and circulate it for comments. The policy should provide clear guidance on controversial issues, including the role of field assistants;

- The assessment and recommendations in Part II relating to the LAS Administration-Overview, List System, and Legal Services Contracts should be applied, mutatis mutandis, to the LAS for victims;[43]

- The assessment and recommendations in Part II relating to Pre-Trial Fee Claims, Trial Fee Claims, Appeal Stage Fee Claims, and Reparations Stage Fee Claims should be applied, mutatis mutandis, to the LAS for victims.

[42] For example, the policy should address:

* Fees levels and hourly ceilings for field staff;
* Job description / permitted tasks for field staff;
* The expected frequency of meetings with victims;
* Transport costs for victims to meet the victims' team;
* Refreshments costs for victims;
* Costs of field office;
* Security issues—who can be covered by ICC security and what other costs are available.

[43] The process for selecting lawyers by or for victims may be very different from the selection of lawyer for a defendant or witness.

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Richard J Rogers
January 2017

# ATTACHMENTS

## I. ATTACHMENT A: EXPERT'S CV

**RICHARD J. ROGERS**
richardrogers@globaldiligence.com

**PROFESSIONAL PROFILE:**

- Qualified lawyer in England and USA (California), with 20 years experience in human rights, international humanitarian law, and rule of law;
- Ten years experience in the UN and OSCE, including senior positions at the UN international criminal tribunals and on UN missions;
- Ten years experience as a private human rights lawyer and consultant acting for multiple clients throughout Africa, Asia, and Europe;
- Provided testimony on human rights issues before US Congress House Committee on Foreign Affairs, European Parliament's Human Rights Sub-Committee, and the Parliament of Bosnia and Herzegovina.

2011-present: **Founding Partner of Global Diligence LLP**

Global Diligence LLP is an international legal advisory firm specialising in human rights, international criminal law, and corporate compliance within conflict-affected and high-risk environments. Global Diligence provides analysis and advice, project management, technical assistance, and training to governments, CSOs, businesses, and individuals throughout Africa, Asia, and Europe.

2010- 2011 **The Senior Legal Officer, Appeals Chamber**
**UN International Criminal Tribunal for former Yugoslavia**

Responsible for overseeing the substantive work of the Appeals Chamber legal officers, including drafting judgments and supervising 20+ lawyers.

2006 – 2010 **Principal Defender / Chief of Defence Support Section**
**UN Extraordinary Chambers in the Courts of Cambodia**

The ECCC is an UN-assisted hybrid tribunal set-up to try former leaders of the Khmer Rouge. Responsible for supervising 30 staff, overseeing substantive legal support to defence teams, representing defence interests, monitoring the legal aid budget, training local lawyers, and managing outreach program.

2005 – 2006 **Lawyer, International Criminal and Transitional Justice**

State Court of Bosnia and Herzegovina (in OKO): Advised local lawyers on *Kravica* with Serbian defendants charged with genocide for the events at Srebrenica. EWMI: Established a criminal trial monitoring program in Cambodia.

2002 – 2005 **Chief of Legal System Monitoring Section (LSMS)**
**OSCE Mission in Kosovo**

The LSMS monitored the UN administered criminal justice system to help ensure fair trial and due process. Responsible for 25 staff, drafting / editing reports, and working with judges to implement positive change.

1998-2002 **ICTY: Legal Officer in Appeals Chamber**
**ICTR: Legal Officer in Trial Chamber**

I worked as a legal officer in the Trial or Appeals Chamber, dealing with cases stemming from the war in Rwanda and Yugoslavia.

1996-1998 **Attorney: Coudert Brothers (Law Firm), San Francisco**

Practiced as an attorney in international law firm doing commercial litigation.

1994-1996 **Barrister: Trafalgar Chambers, Fleet St., London**

Practiced at the London Bar as a criminal defence barrister.

**ASSIGNMENTS / MEMBERSHIPS / TESTIMONY**

Practice Certificates: Licensed to practice law in California, USA; unregistered barrister in England and Wales; admitted to bar in Cambodia (before the ECCC).
Presiding Judge of the Kosovo Media Hearing Board, 2003-2005
Preventing Sexual Violence Initiative: Member of UK's Stabilisation Unit (FCO/DFID/MOD) pool of experts. HMG Security Clearance.

Commented in various media including: *Al Jazeera, BBC, CNN, The Diplomat*, *The Economist, Financial Times, El Pais, Forbes, Le Figaro, Le Monde, Liberation, Phnom Penh Post and Cambodia Daily, RFA, RFI, VOA, Washington Post.*

**EDUCATION and TRAINING**

2013 Hostile Environments Awareness Training
2012 Sexual Violence Investigations (IICI course)
2010 Surviving Hostile Regions, B-Tech Diploma
1997 Admitted to the California Bar
1994 Called to the Bar of England and Wales
1993-94 Inns of Court School of Law, London, UK, (Grade: Very Competent)
1988-91 Sheffield University, UK: Law Degree with Hons

## II. ATTACHMENT B: TRIBUNAL DEFENSE COST COMPARISON

**Name of UN assisted tribunal:**

Currency: USD / Euros

**Defence**

**Relative costs**

1) What is the yearly budget of the tribunal?

2) What is the budget for the prosecutor's office per year?

3) What is the total defence legal aid budget per year? (average over 5 years)

3.b) How many defence teams did this budget cover (average over 5 years)?

**Legal aid in detail**

4) What tribunal staff, if any, provide substantive support to defence teams? Please list the tribunal staff / consultants that provide substantive support to defence teams

| Grade | Number of staff |
|---|---|
| P1 | |
| P2 | |
| P3 | |
| P4 | |
| P5 | |
| D1 | |
| Consultants (not attached to | |

| individual teams) | |
|---|---|

4.b) How many defence teams do these staff support?

5) What is the normal composition of defence teams?

a) Pre-trial

b) Trial

c) Appeal

6) What is the average cost of LA for 1 defence team, for 1 case from engagement of defence lawyers to final appeal judgment? (Average of 5-10 cases)

7) What is the average cost of LA paid to a single defence team, per stage, per month? (Average of 5-10 cases)

1 month of pre-trial: 1 month trial: 1 month of appeal:

8) Do the allotments depend on the level of complexity of the case? If so, how is the complexity estimated. Please explain briefly

**Resources for defence teams**

9) What are the standard fee levels for defence team by members?

| | Amount (pls specify if this is per hour or per month) |
|---|---|
| *Lead counsel* | |
| *Co-counsel* | |
| *Legal assistant / consultant* | |
| *Case manager* | |
| *Investigator* | |

10) How are these levels calculated?

Basic fee level?

Uplift for proven professional costs?

Uplift for payment of income taxes?

11) In general, what other expenses are provided to compensate defence team members for their work?

DSA or Accommodation allowance in the Hague? How much?

DSA for field missions? How much?

Other?

12) What facilities are provided to Defence teams?

Office within the Tribunal?

IT facilities including laptop?

Other?

13) Other budgets

Is there a separate investigation budget? How much and for what period?

Is there a separate travel budget? How much and for what period?

Is there a separate budget for experts? How much and for what period?

**Administration of LAS**

14) How many staff / consultants are assigned directly to administer the LAS for defence (not including staff from HR, Finance, travel sections)?

15) How many defence teams do these staff cover? (Average over 5 years)

## III. ATTACHMENT C: LAS AT ICC-DEFENCE

### LEGAL AID AT THE ICC

### QUESTIONNAIRE

### FOR DEFENCE TEAMS

Please answer all the questions that you consider relevant to your experience and add comments that you think might be useful. Please include examples where appropriate.

Your completed Questionnaire will be treated as confidential and will not be provided to the ICC or its staff. Therefore, please be as frank as possible. Whilst your responses may be used to inform the subsequent LAS Assessment Report (for example, "70% of counsel felt that X" or "one counsel stated that 'Y' ") you will not be identified.

The Questionnaire is in a simple Word document - feel free to use as much (or as little) space as you need.

Thanks in advance for your contribution.

Please return the completed Questionnaire to Richard J Rogers at:
richardrogers@globaldiligence.com or rjrogersbis@gmail.com

### YOUR REPRESENTATION / ROLE

a. Have you worked on a defence team at the ICC?

b. If yes, in what capacity and on how many cases?

c. Did you receive full or partial payment through the ICC's legal aid system ("LAS")? In how many cases?

d. Have you received funding through the legal aid system at any of the following UN assisted courts?

| COURT | NUMBERS OF CASES / CLIENTS |
|---|---|
| ICTR | |
| ICTY | |

| | |
|---|---|
| MICT | |
| SCSL | |
| ECCC | |
| STL | |

## DEFENCE AT THE ICC

### II. Counsel List System:

a) In your view, is the counsel list system managed fairly and efficiently and effectively?

b) What are the issues of concern, if any?

### III. Indigence Determination:

Please refer to paras 23 to 26 of the *Registry's single policy document on the Court's legal aid system ("Registry's Single Policy")* – please find a copy attached for ease of reference.

a. In your view, is the assessment of indigence for defendants managed fairly, efficiently and effectively?
b. What are the issues of concern, if any?

### IV. Team Composition:

Please refer to paras 39 to 45 (composition) and paras 66 to 75 (additional resources) of the *Registry's Single Policy*

(Please note: For the purposes of this question, please assume that 'sufficient' means the minimum level of resources that are reasonably necessary for an effective defence, not the ideal level).

a) In your view, is the current team composition in conjunction with the 'additional means' sufficient to provide an effective defence, at the following stages?

If not, please explain what further resources would be required:

***i.*** Start of proceedings to first appearance?
***ii.*** First appearance to confirmation of charges?
***iii.*** Trial?
***iv.*** Closing statements to Judgment?

***v.*** Appeal process?
***vi.*** Reparations?

b) If you have been paid through the legal aid system of another UN assisted tribunal, how do the resource level compare to the ICC?

**V. Investigation Budget:**

Please refer to paras 46 to 50 of the *Registry's Single Policy*

a) In your view, is the current investigative budget (73,006 euros) sufficient to provide for an effective defence?
b) In your view, is the system for assessing requests for investigative actions managed efficiently?
c) How do you think the system could be improved?

**V.Additional Means:**

Please refer to paras 66 to 76 of the *Registry's Single Policy*

a. In your view, does the system outlined in paras 69-70 enable the CSS to make a fair and objective assessment of the need for 'additional means'?
b. In your view, is the system for assessing requests for 'additional means' administered efficiently?
c. How do you think the system could be improved?

**VI. Remuneration:**

Please refer to paras 81 to 92 (fee scheme) and paras 129-138 (professional uplift) of the *Registry's Single Policy*

(Note: This question relates to the Revised Fee Scheme, not the previous scheme).

a. In your view, are the fees in the Revised Fee Scheme (Table 3 para 85) fair and sufficient?
b. In your view, do the fee levels provide counsel / associate counsel / legal assistants with an equivalent financial compensation (fee plus benefits) to their counterparts in the ICC prosecution?
c. In your view, is the system to calculate 'compensation for professional charges' fair; does it adequately compensate for the costs incurred due to being independent lawyer?
d. In your view, is the system to calculate 'compensation for professional charges' administered efficiently?
e. Would you consider refusing to accept a case paid under the Revised Fee Scheme because the fees are insufficient?
f. How do these fees compare to fees you have received at other UN assisted courts?

**VII. Expenses:**

Please refer to paras 139 to 145 of the *Registry's Single Policy*

a. In your view, does the system used to compensate counsel for expenses result in a fair level of compensation?
b. In your view, is the system administered efficiently?
c. How does this compensation for expenses compare to other UN assisted courts?

## VIII. Procedures for Payment of Legal Fees

For the purposes of these questions, please bear in mind that ICC Registry staff must be in a position to account for the use of public funds paid through the LAS. These staff are required to demonstrate that all the fees and other expenses were 'reasonably necessary' for the effective and efficient representation.

*Management:*

a. In general terms, do you feel that the LAS has been administered fairly, efficiently and effectively?
b. How do you think it could be improved?

*Pre trial:*

a. Do you think the current system of (6-monthly) Action Plans and Monthly Timesheets (for all team members) is necessary, effective and efficient?
b. If not, what system do you think would be more appropriate?

*Trial:*

a. Do you think the current system of (6-monthly) Action Plans and Monthly Timesheets (for all team members) is necessary, effective and efficient?
b. If not, what system do you think would be more appropriate?

*Appeal:*

a. Do you think the current system of (6-monthly) Action Plans and Monthly Timesheets (for all team members) is necessary, effective and efficient?
b. If not, what system do you think would be more appropriate?

## VI. OPCD

**The OPCD has several important roles. One role is "providing general support and assistance to defence counsel." This, in tern, may have an affect on legal aid by reducing the burden on teams.**

a. In what way has the legal assistance provided by OPCD helped to reduce the workload on your team? At what stage and to what extent?
b. In your view, would an increase in the resources of OPCD reduce the burden on the legal aid fund, for example, by reducing or negating the need for 'additional resources'? If so, at what stage and to what extent?
c. How do you think the OPCD could better help to reduce the burden on the LAS by assisting teams?

## VII. Any other comments?

**The ICC's LAS is a complex beast. The above questions may not have covered all the aspects that you consider relevant. Please use this space to add any other issues you think you should considered.**

Thanks for contributing.

Richard J Rogers
rjrogersbis@gmail.com

## IV. ATTACHMENT D: LAS AT ICC-VICTIMS

### LEGAL AID AT THE ICC

### QUESTIONNAIRE

### FOR VICTIMS' TEAMS

Please answer all the questions that you consider relevant to your experience and add comments that you think might be useful. Please include examples where appropriate.

Your completed Questionnaire will be treated as confidential and will not be provided to the ICC or its staff. Therefore, please be as frank as possible. Whilst your responses may be used to inform the subsequent LAS Assessment Report (for example, "70% of counsel felt that X" or "one counsel stated that Y") you will not be identified.

The Questionnaire is in a simple Word document - feel free to use as much (or as little) space as you need.

Thanks in advance for your contribution.

Please return the completed Questionnaire to Richard J Rogers at:
richardrogers@globaldiligence.com or rjrogersbis@gmail.com

### YOUR REPRESENTATION / ROLE

a. Have you worked on a victims' team at the ICC?
b. If yes, in what capacity and on how many cases?
c. Did you receive full or partial payment through the ICC's legal aid system ("LAS")? In how many cases?
d. Have you received funding through the legal aid system at any of the following UN assisted courts?

| COURT | NUMBERS OF CASES / CLIENTS |
|---|---|
| ICTR | |
| ICTY | |
| | |

| | |
|---|---|
| MICT | |
| SCSL | |
| ECCC | |
| STL | |

## VICTIM REPRESENTATION AT THE ICC

**VIII. Counsel List System:**

a) In your view, is the counsel list system managed fairly and efficiently and effectively?
b) What are the issues of concern, if any?

**IX. Indigence Determination:**

Please refer to paras 23 to 26 of the *Registry's single policy document on the Court's legal aid system ("Registry's Single Policy.")* - please find a copy attached for ease of reference.

a) In your view, is the assessment of indigence for victims managed fairly, efficiently and effectively?
b) What are the issues of concern, if any?

**X. Team Composition:**

Please refer to paras 51 to 61 (composition) and para 76 (additional resources) of the *Registry's Single Policy*

(Please note: For the purposes of this question, please assume that 'sufficient' means the minimum level of resources that are reasonably necessary for effective representation, not the ideal level).

a) In your view, is the current team composition in conjunction with the 'additional means' sufficient to provide effective representation, at the following stages?

   If not, please explain what further resources would be required:

***i.*** Start of proceedings to first appearance?
***ii.*** First appearance to confirmation of charges?
***iii.*** Trial?
***iv.*** Closing statements to Judgment?
Appeal process?
***v.*** Reparations?

## XI. Investigation Budget:

Please refer to paras 64 to 65 of the *Registry's Single Policy*

a) In your view, is the current investigative budget (43,752 euros) sufficient to provide for effective representation of victims?
b) In your view, is the system for assessing requests for investigative actions managed efficiently?
c) How do you think the system could be improved?

## IX. Additional Means:

Please refer to para 76 of the *Registry's Single Policy*

a) In your view, does the system outlined in paras 76 enable the CSS to make a fair and objective assessment of the need for 'additional means'?
b) In your view, is the system for assessing requests for 'additional means' administered efficiently?
c) How do you think the system could be improved?

## X.Remuneration:

Please refer to paras 81 to 92 of the *Registry's Single Policy*

(Note: This question relates to the Revised Fee Scheme, not the previous scheme).

a) In your view, are the fees in the Revised Fee Scheme (Table 3 para 85) fair and sufficient?
b) In your view, do the fee levels provide counsel / associate counsel / legal assistants with an equivalent financial compensation (fee plus benefits) to their counterparts in the ICC prosecution?
c) In your view, is the system to calculate 'compensation for professional charges' fair; does it adequately compensate for the costs incurred due to being independent lawyer?
d) In your view, is the system to calculate 'compensation for professional charges' administered efficiently?
e) Would you consider refusing to accept a case paid under the Revised Fee Scheme

because the fees are insufficient?

f) How do these fees compare to fees you have received at other UN assisted courts for equivalent work?

## XI. Procedures for Payment of Legal Fees

For the purposes of these questions, please bear in mind that ICC Registry staff must be in a position to account for the use of public funds paid through the LAS. These staff are required to demonstrate that all the fees and other expenses were 'reasonably necessary' for the effective and efficient representation.

*Management:*

a. In general terms, do you feel that the LAS has been administered fairly, efficiently and effectively?
b. How do you think it could be improved?

*Pre trial:*

c. Do you think the current system of (6-monthly) Action Plans and hourly timesheets (for all team members) is necessary, effective and efficient?
d. If not, what system do you think would be more appropriate?

*Trial:*

c. Do you think the current system of (6-monthly) Action Plans and hourly timesheets (for all team members) is necessary, effective and efficient?
d. If not, what system do you think would be more appropriate?

*Appeal:*

c. Do you think the current system of (6-monthly) Action Plans and hourly timesheets (for all team members) is necessary, effective and efficient?
d. If not, what system do you think would be more appropriate?

## XII. OPCV

**The OPCV has several important roles. One role is "providing support and assistance to the legal representatives of victims..." This, in tern, may have an affect on legal aid by reducing the burden on victims' teams.**

a. In what way has the legal assistance provided by OPCV helped to reduce the workload on your team? At what stage and to what extent?
b. In your view, would an increase in the resources of OPCV reduce the burden on the legal aid fund - for example, by reducing or negating the need for 'additional resources'? If so, at what stage and to what extent?
c. How do you think the OPCV could better help to reduce the burden on the LAS by assisting teams?

## XIII. Any other comments?

**The ICC's LAS is a complex beast. The above questions may not have covered all the aspects that you consider relevant. Please use this space to add any other issues you think you should considered.**

Thanks for contributing.

Richard J Rogers

## V. ATTACHMENT E: REPORT ON THE ASSESSMENT OF THE FUNCTIONING OF THE INTERNATIONAL CRIMINAL COURT'S LEGAL AID SYSTEM

27 October 2015

Registrar Herman von Hebel
The International Criminal Court
Maanweg, 174
2516 AB, The Hague
The Netherlands

Dear Herman,

Pursuant to the mandate of the Assembly of States Parties (ASP) of the International Criminal Court (ICC) and to the agreement of the Registry and International Criminal Justice Consortium (ICJC), please find attached the final *Report on the Assessment of the Functioning of the International Criminal Court's Legal Aid System* by the ICJC's independent legal aid experts. We submit this Report for the Registry's kind consideration.

The Steering Committee of the Consortium believes that the ASP and ICC will find this Report to be a valuable contribution to the ICC's ongoing review of its legal aid system. It is evident after reviewing this document that the legal aid experts put an extensive amount of time, effort, and analysis into the preparation of this Report. We take this opportunity to commend them for their impressive work product.

We look forward to corresponding further with you in regards to this Report, and please feel free to contact us if you would like any additional information.

With best regards,

The Consortium Steering Committee,

Jean-Francois Thony, International Institute of Studies in Criminal Science

Anthony Manwaring, École Nationale de la Magistrature

Michael S. Greco, American Bar Association


# A REPORT ON THE ASSESSMENT OF THE FUNCTIONING OF THE INTERNATIONAL CRIMINAL COURT'S LEGAL AID SYSTEM

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27 October 2015

Content

# A REPORT ON THE ASSESSMENT OF THE FUNCTIONING OF THE INTERNATIONAL CRIMINAL COURT'S LEGAL AID SYSTEM

For its kind consideration, the assessment team of legal aid experts (hereinafter "assessment team" or "team") of the International Criminal Justice Consortium (ICJC) hereby submit to the Assembly of States Parties (ASP or Assembly) of the International Criminal Court (ICC or Court) the following assessment report on the ICC's legal aid system.

## INTRODUCTION

### International Criminal Justice Consortium

1. The ICJC is an independent, nonpartisan alliance of international organisations committed to providing comprehensive practical and expert support to criminal judicial institutions at the national and international levels. The work of the ICJC is *pro bono*, driven by the requests and needs of national and international criminal justice institutions, and provides capacity building assistance through practical legal skills workshops, the sharing of best practices and expertise, and other collaborations.
2. The collective membership of the ICJC[1] draws upon experienced judicial, prosecutorial, legal, and administrative practitioners from varied legal traditions and regions throughout the world. Additionally, the ICJC provides perspectives from diverse professional, judicial, and legal organisations, academic institutions, training academies, and human rights groups.

### Agreement to Conduct Legal Aid Assessment

3. At the 12th session of the Assembly of States Parties, conducted in November 2013, the ASP directed that the ICC engage independent experts to conduct an assessment of the functioning of the Court's legal aid system. (See paragraph 12 below for the text of the ASP's resolution). In Spring 2014, the organs of the ICC and the ICJC engaged in preliminary discussions on

[1] ICJC member organisations are (in alphabetical order): American Bar Association; Association Internationale de Droit Pénal; École Nationale de la Magistrature; Eurjust (pending); The Hague Institute for Global Justice; Inter-American Bar Association; International Association of Prosecutors; International Association of Women Judges; International Commission of Jurists; International Institute of Higher Studies in Criminal Sciences; Japan Federation of Bar Associations; Max Planck Institute for Foreign and International Criminal Law; National Judicial College; Pan- African Lawyers Union; and Planetbood Foundation. More information is available on the ICJC website, *available at* http://www.icj-consortium.org.

capacity building activities. In Fall 2014, the ICC organs jointly expressed their agreement in pursuing avenues of collaboration and synergies between the ICJC and the three ICC organs, individually and collectively.

4. In follow-up to these discussions, the Registry inquired of the ICJC in March 2015 whether there would be interest and capacity to take up the ASP-mandated assessment of the ICC legal aid system on a *pro bono* basis.

5. The ICJC Steering Committee consulted with its membership to determine the ICJC's capacity and interest in undertaking this assessment, particularly its ability to do so under a very tight timetable. The following member organisations stated their interest and capacity (in alphabetical order): American Bar Association, Association Internationale de Droit Penal, The Hague Institute for Global Justice, and the International Institute of Higher Studies in Criminal Sciences. It was communicated thereafter to the Registry that there was preliminary interest and capacity to do the assessment.

6. On 14 April 2015, the Registrar of the ICC, Mr. Herman von Hebel, sent a formal inquiry to Mr. Michael S. Greco, a member of the ICJC's Steering Committee, requesting that the ICJC conduct an independent assessment of the ICC's legal aid system on a *pro bono* basis. The formal inquiry set forth the mandate for the assessment (discussed below) and discussed other related considerations.

7. After careful determination of its capacity and timeline, the ICJC Steering Committee responded to the Registrar's formal inquiry on 11 May 2015 with a proposal for his consideration, including therein the biographies of legal aid experts from varied legal traditions and professional backgrounds.

8. On 19 May 2015, the Registrar sent a reply letter to the Steering Committee accepting the ICJC proposal, commending its selection of experts, and offering to the ICJC and its experts the full support of the Registry.

**Selection of Experts**

9. Through an internal vetting process, the Steering Committee selected the following four experts to conduct the assessment, keeping in mind the need for experienced legal aid experts from varied legal perspectives and professional backgrounds (in alphabetical order): Professor

Lorena Bachmaier Winter (Spain); Mr. James Bethke (United States); Honourable Marcel Lemonde (France); and Mr. Andrew Silverman (United States).[2] Biographies of each of the experts are annexed to this Report.[3]

10. ICJC members, the American Bar Association and The Hague Institute for Global Justice, further offered their institutional capacity to assist with legal research and practical support, among other forms of assistance.

**Mandate**

11. The 12th session of the ASP resulted in the passage of Resolution 8, Annex I, Paragraph 6(c), which stated the following, "[w]ith regard to **Legal Aid**,...*requests* the Court to, in support of the on-going reorganization and streamlining of the Registry, engage independent experts to reassess the functioning of the legal aid system and to report on its findings to the Bureau [of the ASP] within 120 days following the completion of the first full judicial cycles. Such reassessment should pay special regard to the determination of indigence and the resources required for the legal representation of victims, including the ability of counsels to consult with victims".[4] This mandate was reaffirmed by the Assembly during its 13th session.[5] The language of Resolution 8 has guided the assessment performed by the legal aid experts.

12. In consideration of a number of factors – including the 120 day period for completion of an assessment, as well as the on-going reparation proceedings in the ICC's first case[6] – the Registry determined that the assessment team should conduct only an assessment of the ICC's legal aid system and put their findings in a report for submission to the 14th Session of the Assembly. With regard to possible recommendations for change to the legal aid system, the Registry

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[2] It should be noted that the final selection of experts occurred after the ICJC Steering Committee's letter of 11 May 2015. The group of experts was finalised in June 2015. All four experts participated in the fieldwork in The Hague and took part in extensive internal deliberations about the assessment. However, due to a pressing professional obligation, Prof. Lorena Bachmaier Winter was unable to participate in the drafting of this Report.

[3] Annex I.

[4] *Mandates of the Assembly of States Parties for the intersessional period*, 27 November 2013, Resolution ICC-ASP/12/Res.8, annex I.

[5] *Mandates of the Assembly of States Parties for the intersessional period*, 17 December 2014, Resolution ICC-ASP/13/Res.5, annex I., para. 5

[6] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

determined that the assessment team should provide such recommendations at a later date, if requested to do so.[7]

13. While the limited time available for the team to conduct the assessment likely played a significant role in the Registry's decision to ask that the assessment team confine its report to an assessment, and not address recommendations, it may be beneficial that the assessment not include recommendations at this time for the following reasons:

    a. The Assembly and other stakeholders are afforded as much time as possible to consider the team's assessment and provide comment, if so desired. Such comment may serve to inform and enhance a subsequent recommendations report.

    b. The Court may use the assessment team's findings to inform its consideration of the ReVision Project and the recommendations and proposals made therein for reorganisation of the Registry.[8]

**Practical Limitations on the Ability of the Assessment Team to Perform the Assessment**

14. As indicated above and throughout this report, the assessment team takes this opportunity to emphasise that there was an unfortunately limited time available to it in which to conduct an assessment of what is a complicated set of processes that even the most advanced judicial systems find challenging. In terms of actual time allotted, the assessment team was given approximately four months to conduct its work, including travel to The Hague in August 2015, to conduct numerous interviews on late notice to interviewees, and ultimately to produce a report for the Assembly's consideration. The time available for actual work on the assessment, including the scheduling of meetings and interviews, was further limited by the fact that a number of the assessment team members had their own professional obligations, and the reality that many ICC staff, external counsel, and legal representatives were on holiday during the summer months. As a consequence, the assessment team was unable to speak with as many ICC officials, external counsel and their teams, and other stakeholders, as they would

[7] Resolution 8, Annex I, Paragraph 6(c), refers only to a "reassessment" conducted by "independent experts" but does not call for the experts to propose recommendations for change. Resolution 8, Annex I, Paragraph 6(d), requests "the Court to present, as appropriate, a proposal to the Bureau for adjustments of the existing legal aid system within 120 days following the presentation of the report [of the independent experts] on the findings of the reassessment to the Bureau . . . ."

[8] *Draft Registry ReVision Project: Basic Outline of Proposals to Establish Defence and Victims Offices.*

have preferred. The assessment team was also unable to undertake certain other measures that would have contributed to its assessment of the ICC's legal aid system, such as surveys and a greater number of follow-up interviews.

15. In addition, it must be noted that the assessment team made multiple requests to the Registry for detailed information and data related to payments made by the Registry to counsel, staff, investigators, and experts in individual cases, as well as for the opportunity to review time sheets submitted by counsel and staff in support of requested payment. The Registry declined to provide some of the requested information, such as time sheets, due to what it said were privacy concerns. The Registry was unable to provide the balance of the requested material within the time available to the assessment team to conduct its work.[9]

16. Nonetheless, the assessment team did receive a substantial amount of information that helped to provide an extensive understanding of the ICC's legal aid system. Information was received during interviews of a large number of ICC legal aid stakeholders – including ICC staff, external counsel, relevant officials from other international criminal tribunals, civil society representatives, and others – and through the receipt of numerous pertinent documents, in particular a large number of previous internal reviews of the ICC's legal aid system. A list of those interviewed, as well as the documents received, is set forth below.

17. With respect to documents received, the assessment team makes note of the fact that it has reviewed and considered the detailed and comprehensive September 2014 *Audit Report (FINAL) (Audit on Legal Aid)* prepared by the ICC's Office of Internal Audit. For the reasons stated in the *Audit Report*, the assessment team concurs with the findings of the report that the Registry requires additional resources in order to meet its obligations with respect to the legal aid system. (Specific aspects of the *Audit Report* are discussed below).

18. The assessment team also notes that ICC stakeholders, in particular staff and counsel interviewed, exhibited a deep understanding of the Court's legal aid system, including its successes and challenges. While there was a divergence of opinion on particular aspects of the

[9] Given that the Registry is both overburdened with existing obligations and understaffed in meeting those obligations, and further recognizing that the Registry lacks an electronic case management system for its work administering legal aid, it is understandable that much of the information requested by the assessment team could not be provided within the limited time available. This in no way is meant to minimize the importance of the information requested to a full understanding of the legal aid system as well as to the future formulation of proposals for change.

legal aid system, including with regard to extant proposals for change, it was evident to the assessment team that its report will be received by a Court and legal community that has a genuine interest in improvement of the legal aid system.

**Contextual Factors Falling Outside the Scope of the Assessment**

19. Related closely to both its mandate and timetable, the assessment team also takes this opportunity to note contextual factors which it has taken into consideration but which may be viewed as beyond the scope of the assessment. In light of its terms of reference as well as the limited time available to conclude its work, the team focused its review primarily on the operations of the Registry addressed to, *inter alia*, determination of indigence, resourcing of victims and defence teams, and maintenance of a legal aid system with competent counsel.
20. There are, however, a number of related issues that, while noted here and where relevant in the assessment report, will not be discussed in great detail. The assessment team addresses these issues because they affect the ICC's legal aid system. While important, and in some cases controversial, the assessment team believes that these issues deserve more in depth consideration and analysis than the assessment team has been able to devote to them in the limited time available to it.
21. More specifically, the assessment team's experts recognise the existence of the following factors, which impact the legal aid system and are therefore mentioned at the outset of this report:
    a. Prosecutions
        i. The prosecutorial strategy utilised by the ICC Office of the Prosecutor (OTP) has a direct effect on legal aid. The scope of charges, case selection, initiation of preliminary examinations and investigations, and number of cases in total are just a few prosecutorial activities that can affect the legal aid system. As such, with more time and resources, a comprehensive review of the Prosecutor's past and present prosecutorial decisions as they relate to legal aid would provide valuable insight.
    b. Judicial Orders
        i. Similarly, orders issued by ICC Judges have a direct effect on legal aid, including the ability of judges to order the expenditure of additional resources

if defence or victims counsel demonstrate there is a need. In addition, stay of proceedings, scheduling of court events, number of witnesses approved, and judicial requests for expert witnesses are just a few ways that judicial decisions can affect legal aid. Accordingly, a thorough review of ICC judicial decisions on legal aid, past and present, would also provide helpful information.

c. Procedures

   i. The ICC processes and procedures, most notably unique characteristics such as victims participation at all stages of a case, including admissibility, confirmation of charges, and reparations hearings, have a direct effect on legal aid. With additional time and resources, a review of ICC procedures would provide another important perspective. In addition, consideration might be given to the appropriateness of the overall procedural system utilised at the ICC.

d. ReVision Project

   i. The proposals set forth in the ReVision Project will, if adopted, affect the way legal aid is administered to defendants and victims. While the assessment team has discussed some aspects of the ReVision Project in this report as they relate to issues that exist in the current legal aid system, because of the lack of time available the team has deliberately refrained from undertaking an extensive examination of the ReVision Project's proposals. At least with regard to the Office of Public Counsel for the Defence (OPCD), the assessment team has identified and set forth an option not discussed in the ReVision project (i.e., possible creation of a defence services office as a fifth independent organ of the Court), in the belief that the ASP may nonetheless wish to consider such action. The assessment team has not, however, made any recommendation as to whether this option, or the various ReVision proposals, ought to be adopted.

e. Lessons Learned from the Experience of Other Tribunals

   i. Other tribunals, most notably the *ad hoc* and hybrid international criminal tribunals, have legal aid schemes and practices that have evolved over time. While the assessment team consulted with legal aid officials from other international tribunals, additional time and resources to complete a more

comprehensive review of the evolution of those tribunals' legal aid schemes and current practices would provide interesting comparative information.

f. Definition of Legal Aid

i. In addition to providing resources for legal assistance in the case of indigence, the concept of "legal aid" includes a broad range of issues, such as quality of aid provided, training, access to information and services, and disciplinary matters. With more time and resources, it would be helpful to analyse these and related issues within the greater context of "legal aid".

**Process – Interviews Conducted and Documents and Information Received and Reviewed**

22. The assessment team gathered information primarily through interviews and the review of relevant documents and other written material. The team received and reviewed numerous documents from the ICC and other stakeholders. In some instances, review resulted in requests for additional documentation. As for interviews, in-person interviews were conducted in The Hague from 5-12 August 2015 and additional persons were interviewed telephonically or electronically.

23. The following subsections set out a list of those persons with whom the assessment team spoke, and the documents and information received and reviewed by the team:

a. Persons with Whom the Assessment Team Spoke (in alphabetical order)

i. Dr. Mbaye Abdoul, Legal Officer, Jurisdiction, Complementarity, and Cooperation Division, ICC Office of the Prosecutor & formerly in Counsel Support Section, ICC Registry

ii. Ms. Juliet Adyel, Counsel Support Section, ICC Registry

iii. Mr. Emmanuel Altit, External ICC Defence Counsel

iv. Ms. Karine Bonneau, Head of the International Justice Desk, Fédération internationale des droits de l'Homme (FIDH)

v. Mr. Jens Dieckemann, External ICC Defence and Victims Counsel

vi. Ms. Marie-Edith Douzima, External ICC Victims Counsel

vii. Mr. Marc Dubuisson, Director, Division of Judicial Services, ICC Registry

viii. President Judge Silvia Fernández de Gurmendi, President, ICC Presidency

ix. Mr. Tomas Henquet, Chief, Registry Legal Advisory Services Section, ICC Registry

x. Mr. Xavier-Jean Keita, Principle Counsel, Office of Public Counsel for Defence, ICC Registry

xi. Ms. Barbara Le Guennec, Assistant to Mr. Emmanuel Altit

xii. Dr. Esteban Peralta Losilla, Chief, Counsel Support Section, ICC Registry

xiii. Ms. Catherine Mabille, External ICC Defence Counsel

xiv. Ms. Paolina Massidda, Principal Counsel, Office of Public Counsel for Victims

xv. Ms. Fiona McKay, Chief, Victims Participation and Reparations Section, ICC Registry

xvi. Mr. Fidel Nsita, External ICC Victims Counsel

xvii. Ms. Marie O'Leary, Legal Advisor/Counsel, Office of Public Counsel for the Defence

xviii. Mr. Alex Paredes-Penades, Associate Legal Officer, Office of Public Counsel for the Defence

xix. Ms. Mariana Pena, Legal Officer, Open Society Justice Initiative

xx. Mr. Martin Petrov, Project Director – ReVision Project, ICC Registry

xxi. Ms. Fiana Reinhardt, Head of Office, Legal Aid, International Criminal Tribunal for the former Yugoslavia

xxii. Mr. Francois Roux, Head of Defence Office, Special Tribunal for Lebanon

xxiii. Mr. Sam Shoamanesh, Senior Special Assistant to the Prosecutor, Immediate Office of the Prosecutor, ICC Office of the Prosecutor & formerly in Counsel Support Section, ICC Registry

xxiv. Ms. Melinda Taylor, External Defence Counsel

xxv. Mr. Greg Townsend, Chief, Court Support Services Section, International Criminal Tribunal for the former Yugoslavia

xxvi. Mr. Laurent Wastelain, Special Tribunal for Lebanon (STL)

b. Documents and Information Received and Reviewed

i. *Staff Rules of the International Criminal Court*, 27 July 2015 (as amended, entered into force).

ii. *Office of the Prosecutor Strategic Plan, 2016-2018*, 6 July 2015.

iii. Coalition for the ICC, *Comments and Recommendations on the 'Proposal of the Registrar on the Principles Guiding the Establishment of a Victims Office and a Defence Office'*, 3 July 2015.

iv. REDRESS, *Representing Victims before the ICC: Recommendations on the Legal Representation System*, April 2015.

v. *Report on the Expert Conference on the Proposed Victims and Defence Offices*, 23-24 March 2015.

vi. *Approved Program Budget for 2015 of the International Criminal Court*, 24 March 2015.

vii. Office of Public Counsel for the Defence, *Rapport d'activités du Bureau du Conseil Public pour la Défense, Janvier 2014-Décembre 2014*, 19 February 2015.

viii. REDRESS, *Comments to the Registrar in Relation to the ReVision Project as it Relates to Victims' Rights Before the ICC*, February 2015.

ix. FIDH, *Five Myths About Victim Participation in ICC Proceedings*, December 2014.

x. Bureau of the Assembly of States Parties, *Report of the Bureau on Legal Aid*, 28 November 2014 (EN and FR).

xi. Registry, *Registry Report on Ways to Improve the Legal Aid Procedures*, 22 May 2014.

xii. ICC Office of Internal Audit, *Audit Report on Legal Aid*, May 2014.

xiii. Bureau of the Assembly of States Parties, *Report of the Bureau on Legal Aid*, 15 October 2013 (EN and FR).

xiv. *Office of the Prosecutor Strategic Plan, June 2012-2015*, 11 October 2013.

xv. *Code of Conduct for the Office of the Prosecutor*, 5 September 2013 (date of entry into force).

xvi. Registry, *Registry's Single Policy Document on the Court's Legal Aid System*, 4 June 2013.

xvii. Registry, *Report of the Registry on the Comprehensive Review of the Legal Aid System of the Court*, 4 June 2013.

xviii. *Independent Panel of Experts Report on Victim Participation at the International Criminal Court*, July 2013.

xix. REDRESS, *The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future*, October 2012.

xx. REDRESS, *Comments and Proposals on the Legal Aid Consultation June 2012*.

xxi. *The Registrar v. Mr Hervé Diakiese*, Decision of the Disciplinary Board, DO-01-2010 (9 July 2010).

xxii. *Code of Professional Conduct for Counsel*, 1 January 2006 (date of entry into force).

xxiii. *Staff Regulations*, 12 September 2003 (date of entry into force).

xxiv. *Report of the Court on the Basic Size of the Office of the Prosecutor*.

xxv. Counsel Support Services, *Defence and Victim Overview* (list of counsel who have appeared in ICC cases).

xxvi. Office of Public Counsel for the Defence, *Fact Sheet*.

## The Assessment of the ICC's Legal Aid System

In the course of the meetings conducted by the assessment team at the ICC with Court officials, internal and external counsel, and other interested stakeholders, a number of issues were raised regarding the Legal Aid system. The focus of the assessment team was directed to two principal areas. First, special attention was given to issues arising from the participation of victims. Second, a variety of issues related to the defence function were discussed, including measures to ensure quality control, the process for selection of counsel, the desirability of performance standards for counsel, the adequacy of funds for investigation and expert assistance, the use of duty counsel, the need for guidelines regarding what expenses will be reimbursed, the use of status hearings to promote increased efficiency, and the appropriate scope of legal aid for Article 70 proceedings. The issues of greatest significance concerned the participation of victims in proceedings, remuneration of defence counsel and team members, appointment of counsel and administration of counsel services, indigence assessment, and the respective responsibilities of the Office of Public Counsel for Victims (OPCV), the Victims Participation and Reparations Section (VPRS), and the OPCD.

## Issues Concerning Participation of Victims

***Issue: Is the exercise of victims' rights too restricted to ensure meaningful participation in international criminal proceedings?***

*Background*

24. The intervention of victims in ICC proceedings is one of the essential features of the Court. Yet, neither the Rome Statute (RS) nor the Rules of Procedure and Evidence (RPE) govern the modes of victims' participation.[10] They simply provide for their participation as a core principle, leaving to judges the discretion to define the manner of such participation. As a result, the approach to participation is determined by each Chamber and thus varies from case to case.

*Observations*

25. A "legal representative," who must have at least 10 years experience in criminal trials whether as a lawyer, judge, or prosecutor, usually ensures the participation of victims. In principle, victims are free to choose their legal representative. In practise, however, exercising this choice is a practical impossibility due to the number of victims concerned in an ICC case (often numbering in the thousands). In fact, the few cases where legal counsel was actually selected by the victims occurred only in the pre-trial phase of proceedings. To ensure procedural effectiveness in cases where there are numerous victims, the judges may ask them to come together to form a group that will be represented by a common legal representative. If, for one reason or another, the victims are not able to organise such a group and choose a joint legal representative, judges may request that the Registrar intervene. If the victims are not satisfied with the Registrar's decision,[11] they can petition the judges to review it. They can also petition judges to respect their preference not to be grouped with certain other victims, because they believe that separate legal representation is required to avoid a conflict of interest.

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[10] Cf. articles 68 and 75 of RS and Rules 89 to 93 of RPE (in particular Rule 89-1).

[11] It was mentioned during the interviews conducted by the assessment team that, despite the importance of ensuring that the Registry consults victims before appointing their legal representative, in some cases this may have not been done.

Assessment

26. Generally, the persons interviewed by the assessment team were reasonably satisfied with the current functioning of the system. Some, however, viewed it as problematic to have the Legal Aid system for victims utilise the same model of team composition as that of the defence.[12] They pointed out that the respective needs of the accused and of the victim(s) are different, and argued that this would justify two separate Legal Aid regimes. (Some went so far as to propose that the term "Legal Aid" not be used with regard to the representation of victims). For example, the composition of the team of the victims' legal representative requires a much more substantial presence of the team on the ground where the victims are located.

27. In this respect, it is worth mentioning that the issues regarding the participation of victims before the ICC also arose before the Extraordinary Chambers in the Courts of Cambodia (ECCC), otherwise known as the Khmer Rouge Tribunal, and it is useful to compare the solutions of these two courts. At the ECCC, there is no real legal aid scheme for victims. And yet, they participate in the proceedings as "civil parties," which gives them important legal rights that require legal representation (e.g., rights of access to the entire case file, to request investigations, to appeal decisions of judges). At the ICC, participation is more limited in principle and, in practice, is determined by each Chamber of judges on a case-by-case basis. Before the ECCC, at the trial stage a lawyer must assist the victims and victims are members of a consolidated group, in which two lead co-lawyers appointed and financed by the Tribunal represent them. Supported by the necessary staff, these lawyers represent the collective interests of the group and have ultimate responsibility for the advocacy strategy. The civil parties only have an opportunity to participate individually at the preparatory stage and normally their potential personal lawyer intervenes *pro bono*. Thus, the system is completely separate from legal aid and yet the situation in the end is not that different from the ICC. Some observers conclude that, "the exercise of victims' rights is extremely restricted in both courts to the point that, today, there is no effective and useful victim participation in international criminal

[12] The Registry's Single Policy Document sets out the composition of the core defence team. The composition of the team is somewhat different at each stage of the proceedings, but is largest during trial when it consists of four persons: a lead counsel ("counsel"), an associate counsel, a legal assistant, and a case-manager. See the Single Policy Document at pp. 10-11, ¶43 (hereinafter cited, by page and paragraph number, as RSPD at p. , ¶ ).

proceedings."[13] However, most commentators—while asserting that victims' participation is as important for the victims' sake as it is for the credibility of international justice—argue that the ECCC system serves these dual purposes quite satisfactorily and can function as a model on which to base ICC improvements.

## Issues Concerning Remuneration of Counsel

***Issue: Is it appropriate that the amount of remuneration paid to counsel assigned to represent the accused is the same as for counsel assigned to represent victims?***

*Background*

28. The Registry takes the position that the amount of remuneration paid to counsel assigned to represent victims ought "generally" to be the same as the remuneration paid to counsel for the Defence.[14] The Registry rests its requirement of general equivalence of remuneration as between defence counsel and victims counsel on the rationale that counsel for victims "must meet the same qualifications as those for the Defence..."[15]

*Observations*

29. There is disagreement among ICC officials and counsel as to whether equivalence of remuneration is appropriate. Some made the point that the role of counsel for the accused is likely to involve a level of sustained and intense legal work, both at the pre-trial and trial stages, exceeding the professional obligations of victims counsel. Persons espousing this viewpoint saw the role of victims counsel as distinctly more limited and passive, and accordingly less demanding. They described the role of victims counsel at pre-trial and trial proceedings as more of an observer; with an increase in responsibilities and attendant work occurring only when, and if, the reparations stage of proceedings was reached. Concern was expressed that representation by victims counsel was more symbolic than real.

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[13] Cf M. Vianney-Liaud, *Emerging voices: Victim participation in ICC and ECCC's proceedings*, OPINIO JURIS 21 August 2015. See also a more nuanced analysis in M. Lemonde, *Un juge face aux Khmers rouges*, Seuil 2013 p. 205 & ss.

[14] See RSPD at p. 14, ¶61.

[15] See RSPD at 14, ¶61, citing RPE 90, ¶6.

30. On the other hand, the assessment team heard from a number of persons with experience regarding representation of victims who described the difficulties inherent in serving as counsel for victims, not the least of which involves representation of multiple clients sometimes numbering in the thousands. They explained that the demands on counsel for victims include the significant challenge of representing persons who continue to experience the painful trauma of victimization. The already difficult work of building an effective attorney-client relationship is also made harder when counsel must attempt to communicate with multiple indigent clients, many of whom lack basic technological services and are spread over large geographic areas (even different countries). Those persons insisted that the victims' representative has two roles: (1) being present in court; and (2) keeping the victims informed about judicial developments. They explained that victims counsel must sometimes oppose both the prosecutor and the defence, which implies that (s)he must have the same level of competency as counsel for the accused. It is also clear that many persons hold the view that representation of victims is not merely symbolic, but instead adds real value to the ICC.[16]

*Assessment*

31. Resolution of the issue of equivalency of pay would benefit from having more experience with ICC cases that proceed to conclusion, including the reparations stage of proceedings. (To date, no case has proceeded through to the completion of the reparations stage). Assessment of the actual skills required to provide competent representation to victims, as well as the time demands required of victims counsel, would best be made on the basis of actual experience. In the interim, it is important to note that, while the Registry's remuneration system for victims counsel is "generally" equivalent to that of counsel for the Defence,[17] the process for compensating counsel for victims differs in one significant aspect. "[W]hile the remuneration of legal representatives of victims and their team members is based on a lump-sum monthly cap, [as is the case with the Defence,] the modalities of payment [to victims counsel] are based

[16] See, e.g., FIDH, *Five Myths About Victim Participation in ICC Proceedings* (December 2014); REDRESS, *Representing Victims Before the ICC: Recommendations on the Legal Representation System* (April 2015).
[17] See RSPD at p. 14, ¶7.

on actual hours worked on the cases as reviewed and approved by the Registry."[18] Thus, it would appear that, while the remuneration of victims counsel is theoretically the same as for defence counsel and can potentially reach the same monthly maximum figure, the actual amount received by victims counsel may be less than for defence counsel and is instead tied directly to hours of work performed as documented in time sheets submitted.

***Issue: Is defence counsel being paid for full-time work on ICC cases notwithstanding the possibility that they may not be devoting their full professional work time to ICC matters?***

*Background*

32. The remuneration scheme utilised by the Registry for payment of defence team members "is based on the assumption that each team member guarantees a full-time commitment to the case to which he or she has been appointed."[19] Rather than pay defence counsel an hourly rate for documented hours actually worked on the case, counsel is instead paid a monthly "lump-sum" intended to be equivalent to the salary paid to his or her counterpart in the OTP.[20] This approach rests on the principle of "equality of arms."[21]

*Observations*

33. Notwithstanding the assumption that defence counsel will work full-time on the individual case, there is in fact official recognition by the Court that counsel may be assigned simultaneously to two ICC matters ("mandates").[22] In the case of a second mandate, however, counsel's lump-sum fee arrangement is limited to 50% of the full remuneration paid when only a single matter is being handled. Thus, at least in the case of simultaneous mandates on two ICC matters, the Court implicitly accepts that less than full-time work will be done on one or both of the cases.

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[18] See RSPD at p. 14, ¶61 n. 42.
[19] See RSPD at p. 17, ¶81, and at p. 22, ¶115.
[20] See RSPD at p. 16, ¶17, and at p. 22, ¶115.
[21] See RSPD at p. 4, ¶9.
[22] See RSPD at p. 20, ¶102 ("simultaneous mandates are limited to no more than two cases" [emphasis in original]).

34. Court stakeholders told the assessment team that some defence counsel continue to work on non-ICC legal matters, including cases pending before other international tribunals sitting in The Hague, while simultaneously representing a client in a matter before the ICC. Such counsel, although being remunerated on the basis of a full-time commitment to the ICC case, are necessarily working less than full-time on the ICC matter.[23]

Assessment

35. This issue needs and deserves further analysis, especially with a more comprehensive assessment of the Court's structure for payment of counsel. It would be important to know the documented number of hours that counsel are claiming to have worked on individual cases, as well as the breakdown of those hours by phase of the case and individual task. Any assessment would benefit from a review of the time sheets that counsels are currently required to submit each month.[24] At present, the Registry lacks an electronic case management system, and to the knowledge of the assessment team there is no standardised electronic format utilised for timesheets.[25] The institution of an electronic case management system in the Registry, as well as a requirement that time sheets be submitted electronically in a standardised format, would facilitate such analysis.

***Issue: Is the provision for change in remuneration of counsel during periods of reduced activity utilised appropriately?***

[23] Counsels are not required to provide a list of their current pending cases before accepting a new appointment to an ICC case. Similarly, while serving as counsel in an ICC case, they are not prohibited from undertaking representation in new matters outside the ICC.

[24] See RSPD at p. 23, ¶123 ("The payment of fees under the Court's legal aid system is processed on a monthly basis upon the submission of time-sheets duly completed and signed by counsel and each team member . . . ."). The Registry declined to allow the assessment team to review time sheets submitted by counsel. Although requested, the Registry was also not able to compile data on hours billed by individual counsel in time for the assessment team to review such information.

[25] See Audit Report (*FINAL*) (Audit on Legal Aid) (3 September 2014) at pp. 10-11, ¶¶23-27 (describing the limitations connected with the Registry's use of Excel spreadsheets for records of legal aid allotments and payments, and the "need to adopt a comprehensive automatized legal aid management system").

*Background*

36. The Registry's Single Policy Document (RSPD) anticipates that there may be times during a case in which proceedings are effectively held in abeyance and relatively little work is required of counsel. During such periods of "reduced activity," remuneration to assigned counsel and team members is no longer to be paid on a monthly "lump-sum" basis, but is instead to be determined "on the basis of hours actually worked".[26] Counsel and team members are required to submit time sheets documenting the hours worked during periods of "reduced activity" and those time sheets are subjected to a "detailed review" before payment is made.[27] The switch to an hourly system of remuneration is justified on the basis that, during periods of "reduced activity," it is no longer reasonable for counsel and team members to devote full-time commitment to the case.[28]

*Observations*

37. In at least one case, *The Prosecutor v. Abdallah Banda Abakaer Nourain* ("*Banda*"), it appeared that the "reduced activity" policy had not been applied notwithstanding its apparent suitability. In *Banda*, with trial about to commence, the accused allegedly decided not to appear in court and absented himself from further proceedings.[29] The national jurisdiction of the accused, Sudan, declined to arrest Mr. Banda. As a result, the proceedings in the case have been suspended *de facto*. Notwithstanding the suspension of proceedings, monthly lump-sum payments to the defence team have apparently continued based on a representation by the defence team that it continues to receive and review disclosure from the prosecution and also that defence counsel continues to communicate with the client by telephone.

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[26] See RSPD at p. 22, ¶¶115-118.
[27] See RSPD at p. 22, ¶119.
[28] See RSPD at p. 22, ¶115.
[29] Mr. Banda first appeared in the ICC voluntarily on 17 June 2010; the confirmation of charges hearing took place on 8 December 2010. On 7 March 2011, Pre-Trial Chamber I unanimously decided to confirm the charges of war crimes brought by the ICC's Prosecutor against Mr. Banda and committed him to trial. On 11 September 2014, Trial Chamber IV issued an arrest warrant against Mr. Banda. The Chamber also vacated the trial date previously scheduled to open on 18 November 2014 and directed the ICC Registry to transmit new requests for arrest and surrender to any State, including the Sudan, on whose territory Mr. Banda might be found.

*Assessment*

38. The assessment team requested information but did not learn why the Registry has not designated the proceedings in *Banda* as having entered a period of "reduced activity." While it is possible that Banda's counsel may have some limited case-related work to perform, the circumstances would appear to fit well within the "[n]on-exhaustive" list of examples of "reduced activity" set out in the Registry's Single Policy Document.[10] The Court may consider whether it would be appropriate to add an explicit provision to the Regulations of the Court directing Chambers to designate a case as having entered a period of "reduced activity" when proceedings are suspended indefinitely ("hibernated"), including when an accused has absented himself or herself from proceedings. However, the assessment team is mindful of the negative impact that a "reduced activity" designation may have on the ability of lead counsel to keep the defence team intact for future work on the case. Thus, any new regulation addressed to this issue must be drafted with great care so as to ensure that a designation of reduced activity is not made prematurely.

***Issue: Are case costs being increased by unjustified delays in proceedings?***

*Background*

39. Because lead counsel and other members of the defence team are paid a monthly lump-sum amount, the overall cost of the case will necessarily increase the longer the case takes to reach a conclusion.

*Observations*

40. The assessment team was told repeatedly that the substantial length of ICC cases was a significant factor in the cost of providing legal aid for the accused. The team heard a variety of opinions as to the reason ICC cases take so long to resolve. Some stakeholders were quick to blame the OTP, which they claimed has a history of bringing charges without first having completed full case investigation. In such situations, OTP critics maintained, cases were slow

[10] See RSPD at p. 22, ¶117 ("stay, suspension or other protracted delay in the proceedings").

to move forward because the prosecution was forced to later expend time continuing its investigation in an effort to bolster weak cases. The result was that the prosecution was forced to seek multiple delays of proceedings, both before confirmation of charges and later prior to trial. Moreover, it was alleged that the prosecution typically turned over disclosure to the defence in an inefficient and piecemeal fashion, thus causing further delay.

41. Other stakeholders maintained that the fault lay with Chambers. The assessment team was told that judges were either unwilling or unable to establish and enforce deadlines, and were said to be too willing to accede to requests for postponement and other forms of delay. In some instances, these critics claimed, judges of the Court did not possess sufficient experience as trial judges in complex criminal matters prior to joining the ICC and, thus, they lacked familiarity with the mechanisms that exist to keep cases moving forward toward fair and efficient resolution.

42. One attorney with whom the assessment team spoke suggested that the ICC adopt informal status conferences of the sort used at the International Criminal Tribunal for the former Yugoslavia (ICTY). At such conferences, ICTY judges learn of outstanding issues regarding pre-trial disclosure, as well as other impediments to efficient pre-trial preparation, and are able to resolve disputes quickly and without the need for counsel to resort to more formal, time-intensive pre-trial litigation.[31]

43. Finally, it was claimed by others that the defence intentionally sought to delay cases. Two motivations for intentional delay were identified: first, delay was used as a tactic meant to impede the prosecution's ultimate ability to prove its case, with the hope that witnesses' memories would fade and, in some instances, witnesses would become unavailable; and, second, delay was used as a means of continuing the monthly lump-sum remuneration.

*Assessment*

44. It is evident that ICC cases have, thus far, moved at a very deliberate pace and have taken considerable time to reach resolution. Given that the cases heard at the ICC involve the most serious allegations and very high stakes, such a cautious pace may be reasonable to ensure

[31] It is important not to overestimate the potential impact of such a solution. The length of proceedings before the ICTY has also been a significant problem, as the Milosevic case, among others, has shown.

fairness and justice. However, excessive delay risks frustrating efforts to afford fairness in proceedings, and may ultimately serve to undermine the Court's legitimacy.

45. The ICC does not appear to have developed time standards to guide the pace of ICC proceedings. Such standards, which may be made advisory rather than binding, can be of great assistance to judges, counsel, and the public, in setting expectations regarding scheduling of case events and helping to avoid unnecessary delay.[32] Moreover, the Court does not appear to have adopted a rule of procedure requiring that trials commence within a specified maximum time period following an accused person's first appearance before the Court. Such a rule can assist in moving cases toward more efficient resolution.

46. Some observers have argued that—regardless of the relative shares of blame for delay attributed to defence strategy, prosecutorial policy, or the accountability of judges—proceedings are too strongly influenced by the adversarial aspects of the ICC system, although it is supposed to be a hybrid legal system. The pace of proceedings, they claim, is strongly influenced by the adversarial system of justice, which leaves little room for the use of written case files and effective intervention by judges in the course of trials. They contend that the adversarial system is particularly ill-suited for mass crimes of the sort that fall within the jurisdiction of the ICC. Some persons interviewed by the group of experts also expressed the view that there is considerable budgetary waste in the current procedural system. They argue for a procedural change that would entrust investigations to a form of investigating magistrate, as is used in the French justice system, and contend that such a system would save time and reduce costs.

47. There is, however, another view point, which holds that the type of due process protections that are the hallmark of the adversarial process are the best way in which to ensure fairness and justice. While conceding that the adversary justice model is sometimes inefficient, its

[32] Other jurisdictions have addressed delay in proceedings by promulgating time standards. See, e.g., American Bar Association Standards for Criminal Justice (3d. ed. 2006), *Speedy Trial and Timely Resolution of Criminal Cases*, Commentary to Standard 12-1.1 at p. 28 ("Unnecessary delay in the processing of criminal cases undermines defendants' rights to a speedy trial, prolongs periods of tension and anxiety for victims and witnesses, adversely affects public confidence in the justice system, and often causes unnecessary expense to taxpayers. Reflecting these concerns, this Standard articulates three main purposes of the Standards on *Speedy Trial and Timely Resolution of Criminal Cases*: effectuating a defendant's right to a speedy trial; furthering the public interest (including the interests of victims and witnesses) in fair, accurate, and timely resolution of criminal cases; and enabling effective use of public resources. It emphasizes that fairness and accuracy are essential elements of a viable criminal justice system and cautions that in implementing the Standards jurisdictions should ensure that both prosecution and defense have adequate time for investigation and case preparation").

proponents argue that the costs of foregoing the adversary system are more than budgetary and, in the end, greater in their negative impact on justice. Adherents of the adversary system would contend that any lack of efficiency that might be perceived in the adversarial process could be mitigated or alleviated by the appropriate use of time standards under judicial control, without sacrificing the superior procedural protections that are inherent in the adversarial model. Those who favour the adversarial system view retreat from the adversarial aspects of the ICC as premature, given the possibility for reform of this relatively new (thirteen years old) international tribunal.

48. The expert panel seeks to do no more than draw attention to this important debate. It takes no position on the issue, other than to note that it is deserving of further careful study and consideration.

***Issue: Is the remuneration paid to assigned counsel and team members adequate?***

*Background*

49. According to the Registrar, "many defence teams [have] raised the insufficiency of resources available through the legal aid system as their main issue of concern. Current resources provided under the legal aid scheme . . . [have been] criticized as being insufficient with respect to legal representation, investigations and expert support. The current legal aid system was also criticised for not sufficiently taking into account the complexity of cases."[55]

*Observations*

50. In regard to the adequacy of the lump-sum remuneration paid to counsel, there appear to be two discordant points of view. On the one hand, defence counsel indicated that the amount paid, particularly since a 30% reduction in rates was instituted in 2012, was not adequate to compensate them for what they believed amounted to more than full-time work. They stressed that ICC cases were extraordinarily demanding and that unusual efforts were necessitated by

[55] See *Report on the Expert Conference on the Proposed Victims and Defence Offices* (23-24 March 2015, The Hague).

the extremely serious subject matter of ICC cases.[34] Counsel also challenged the Registry's contention that remuneration to counsel and team members was equivalent to staff salaries paid for comparable work positions in the OTP. Defence counsel pointed out that unlike members of the OTP staff, defence counsel and defence team members may be subject to income tax requirements of the Court's host country and do not receive benefits of the sort provided to OTP staff members.[35] Finally, a number of persons with whom the assessment team spoke expressed the view that there are significant problems in the remuneration paid by some defence counsel to non-attorney members of the defence team.[36] As the Registry has increasingly permitted flexibility in the composition of defence teams, some lead counsel have responded by transforming a single support staff position into multiple low paying positions filled by staff members who work without contracts or benefits.

51. Registry officials, on the other hand, generally seemed to believe that the amount of pay for defence teams was adequate. In particular, some expressed the view that there were a number of defence counsels, as well as some counsel for victims, who devoted less than full-time effort to ICC cases.[37] They also intimated that some defence counsel delayed cases in order to prolong the time during which they would continue to receive monthly lump-sum payments. Registry officials holding this view expressed a preference for replacing the indefinite payment of a monthly lump-sum with a lump-sum payment, perhaps paid periodically, based on a total amount for the projected life of the case. Such an approach, they argued, would have the benefit of capping the total amount paid to counsel for work on the case.

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[34] One private attorney, with whom the assessment team spoke, estimated that he regularly worked 300 hours each month on his ICC case. This attorney maintained that the individual support staff members of his defence team worked nearly as hard, each devoting 250 hours per month to their work as members of the team.

[35] The benefits that OTP staff receives were described as substantial and include a dependancy allowance, as well as a schooling allowance, for those who have dependant children; a housing subsidy; contributions to medical insurance premiums; and pension contributions.

[36] Although the Registry's Single Policy Document provides for increased remuneration of external counsel in order to cover a fixed percentage of "professional charges" that are "directly linked to the work carried out in [ICC] proceedings", "contributions to social security, pension and health insurance schemes to which counsel belongs," see RSPD at p. 24, ¶¶129-131 (emphasis in original), and "a *total global amount* to cover the totality of taxes or similar additional charges" paid by certain team members, see *id.* at ¶133 (emphasis in original), some external counsel contend that the total remuneration received still falls short of the benefits and salaries provided for comparable OTP attorneys and staff.

[37] The assessment team heard anecdotal information concerning individual defence lawyers who appeared for only a limited number of court proceedings; lawyers who were inattentive during the course of trial proceedings; and lawyers who only infrequently visited their clients who were held in detention. It was not clear, however, whether such conduct was typical of more than a small group of attorneys.

Assessment

52. The assessment team requested that the Registry provide historical information regarding payments made to defence teams to enable the assessment team to better evaluate the adequacy of pay. The assessment team viewed the comparison of total remuneration amounts with documented hours worked as set forth in time sheets, and comparison to the pay of OTP prosecutors and staff members, as highly important in this regard. Due to its other obligations and resource limitations, the Registry regrettably was unable to provide the information requested within the limited time available to the assessment team.

***Issue: Are the administrative requirements with which assigned counsel must comply in order to receive remuneration for their work and related expenses unduly burdensome?***

*Background*

53. On 23-24 March 2015, the Registrar convened a conference of experts at the ICC. The two-day event was attended by approximately 70 participants, including counsel with experience representing accused persons or victims at international tribunals, ICC officials, and other stakeholders. A recurring theme expressed during the conference was that "defence teams spend a significant amount of time in justifying their expenses for purely administrative purposes and are often obliged to litigate for additional resources before Chambers, when they should be focusing on preparation of their case."[55] These same themes were repeated during the assessment team's meetings in The Hague with counsel for the accused and for victims.

Observations

[55] *Report on the Expert Conference on the Proposed Victims and Defence Offices* (23–24 March 2015, The Hague) at pp. 2–3. Following the March 2015 conference, the Registrar submitted to the Court his Proposal *of the Registrar on the Principles Guiding the Establishment of a Victims Office and a Defence Office* (hereinafter cited by page number as Proposal of the Registrar). He reiterated that "there was broad consensus among participants at the Expert Conference that *modalities and procedures in place to make resources available to the defence do not function well and, some argued, cause unnecessary constraints and delays for defence teams. It was felt that the legal aid policy insufficiently takes into account the complexity of cases; that its procedures are overly bureaucratic and time consuming;* and that the human resources required for the adequate implementation of the legal aid policy in the Registry are insufficient. The provision of legal aid to counsel indeed requires improvement in several ways." Proposal of the Registrar at pp. 3–4 (emphasis added).

54. Counsel who have appeared in ICC cases consider the administrative requirements to receive both remuneration for their work and reimbursement for expenses to be unduly burdensome. While the payment system employed at the ICC purports to involve a set monthly lump-sum amount, counsel and team members are nonetheless required to submit substantial paperwork as a prerequisite to being paid. The required paperwork includes:

- "action plan": before each phase of the proceedings or every six months, whichever comes first, counsel must submit an "action plan" containing a detailed account of "all the activities counsel deems most appropriate in order to represent his/her client" during the next phase of the proceedings.[39]

- "report on implementation": at the end of each phase of the proceedings, or every six months, whichever comes first, counsel must submit a report describing implementation of the most recent action plan.[40]

- Monthly "time sheets": payment of fees is contingent upon the submission each month of time sheets duly completed by counsel and each team member. Each individual must sign his or her own time sheet, and counsel must also review and sign the time sheets of all other team members.[41] Time sheets are intended to serve as "a record or itemized statement of activity for each team member for the duration of the month in respect of which payment is being sought."[42]

55. In addition to the paperwork that counsel must submit in connection with payment of fees, additional paperwork is required in order for counsel to secure partial reimbursement for professional charges directly linked to the work on the proceedings before the Court.[43] Counsel is also required to produce for review by the Registry "supporting evidence/documentation of actual payment of charges".[44]

56. A final category of charges for which counsel may seek reimbursement relates to the "monthly allowance to cover the expenses of each legal team."[45] The expenses intended to be covered by

[39] See RSPD at p. 23, ¶122.
[40] See RSPD at p. 23, ¶122.
[41] See RSPD at p. 23, ¶123.
[42] See RSPD at p. 23, ¶124.
[43] See RSPD at p. 24, ¶129.
[44] See RSPD at p. 25, ¶138.
[45] See RSPD at p. 25, ¶139.

this allowance include "two categories of expenses: miscellaneous and travel."[46] Miscellaneous expenses include office supplies, translation costs, and other reasonable expenses of the team directly related to the case. At least with respect to costs of accommodation and other expenses related to the stay of counsel and associate counsel in The Hague, counsel must also supply "proof that such costs have actually been incurred."[47] The ICC's Office of Internal Audit has concluded that the process employed by the Registry for payment of such costs "is cumbersome and lacks clarity"[48] and is in need of "clear guidelines . . . including specific criteria . . . that set out the internal procedure [for] how to assess and process the mission requests, the entitlements of the legal representatives and the expenses which are remunerable under the legal aid policy."[49]

Assessment

57. The assessment team repeatedly heard complaints from private attorneys appointed to represent accused persons at the ICC, as well as at other international tribunals, regarding the bureaucratic burdens in seeking remuneration and reimbursement for expenses at the ICC. Similarly, victims' representatives told the assessment team that they spend more time explaining to the Registry what they have to do for victims than actually helping them. Registry officials felt that some justifications for the expenditure of public funding were necessary. Overall, however, they candidly acknowledged that the significant paperwork required of counsel at the ICC made the system overly bureaucratic and burdened counsel.[50]

***Issue: Are resources for defence investigation adequate?***

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[46] See RSPD at p. 25, ¶140.
[47] See RSPD at p. 26, ¶142.
[48] See *Audit Report (FINAL) (Audit on Legal Aid)* (3 September 2014) at p. 12, ¶33.
[49] See *Audit Report (FINAL) (Audit on Legal Aid)* (3 September 2014) at pp. 11-12, ¶29.
[50] At least some Registry officials with whom the assessment team spoke indicated that time sheets submitted by counsel and team members were subjected to minimal review, at best; and were collected primarily as protection in the event of an audit of the Registry. On the other hand, a person with experience working in the Registry's CSS insisted that he reviewed the time sheets carefully and utilised them in determining whether counsel was entitled to payment.

*Background*

58. In regard to resources for defence investigations, Registry officials explained that the amount initially allotted in the RSPD had been intended as a starting point to be adjusted as experience dictated. There was widespread agreement among the Registry officials with whom the assessment team spoke that the amount allocated for investigation had proven to be woefully inadequate. As a result, in most cases defence counsel were forced to seek additional funds for investigation and shoulder the burdensome administrative task of justifying these expenses.

*Observations*

59. Both counsel and Registry officials expressed the view that disagreement over Registry decisions on defence requests for additional funds had led to time-consuming litigation before Chambers, as well as to delays in proceedings.[51] Moreover, counsel and Registry staff viewed the litigation challenging the Registrar's funding decisions as having caused deterioration in the working relationship between defence counsel and the Registry.

*Assessment*

60. Given the short timeframe available to the assessment team to complete its work, it was not possible to do more than listen to the widely held frustrations regarding the bureaucratic burdens of the current system, as well as to the competing views as to the adequacy of remuneration. It is plain that there is significant dissatisfaction with the current system, and further study of this issue is warranted. Such study would benefit by careful perusal of time sheets previously submitted by counsel and team members;[52] calculation of effective hourly

[51] On occasion, however, litigation over funds requests has involved defence claims that additional staff is needed to avoid delay in proceedings. Thus, it is not always the case that funds-related litigation will result in an overall lengthening of proceedings.

[52] In order to better understand the current situation, the assessment team requested that the Registry permit it to inspect time sheets submitted by defence counsel. Citing privacy concerns, the Registry declined to make time sheets available to the assessment team. The assessment team also requested data on defence spending on investigations and experts. The Registry was unable to provide the requested information within the timeframe available for the assessment team to consider it.

rates of pay received;[31] comparison to rates of pay used at other international tribunals;[32] consideration of alternate modalities of pay employed in other tribunals;[33] and comparison to the rate of pay, and other benefits provided, to compensate attorneys and other staff in the OTP.

61. Further study is not required, however, in order to conclude that the presumptive amounts made available to defence teams for investigation are in need of revision. It is plain that an increase is needed in the amount allotted in the RSPD. The existing body of ICC cases involving indigent defendants provides a rich source of empirical evidence that the current investigation budget of 73,006 Euros for the life of the case falls far short of the actual investigation resources needed.

62. In addition, consideration should be given to whether the initial decision on authorising additional funds for investigation, as well as monies for expert services,[34] ought to remain with the Registry. An alternative model, utilised in some jurisdictions, would direct such requests for monies to the attention of Chambers and omit entirely the Registry from substantive

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[31] An "effective hourly rate" could be computed in a number of different ways. One method would be to presume, consistent with the idea of full-time commitment to ICC cases, that counsel works 40 hours per week (or 2,080 hours per 52 work weeks). The annual amount paid as remuneration would then be divided by 2,080 in order to arrive at an effective hourly rate. A second method would be to utilise the time sheets submitted by counsel to calculate the actual number of hours worked on the case during a particular time period and then divide the total remuneration paid during that period by the number of hours worked.

[32] The ICC utilises a single rate of remuneration for payment of defence counsel in its cases. By contrast, the ICTY employs a payment system in which a case is evaluated for its complexity and likely duration and remuneration to counsel is adjusted accordingly.

[33] Many experts on public defence systems believe that a lump-sum payment system is antithetical to the provision of high quality legal representation for indigent persons. The argument against the use of the lump-sum is that it provides a disincentive for doing additional work on the case beyond the bare minimum. See, e.g., National Legal Aid and Defender Association at http://www.nlada.net/library/article/no-flatfeecontracts ("A flat-fee contract pays a lawyer a single lump-sum to handle an unlimited number of cases. This type of contract creates a direct financial conflict of interest between the attorney and each client. *Because the lawyer will be paid the same amount, no matter how much or little he works on each case, it is in the lawyer's personal interest to devote as little time as possible to each appointed case, leaving more time for the lawyer to do other more lucrative work.* Worse yet, many flat-fee contracts require the lawyer to pay all case-related expenses out of the single lump-sum. In this situation, it is in the lawyer's personal interest to incur as little expense on behalf of clients as possible, so that more of the lump-sum payment can go toward the lawyer's fee. Finally, some flat-fee contracts require the lawyer to hire other lawyers out of the same single lump-sum, such as when an additional lawyer is required to represent a co-defendant or in other conflict case situations. Such contracts are oriented solely toward capping defence costs at the lowest possible level, without regard to the lawyer's ethical and constitutional duties to the client") (emphasis added).

[34] At present, the Registry's Single Policy Document provides no guidance as to what monies will be made available to the defence to secure expert assistance prior to trial. The defence must seek funds for experts under the broad and undefined rubric of "Additional means." See RSPD at p. 15, ¶¶66. The absence of standards regarding legal aid funds for expert assistance has led to considerable confusion and litigation.

consideration of requests for funds. The Court might consider whether such a change in procedure would enable the Registry to remain a neutral agent of administrative services and avoid having it placed in the uncomfortable and undesirable role of adversary of the defence. An additional potential benefit of moving from the current two-stage process to one in which only Chambers considered requests for funds is the possibility of an overall increase in efficiency and the speed with which requests for funds are decided.[57]

## Issues Concerning Resources Required for Victims

***Issue: Are the resources provided for victims' participation adequate?***

*Background*

63. The assessment team examined previous reports on this issue, in particular the report dated July 2013 by the Panel of independent Experts appointed by Amnesty International and REDRESS. In that report, the panel mentioned that despite important efforts and investments, the victims participation system could not fulfil its potential and that there were concerns about its durability and effectiveness for victims. The report insisted that the procedures developed during the first ICC trial had been applied to a relatively small number of victims and would be insufficient to deal with a larger number of victims. The report also mentioned that there were differences of opinion within the ICC on this topic.

*Observations*

64. The concerns were justified. According to all persons interviewed, resources granted for victims' participation are deemed insufficient. As a result, the number of victims who participate is far less than what it could be.

65. Several persons interviewed stated that it is more difficult to represent the interests of the victims than to intervene in defence of the accused because of the uncertainty surrounding the role of victims in the ICC system. Moreover, the legal representation of victims is made even

[57] These observations are offered independently of any eventual consideration of change to the ICC procedural system as a whole (see discussion above).

more challenging by the fact that the legal representative must at times oppose both the prosecution and the defence.

66. The assessment team was told that when victims do not have a way to contact their lawyer they feel they are not truly participating. Thus, it is important to explain to victims how they can consult with their lawyer and to have funds for the ongoing presence of a counsel in the field. The continuous presence of a counsel in the field is required to ensure that communication between victims and their legal representatives can take place, and to make sure the victims are kept informed and up-to-date on developments in the case. The legal representative in the field should also be able to travel to The Hague and appear before the judges of the ICC, and will thereby serve to assure victims that they have a meaningful voice in the proceedings.
67. The assessment team heard from a number of counsels that there are serious difficulties in obtaining the funds needed to enable victims to travel to safe locations where they can meet with their lawyer. It appears that such expenditures were not contemplated in the legal aid scheme for victims, even though it was contemplated for the defence. Apparently, it was thought that legal representatives for victims would have a minor role in proceedings.

Assessment

68. It must be noted that there has been some improvement with regard to the issue of funds for victims' travel. Jurisprudence has settled some rights for representatives of victims (e.g., to have victims at trial), and the legal aid scheme was amended to cover this right. In the beginning, there was no budget at OPCV for "general operating expenses" (only for staff and travel, but not for rental of safe places where meetings with victims could take place). Such expenditures are now covered via general operating expenses.
69. The assessment team was told that in interactions between the Registry and external lawyers there is a tendency for the Registry to devote excessive attention to scrutinising activities of lawyers that require ICC funds. In this regard, some persons interviewed complained that the Registry too frequently questions the need of counsel to meet with the victims they represent. They argued that this should not be the Registry's business, and that it causes tensions between external lawyers and the Registry. For example, a victims' representative explained that, despite making numerous requests, the Registry would not authorise her to travel to the field, at the

time she maintained that it was necessary to do so, in order to establish a good relationship with her clients.

70. It must be noted that at one time there was no budget for external counsel in the field. This ended as of 1 January 2015. Now the OPCV has in its budget all positions when it is serving as lead counsel. (If external counsel is appointed as lead counsel, payment is made through the legal aid system.) This change seems to be an improvement. Whereas going through the Registry's Counsel Support Section (CSS) to obtain funds for external counsel to go to see witnesses can take several weeks, OPCV can make a decision about such travel and arrange for it much more quickly (usually within 48 hours).

## Issues Concerning Defence Counsel

***Issue: Should the Court establish a separate legal aid policy for Article 70 cases?***

*Background*

71. The basic jurisdiction of the ICC is set forth in Article 5 of the Rome Statute and includes the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[59] Persons alleged to have committed an Article 5 offense are entitled to be represented by counsel of their choice.[60] If an accused does not have legal assistance, he or she is entitled to have such assistance assigned by the Court where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.[61]

72. Under Article 70 of the Rome Statute, the ICC also has jurisdiction over offenses relating to the Court's administration of justice. When committed intentionally, crimes against the administration of justice include: giving false testimony; presenting false or forged evidence; corruptly influencing, obstructing, or interfering with the attendance of a witness; retaliating against a witness for giving testimony; destroying, tampering with, or interfering with the collection of evidence; impeding, intimidating, or corruptly influencing an official of the

[59] The Rome Statute will be cited herein by article number as (Rome Statute at Art.____).
[60] See Rome Statute at Art. 67(1)(d).
[61] See Rome Statue at Art. 67(1)(d).

Court; retaliating against an official of the Court; and soliciting or accepting a bribe as an official of the Court.

73. In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 21 May 2015, (hereinafter cited by paragraph number as, "*Bemba Gombo et al.*, at ¶ "), Trial Chamber VII held that the Rome Statute and the various texts relating to legal aid contain no indication that the legal aid system should apply differently to Article 70 trials than they do to Article 5 trials.[61] Thus, an accused facing charges pursuant to Article 70 who lacks sufficient means to pay for counsel, is entitled to have counsel assigned by the Court in the same way as for Article 5 proceedings.[62]

Observations

74. In conversations with Registry officials, the assessment team heard concern as to the wisdom of providing for legal aid in Article 70 proceedings at equivalent levels as is paid in Article 5 proceedings. The argument was made that the gravity of offenses under Article 70, including the potential punishments after conviction, do not equate with crimes charged under Article 5. Thus, it was suggested that it is not appropriate to remunerate assigned Article 70 counsel at the same level as Article 5 counsel.

Assessment

75. As a matter of policy making, it remains open to the ASP to consider whether it wishes to make a distinction as between the legal aid paid in Article 5 and Article 70 proceedings. On the one hand, it is not difficult to argue, as have some Registry officials, that the gravity of Article 5 offenses far exceeds that of offenses under Article 70. It will remain to be seen, however, whether experience with trial in Article 70 cases will show that the degree of skill and the resources required to defend them is different than for Article 5.

[61] See *Bemba Gombo et al.*, at ¶35.

[62] The Registry retains discretionary authority, as in proceedings under Article 5, to consider the "peculiar circumstances of the particular case" in determining the actual needs of the legal aid applicant. *Bemba Gombo et al.*, at ¶37.

76. On the other hand, consideration ought to be given to whether continued equality of treatment of Article 5 and Article 70 proceedings is merited given that, by their nature, Article 70 proceedings address offenses against the legitimacy of the ICC itself. Obstruction of the Court, and the other offenses detailed in Article 70, threaten to undermine the Court's ability to conduct its business in a most fundamental sense. As such, adjudication of these cases in a fair and efficient manner can be seen as crucial to the Court's ongoing ability to adjudicate Article 5 matters and to the world's view of the legitimacy of those Article 5 proceedings. Thus, there may be an institutional interest in ensuring that counsel assigned to represent the accused in Article 70 cases provide representation that is of the same quality as in Article 5 proceedings.

***Issue: Whether only a small subset of the more than 550 attorneys on the list of qualified counsel are actually receiving appointments to serve as defence counsel in ICC cases?***

*Background*

77. Pursuant to Rule 21, of the Rules of Procedure and Evidence (hereinafter cited, by rule and paragraph number, as RPE , ¶ ), the ICC Registrar maintains a list of attorneys who have been found qualified to accept assignments to represent the accused or victims in cases before the Court.[65] In order to be placed on the list of counsel, an attorney must meet the following criteria: (1) have "established competence in international or criminal law and procedure"; (2) have "the necessary relevant experience"; and (3) have "excellent knowledge of and be fluent in" either French or English.[66]

78. According to the Registry, as of 12 August 2015, the list of qualified counsel contained the names of 587 attorneys. Despite the large number of attorneys on the list, the assessment team was told during its meetings with Registry officials, as well as with counsel who have appeared in cases before the ICC, that only a small subset of attorneys have actually been selected from the list by accused persons and that the same attorneys continue to be selected in new cases.

[65] See RPE 21, ¶2.
[66] See RPE 22, ¶1. In addition, pursuant to Regulation 67(1) of the Regulations of the Court, lead counsel is required to have at least ten years of relevant experience, and associate counsel must have at least eight years experience. Pursuant to Regulation 124 of the Regulations of the Registry, assistants to counsel shall have at least five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure.

The concern raised was that the Court was not benefiting from exposure to the diversity of experiences and talents that a list of more than 550 attorneys could provide. Moreover, in situations where an attorney was selected who did not speak the language of the accused, the costs of representation were increased by the need to employ translators. A related concern, voiced by at least one individual, was that accused persons were being influenced to select particular counsel by some unidentified person or persons.

Observations

79. In order to ascertain whether the anecdotal reports concerning the existence of a small coterie of lawyers receiving the majority of appointments were in fact accurate, the assessment team requested that the Registry provide a list of all counsel who have appeared in ICC cases, the name of the case and the party for whom counsel appeared, and whether counsel was privately retained or appointed by the Court. On 8 September 2015, the assessment team received the requested information.[65]

80. A total of 100 different attorneys have appeared on defence teams in ICC cases in at least one of the following roles: lead counsel, associate counsel, or legal assistant.[66] Of those 100 attorneys, 39 appeared as lead counsel in at least one matter.[67] An additional 21 persons appeared as associate counsel (but not lead counsel) in at least one case. Finally, 40 persons appeared as a legal assistant in at least one case.

81. In regard to multiple appearances by the same attorney as lead counsel, only seven attorneys appeared in more than one case as lead counsel. Of this group, four appeared in cases twice as lead counsel; one appeared three times as lead counsel; one appeared four times as lead counsel; and one attorney appeared five times as lead counsel. Thus, of the 39 attorneys who have appeared as lead counsel in ICC cases since the Court came into existence,[68] only three attorneys have appeared as lead counsel in more than two cases.

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[65] The information provided by the Registry was set out in an Excel spreadsheet. The Registry does not have an electronic case management system. See *Audit Report* (FINAL) (Audit on Legal Aid) (3 September 2014) at p. 10, ¶¶21–23. Without such a system, it is a difficult and time intensive process to generate statistical information.

[66] See footnote 64, *supra*, for the experience levels required to qualify as counsel, associate counsel, and legal assistant.

[67] In some instances, the duration of a counsel's appearance in the case was relatively brief and successor counsel appeared in the same matter.

[68] The Rome Statute entered into force on July 1, 2002.

Assessment

82. There are two considerations that should be taken into account in deciding whether this data is evidence of a problem that ought to be addressed. First, the ICC places a high value on according "freedom of choice" to the accused's selection of counsel.[69] The fact that an individual accused chooses counsel who has previously been selected by other accused may simply reflect that the goal of "freedom of choice" is being met and that accused persons are making the informed choice to be represented by counsel with experience litigating cases before the ICC.[70] Notably, the assessment team heard no complaints concerning the right of the accused to freely choose counsel. This may stem largely from the fact that the Registry and its staff have implemented processes and procedures that appear to effectuate the right of the accused to freely choose counsel as guaranteed in Article 67(1)(d) of Rome Statute and rule 21(2) of the RPE.[71] Importantly, the Registry has in place safeguards to ensure counsel of choice fully meets the conditions required by the regulations of the Court.[72]

83. Second, the relatively small number of cases that have been filed in the ICC since it first came into existence[73] necessarily means that the actual number of attorneys who have been selected

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[69] See RPE 21, ¶2 ("The person shall freely choose his or her counsel from the list . . . .").

[70] It is a common phenomenon in the criminal justice system that accused persons held in pre-trial detention discuss among themselves the relative merits of defence counsel and that those discussions come to influence the choice of counsel. A more troubling phenomenon, also sometimes seen, involves efforts by detention or court officials to influence the accused in their choice of counsel and thereby steer cases to particular attorneys. While at least one person with whom the assessment team spoke speculated that such a scenario might have taken place in some ICC cases, no one claimed to have firsthand information that this was true.

[71] According to the CSS, the accused is given a binder containing a one-page summary of basic information for each lawyer on the list of counsel; the accused can request, and CSS will provide, the full curriculum vitae for each of as many attorneys as the accused wants to review; and if the accused wishes to speak with some of those persons in order to make a selection, CSS will facilitate telephone conversations for the accused with as many potential counsel as the accused wishes to speak.

[72] The appointment of a duty counsel involves a procedure different than that utilised for selection of lead counsel. For the selection of lead counsel, the accused chooses from the complete list of the more than 550 qualified counsel. By contrast, for appointment of duty counsel, the Registry provides the accused with a list of just five counsel from which the accused is asked to make a selection. The assessment team was told that it sometimes happens that an attorney appointed as duty counsel is later, based on his or her performance as duty counsel, selected by the accused to serve as lead counsel for the remainder of the case. Thus, efforts might be made to ensure that the same names of counsel are not repeatedly included in the list of five names presented to the accused when a choice is to be made as to duty counsel.

[73] According to the ICC's web site, since the Rome Statute entered into force on July 1, 2002, a total of 22 cases in nine situations involving a total of 29 defendants have been brought. See http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

to serve as counsel will be correspondingly small and will not include most of the more than 550 attorneys on the Registry's list of qualified counsel. As the number of cases handled by the ICC increases in future years, there should be a better opportunity to evaluate whether the number of attorneys actually serving as counsel is what would be expected.

84. A final factor to be considered in assessing this issue is whether the list of counsel is too large and the qualifications for inclusion on the list of eligible counsel ought to be strengthened. While established competence in international or criminal law and procedure appears to be a reasonable general requirement, the Court might consider whether more specific objective and qualitative experiential requirements should be added. For example, actual experience as lead defence counsel trying a minimum number of serious criminal cases, including homicides, might be considered as relevant to assessment of an applicant's experience. Similarly, those seeking inclusion on the list of counsel might be required to have significant experience as counsel in cases which involve sophisticated forensic issues and in which they participate in the presentation of expert testimony or the cross-examination of expert witnesses. Apart from these and other relevant objective measures of an applicant's experience, the ICC might consider adding a qualitative element to its process of vetting applicants for the list of counsel, and include an interview of the applicant as well as an assessment of counsel's performance in prior cases. Such an assessment could include speaking with other counsel, as well as judges, who have observed the applicant's performance in court and at trial, as well as a review of pleadings and legal briefs filed by the applicant in earlier cases.

## Issues Concerning Indigence Assessments

### *Issue: How can the Court's assessment of indigence be improved?*

*Background*

85. The Registry's Single Policy Document lays out a detailed explanation of the criteria and mechanisms it employs for determining whether an accused or a victim is indigent and qualifies for legal aid.[74] The assessment of indigence is based on the following legal principles:

[74] See RSPD at pp. 6-10, ¶¶21-37, and RSPD Annex II at pp. 28-34.

- That objective criteria be utilized for assessment of indigence;
- That the person requesting legal assistance not be forced to choose between legal representation and foregoing his or her obligations to dependants;
- That the system for assessment of indigence be flexible and allow for consideration in changes in financial status;
- That the system for determining indigence be simple yet comprehensive and avoid excessive complexity.[75]

86. The objective criteria to be considered in assessing indigence focus on two categories: (1) the assets of the person claiming indigence, and (2) the financial obligations of the person claiming indigence.[76]

87. The consideration of assets is intended to arrive at an estimation of the value of assets, excluding therefrom the assets deemed necessary for the normal living expenses of the person and his or her dependants.[77] Among the assets taken into account in this calculation are the person's residence, the furnishings and other property contained in the principal family home, motor vehicles, and all other assets including real estate either owned by the individual or transferred to another person for the purpose of concealment.[78] In determining the financial obligations of the person claiming indigence, consideration is given to living expenses in the place of residence of each dependant, and the rate of daily subsistence allowance set by the UN International Civil Service Commission.[79]

Observations

88. On their face, the criteria employed for indigence determinations appear to be reasonably detailed and sufficiently comprehensive to effectuate the core principles of objectivity, flexibility, simplicity, and giving due consideration to allowing the individual seeking legal aid to continue to honour his or her obligations to dependants. No one with whom the assessment team spoke during its visit in The Hague suggested otherwise.

89. Indigence of victims is not an issue. The assessment team was told that, based on experience, virtually all victims indeed are indigent. Moreover, given that each victims counsel was

[75] See RSPD at p. 7, ¶23.
[76] See RSPD at pp. 7-9, ¶¶24-28.
[77] See RSPD at p. 7, ¶24.
[78] See RSPD at p. 7, ¶24.
[79] See RSPD at p. 8, ¶27.

representing multiple victims, an incorrect determination that an individual victim was indigent would have minimal budgetary impact.

90. The situation is more controversial in regard to accused persons, where questions have arisen as to the Court's indigence determinations. It is reported that almost all accused persons have been found to qualify for legal aid. More specifically, Registry officials state that of the 23 accused currently facing charges before the Court, 21 (91%) have been found to be indigent.

Assessment

91. Given that the nature of the cases within the Court's jurisdiction are both extraordinarily serious, and frequently involve numerous victims, the life span of ICC cases has proven to be substantial. Only a person of considerable financial means would be able to afford the costs of experienced and capable counsel, as well as the costs of necessary investigation and expert assistance, for such serious and protracted proceedings. Thus, in this light it does not seem unusual that many accused have been found to qualify for legal aid.

92. Nonetheless, it is reasonable to expect that determinations of indigence will involve not only a searching inquiry as to the assets and obligations of those seeking legal aid, but also will involve some reasonable degree of investigation of the representations made by applicants for legal aid. It is on this last point –i.e., the capacity to investigate the representations made by applicants – that the current system might fairly be said to be in need of change. Registry officials informed the assessment team that its CSS does not have sufficient resources to do its own financial investigations of indigence. Instead, the CSS relies on the OTP for information about assets of the accused. It was stated that at least two investigators and an assistant would be required to give the CSS sufficient capacity to do necessary financial investigations.

93. There is one further issue regarding indigence that ought to be addressed, which concerns an unjustified refusal of an accused to liquidate available assets and whether such refusal ought to trigger consideration by Chambers of deeming the accused to have waived the right to appointed counsel. According to persons with whom the assessment team spoke, an accused with a case pending before the Court was known to own property of substantial value. Ordinarily, such property would be expected to be included within the assets available to the accused and would count against a finding of indigence. In this instance, the value of the

accused's property was sufficient –if sold– to permit the accused to hire counsel of his own choosing. However, the accused evidently refused to sell the property and instead maintained his request for appointed counsel. It was reported to the assessment team that the Court in this case had acceded to the accused's decision not to sell the property and agreed to provide some measure of legal aid.

94. In many national systems, an accused of substantial financial means would not be permitted to have the benefit of appointed counsel if he or she voluntarily chose not to liquidate otherwise available assets. The court would instead make a finding that the accused was deemed to have waived the right to proceed with assigned counsel and would decline to appoint counsel paid by the Court. While it is important to have an accurate process in place for determining whether an accused has available assets so as to afford to hire his or her own counsel, due consideration should be given to instituting a process by which an accused who refuses to liquidate available assets, not essential for normal living expenses, may be found to have waived the right to proceed with counsel paid for by the ICC.[80]

## Issues Concerning the Responsibilities of VPRS and OPCV

***Issue: Are the responsibilities between VPRS and OPCV delineated sufficiently? Are there any policies or guidelines on when to appoint an external representative or the OPCV?***

*Background*

95. The participation of victims is supported by contributions from CSS, the OPCV, and the VPRS.[81]

[80] However, if assets of an accused person have been "frozen" by order of a State Party, then the assets may not in fact be available to the accused. In such an instance, consideration may be given to seeking appropriate action under the pertinent provisions of the Rome Statute. See Article 86 ("General obligation to cooperate") and Article 93 ("Other forms of cooperation").

[81] The Registry also contains a Victims and Witnesses Unit (VWU), that works to provide protection, as well as psychological, administrative and logistical support, to witnesses and victims who testify before the Court. The VWU also provides protection to any other witnesses who may be at risk because of their testimony.

96. CSS employs a staff of eight persons and handles administrative issues, including financial matters such as payment of fees, providing equipment and supplies, and arranging for and authorising necessary travel.

97. OPCV employs a staff of about 40 persons and provides legal support to external lawyers appointed for victims. OPCV may also be appointed as the legal representative for victims and may intervene in proceedings to represent the interests of victims. In regard to the selection of Legal Representatives of Victims, there are three different approaches: (1) appointment of external lawyers only, (2) appointment of external lawyers with an OPCV lawyer appearing in court daily, and (3) appointment of OPCV as lead counsel with the possibility of an external attorney in the field.

98. VPRS employs 24 persons (16 in The Hague and eight in the field). It informs victims of their rights regarding participation in ICC proceedings and the potential for reparations granted by the Court, and helps victims to submit requests and petitions as appropriate. VPRS is the first entry point for victims who wish to participate in the ICC. VPRS maintains the database of victims' applications. The status of victim is accorded by chambers based on information provided by VPRS, which goes to the ground and begins mapping the victims and collecting information.[82] OPCV does not enter into that initial phase of the proceeding and depends on VPRS for everything related to applications, preliminary observations, or operations on the ground. OPCV and VPRS have weekly coordination meetings, where different issues are discussed (e.g., information regarding the mapping of victims or intermediaries, and legal analysis of topics such as whether some victims should attend court proceedings). VPRS consults with victims about what the victims want (e.g. whether they wish to be represented by a lawyer from their own country) and interacts with victims' counsel. In some instances, VPRS advises CSS as to the resources needed by lawyers in order to perform their duties to their victim clients.

[82] Registry also has an Outreach Unit to provide information to affected communities and to make them understand what the court is doing.

Observations

99. Each Chamber decides whether to appoint an external representative or the OPCV. When Chambers decide to appoint external counsel, they either ask OPCV to recommend whom to appoint or to do the selection. Once an accused person is arrested or appears in court, the "confirmation of charges" process starts. OPCV begins by consulting victims about their choice of representation, which potentially creates competition when OPCV wishes to continue representing victims at trial. Until recently, this unit was never appointed to represent victims in proceedings after the confirmation of charges. However, OPCV was recently appointed to represent victims post-confirmation of charges, although a dissenting opinion argued at length about the advantages and disadvantages of appointing an external lawyer.[85]

100. OPCV reports to the Registrar on administrative issues (budget, lack of staff, selection of staff), but not with regard to substantive matters. Indeed, although it is attached to the Registry for administrative purposes, OPCV operates independently when representing victims. This is obviously essential to preserve the privileged relationship that OPCV must maintain with victims and their legal representatives. But, concern was raised about whether OPCV is truly independent. The rationale given was that because members of the OPCV are staff of the ICC, and are under the administrative oversight of the Registry, the apprehension is that the OPCV may have to answer to non-clients. This creates a potential problem for OPCV's clients– victims for whom it is important to know that their interests alone will be represented. Other interviewees, however, expressed a different viewpoint on this issue. They noted that, since the victim is not a *party* but rather a *participant* in the proceeding, there is no conflict.

101. One of the persons interviewed expressed concerns about having representation provided solely by OPCV. For this individual, OPCV has technical know-how, but only local counsel can know "the heart" of the victims.

102. One of the lawyers interviewed complained that, when an ethical issue is identified and she or he wants advice, there is still no mechanism available at the ICC by which advice may be obtained. The lawyer can consult OPCV, but its advice is not binding in the way that ethical advice from a Bar would be.

[85] See Decision dated 16 June 2015 TrialChamber VI in the *Ntaganda* case, No.ICC-01/04-02/06, dissenting opinion of Judge Kuniko Ozaki.

103. The assessment team did not learn of any policies or guidelines to assist Chambers in making decisions regarding whether to appoint external representation or OPCV. Current practice at the ICC is for each of the Chambers to arrive at its own decision as to whether to appoint OPCV or external counsel, or a combination of both with one designated as "lead counsel." Establishing applicable policies and guidelines seems an area worthy of consideration.

104. Regarding the work of VPRS, a number of those interviewed expressed the view that VPRS' work essentially consists in collecting application forms from victims, which is a far different function than covering the entire representation of victims. Some external lawyers complained that they had difficulty in acquiring information or assistance from VPRS, while others expressed their satisfaction.

105. The assessment team was also told that field people should be part of the legal team's staff, not of VPRS. The point was made that those who work with victims in the field will have access to confidential information that ICC staff should not know. Those in the field are in direct contact with the clients. They are responsible for organising visits between clients and legal representatives, which is not an easy task. Moreover, they address other needs of victims, such as security and liaising with other services. Ultimately, all agreed that, to ensure good representation of victims, a strong team on the ground is needed and that a single field representative is not sufficient.

106. Some of those interviewed stated that the division of labour between VPRS and OPCV is clear and that the work is done well by both. Others were more critical and argue that the multitude of organisational units creates confusion about the division of labour and responsibility. In fact, it seems that expectations of the lawyers representing the victims about the two units vary greatly, and there is a sense of vagueness regarding their distinct roles.

107. Other persons interviewed by the assessment team complained about a lack of understanding on the part of the Registry as to what is needed in order for counsel to obtain victims' cooperation. These persons stated that there was a lack of trust by the Registry of external counsel, particularly when counsel contend that particular work, and payment of expenses, is necessary to effective representation.

108. Some persons contend that what needs to be clarified is what is asked by different chambers; that it is clear what victims want, but not clear how victims can effectively participate at the ICC.

Assessment

109. The benefits of utilising OPCV staff counsel include the institutional knowledge and experience that it has gained over its ten-year existence. The use of external counsel, particularly counsel who are familiar with the victims' home country and are able to communicate with victims in their own language, has obvious advantages including the potential for a more robust presence in the field. Given that no case has yet proceeded through to conclusion of the reparations stage of proceedings, the assessment team is unable to offer a definitive assessment as to the value of these competing modalities and instead recommends further study of the issue.

110. Finally, the assessment team was told that there is a real problem managing the cases of victims of crimes excluded from the proceedings because of the scope of a prosecution. The support offered to these victims remains very superficial due to the absence of resources allocated for this purpose. For example, in the Kenya situation, charges were narrowed after the confirmation of charges stage. VPRS tried to inform the victims of the change, but doing so is very resource intensive. Thus, VPRS ultimately sought to rely on local intermediaries to communicate to the affected victims, but lacked the resources to pay those intermediaries. From a strictly legal point of view, it is clearly arguable that such a situation does not fall within the remit of the ICC, since the problem is outside the judicial field. Such reasoning, however, seems hardly acceptable for the victims, who do not always understand why the crimes, of which they are victims, are not prosecuted. For its own credibility, the Court cannot afford to ignore this problem and a form of support, and minimum outreach, should be considered for these persons.

## ISSUES CONCERNING THE ROLE OF OPCD

***Issue: What is the appropriate role for the Office of Public Counsel for the Defence (OPCD) and is it appropriate that the OPCD be an independent office of the ICC?***

*Background*

111. The OPCD was created in 2004 with the directive that it "shall function as a wholly independent office. Counsel and assistants within the Office shall act independently."[84] Its purposes, as set forth in Regulation 77(4), are as follows:

> "[T]he tasks of the Office of Public Counsel for the [D]efence shall include:
>
> (a) *Representing and protecting the rights of the defence during the initial stages of the investigation* . . . . For this purpose the Office of Public Counsel for the defence may, on the instruction or with leave of the Chamber, make submissions concerning the needs of the defence in ongoing proceedings;
>
> (b) *Providing general support and assistance to defence counsel and to the person entitled to legal assistance, including legal research and advice* and, on the instruction or with the leave of the Chamber, advising on and assisting with the detailed factual circumstances of the case;
>
> (c) Appearing, on the instruction or with the leave of the Chamber, *in respect of specific issues*;
>
> (d) *Advancing submissions*, on the instruction or with leave of the Chamber, *on behalf of the person entitled to legal assistance when defence counsel has not been secured or when the mandate of temporary counsel is limited to other issues*;
>
> (e) *Acting when appointed* under regulation 73 [duty counsel] or regulation 76 [standby counsel]; and
>
> (f) Assisting or representing defence counsel or defence witnesses who are subject to article 70 proceedings [offences against the administration of justice] or when rule 74, sub-rule 1, applies [appointed counsel, retained counsel, and duty counsel], on the instruction or with the leave of the Chamber."[85]

[84] See Regulations of the Court at 77(2).
[85] See Regulations of the Court at 77(4) (emphasis added).

Thus, the OPCD has both specific representational functions, where its staff counsel is tasked with protecting the rights of individuals, and more general functions wherein it is to support and assist external defence counsel, at any point from the pre-trial stage until the conclusion of proceedings, including through the provision of bespoke legal research and advice to external defence teams.

*Observations*

112. In its conversations with stakeholders, the assessment team was told that OPCD provides significant substantive support to many external counsels. OPCD staff maintains a record of requests received for their assistance, and report that they typically receive between 800 and 1000 requests each year.[86]

113. By sharing its institutional knowledge of the ICC and its jurisprudence, OPCD can assist external counsel who lacks familiarity with the ICC come up to speed. In turn, OPCD's assistance may enable external counsel to more fully concentrate their attention on case preparation, trial, and post-trial proceedings. By advising and assisting with discrete issues of legal research, OPCD provides a valued defence perspective and it is in a position to develop a bank of available legal materials for later use by other defence teams.[87] The assessment team was also told that OPCD assists in a variety of ways with discrete issues that arise during court proceedings.

114. The staff of the OPCD is not large. In addition to the Principal Counsel, who is responsible for management of the office, there is one counsel, one associate counsel, a case manager, and

[86] The nature of these requests for assistance varies. Some are relatively simple and involve quick answers to non-technical questions. Others, however, involve sophisticated jurisprudential issues, entail extensive legal research and analysis, and require substantial time on the part of OPCD staff.

[87] OPCD staff indicated that they have completed four practice manuals that they make available to external counsel in order to familiarise them with ICC issues and practice. A fifth manual is currently in development. In addition, the OPCD have a variety of targeted, comprehensive legal memoranda that address important jurisprudential issues of significance to the defence teams. Those memoranda are updated as new developments occur in the ICC's jurisprudence and represent an important resource for defence counsel. The office also maintains a database of oral decisions in ICC cases, a database of interlocutory appeals, and a database on participation of victims. See the *Report of Activities of the Office of the Public Counsel for the Defence* (2014), at pp. 13-14.

an administrative assistant.[89] Only the OPCD Principal Counsel and its counsel meet the experience requirements to appear for clients in ICC proceedings. The modest size of its staff and resources has necessitated that the OPCD play only a limited role in the actual direct representation of clients.

115. Notwithstanding contentions to the contrary advanced by the Registry,[90] on the basis of the assessment team's conversations with stakeholders, it appears that there is widespread understanding of the difference between the substantive legal services which it is mandated that OPCD provide and the administrative nature of the role played by the Registry's CSS in providing its own assistance to defence teams. From discussions with OPCD staff, as well as communications from a number of private counsels, it is plain that there is little, if any, confusion as to the differing roles played by the OPCD and CSS.

116. The Registry provides assistance to the defence primarily through its CSS.[91] First created in 2009, the CSS administers the list of counsel, including certification of counsel for inclusion on the list, and provides information to the accused to facilitate the process of selecting counsel. It also provides technical and logistical support to defence counsel, helping to arrange for computers, office space, witness security, and other aspects of mission planning. The CSS is responsible for coordination of an annual training programme for counsel, although others do the actual training. Finally, CSS administers the legal aid programme of the Court on behalf of the Registrar. CSS does not, however, provide substantive legal assistance to either counsel or the person entitled to legal assistance. While it has expressed the intention to develop a computerised repository of ICC jurisprudence, CSS has not done so as yet. It does not purport or intend to offer substantive analysis or advice with regard to ICC jurisprudence.[92]

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[89] Contrast the five-member OPCD staff and its 2015 annual budget of 533,900 Euros, with the staffing and budget of the OTP. In 2015, the OTP had a total of 218 staff members, of which 154 were "professional" grade positions, and a total budget of 39,612,600 Euros. Thus, the OTP has more than 40 times the staff of the OPCD, and nearly 80 times the budget.

[90] See Registry *ReVision Project, Basic Outline of Proposals to Establish Defence and Victims Offices*, October 2014, at p. 6 ("While at first glance the roles of the two Offices [CSS and OPCD] are different, in practice there is overlap and confusion as to the exact scope of their respective roles and responsibilities").

[91] In addition to assisting the defence, the CSS is also tasked with serving victims, independent counsel assigned by judges, government representatives, and other external counsel appearing before the Court.

[92] In the internal audit of the legal aid system performed by the ICC's Office of Internal Audit (OIA) there was no indication of OIA having detected any confusion as to CSS's role. See, e.g., *Audit Report (FINAL) (Audit on Legal Aid)* (3 September 2014) at p. 17, ¶47 (detailing the tasks performed by CSS).

117. Consistent with its mandate to provide substantive assistance to the defence, the OPCD is required to function "as a wholly independent office" and OPCD's counsel and assistants are required to "act independently."[92] Thus, the OPCD "fall[s] within the remit of the Registry solely for administrative purposes,"[93] and the "members of the [OPCD] shall not receive any instructions from the Registrar in relation to the discharge of their tasks . . . ."[94]

118. The necessity of independence of the OPCD from the Registry not only rests on the importance of ensuring that the substantive advice provided by the OPCD is unfettered by outside influence, but also is required by the sometimes adversarial nature of the relationship between the OPCD and the Registry. It is not infrequently the case that the defence will elect to challenge a decision by the Registrar on the scope of legal assistance to be paid by the Court. In the event of a challenge, review is by the relevant Chamber.[95] The Registrar has chosen to be represented by his staff counsel in these appeal proceedings before Chambers. Both Registry officials and defence counsel shared with the assessment team that the proceedings have strained the relationship between the Registry and the defence. Given the adversarial tone of these contested matters, and the importance of the issues at stake to fairness and efficiency of proceedings, it can be seen as critically important that defence independence from the Registry not be lessened, both for external counsel and for the OPCD who work to assist those counsel.

119. An argument can also be made that independence of the OPCD is necessitated by the fact that in its substantive work with defence teams and the accused the OPCD is frequently privy to confidential defence information. In such circumstances, the duty of the OPCD to maintain confidentiality may require that it remain independent of the Registry.

120. Notwithstanding the relatively modest size of the OPCD budget within the ICC as a whole, some of those with whom the assessment team spoke questioned whether the funds allocated for the OPCD were well spent or necessary. They argued that payment to external defence teams ought to suffice to provide representation to the accused. Several factors are relevant to consideration of these claims.

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[92] See Regulations of the Court at Regulation 77(2).

[93] Id.

[94] See Regulations of the Registry at Regulation 144(1). See also Rules of Procedure and Evidence, Rule 20(2) (Registrar must carry out functions of Registry "in such a manner as to ensure the professional independence of defence counsel").

[95] See Regulations of the Court at Regulation 83(4).

121. First, as described previously, the size of the OPCD staff, as well as its annual budget, pales in comparison to the staff and budget of the OTP. OPCD has five staff members, of which three are attorneys, and an annual budget of 533,900 Euros. The OTP, by contrast, has a total of 218 staff members, of which 154 are in "professional" grade positions; and the total OTP budget for 2015 was 39,612,600 Euros. Second, viewed in light of the total ICC 2015 budget of 130,670,000 Euros, the OPCD budget is a mere .4 of one per cent of the total budget. Similarly, of the total ICC staff of 790, the OPCD staff of five persons is only .6 of one per cent of total staff.[96]

122. Consideration of the wisdom of having an OPCD ought also to include consideration of the importance the ICC places on the principle of "equality of arms."[97] In part, the OPCD was established in order "to remedy an imbalance between the prosecution and defence consistent with the principle of equality of arms by ensuring that defence teams were provided with legal assistance and support during trials."[98]

123. The prosecution, operating through the OTP, has an impressive array of resources upon which it may call to assist prosecution teams at all stages of proceedings.[99] In addition to its prosecution trial teams, included within the OTP are a Legal Advisory Services Section, an Appeals Section, and a Knowledge Base Unit. All are available to assist trial teams through research, advice, and technical assistance. Moreover, the size of OTP's staff virtually guarantees that it will be able to make available to its trial teams an impressive institutional memory of ICC proceedings of the sort that can prove invaluable in court proceedings. Whether the

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[96] Even factoring in the funds allocated for payment of private assigned defence counsel, the total 2015 ICC budget allocation for the defence–both OCPD and private assigned defence counsel combined–was 2.89 million Euros. Not only does this figure fall far short of the 39.6 million Euros allocated to the prosecution, but also it represents just 2.21% of total ICC spending.

[97] The Registry's Single Policy Document sets out a list of five basic principles applicable to its consideration and management of the Court's system of legal aid. The first of those principles is "Equality of arms," as to which it provides, "The payment system must contribute to maintaining a balance between the resources and means of the accused and those of the prosecution." RSPD at p. 4, ¶9.

[98] See IBA, *Fairness at the International Criminal Court*, August 2011, at p. 29.

[99] The OTP's prosecution trial teams consist of twelve members. See *Report of the Court on the Basic Size of the Office of the Prosecutor*, 17 September 2015, at p. 52. Compare and contrast the size of defence teams, which typically have just four members. See RSPD at pp. 10-11, ¶¶38-45.

OPCD staff of five is consistent with the principle of equality of arms should be viewed in this context.[100]

Assessment

124. The OPCD is providing a valuable service to the defence in cases before the Court and thereby contributing to the ICC's goal of fairness in proceedings. Given that the total expenditures involved for the OPCD are of a comparatively modest amount relative to those for the OTP, it would seem that detractors of the OPCD would have a heavy burden to prove that the OPCD is wasteful or unnecessary. The assessment team is not persuaded that they have carried that burden.

125. An additional issue relevant to consideration of the OPCD is whether it serves a valuable role in presenting an institutional voice of the defence within the ICC. According to the members of the OPCD, the OPCD deliberately attempts to be a voice for the defence in a variety of contexts at the ICC.[101] Unlike the external defence teams, which vary in experience and connection to the ICC, the OPCD appears well situated to play such a role. OPCD not only has accrued credibility with Court officials over its more than ten years at the ICC, but also it has the institutional memory of those who have participated in earlier policy and process discussions. Discussions with Court stakeholders reinforced the view that the OPCD is respected within the Court and is regarded as a knowledgeable and informed defence voice.[102]

126. The Registrar has suggested in his most recent proposal that an ICC association of counsel could potentially play a role as an institutional voice for the defence. He states, "the interests of counsel may be best served through the establishment of an association . . . ."[103]

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[100] Although the assessment team was not in a position to be able to calculate the actual savings generated, the OPCD argues that the legal work it performs for the benefit of defence teams results in financial savings for the ICC because expenditures do not have to be made in order to provide greater resources to the defence teams. See also IBA, *Fairness at the International Criminal Court*, August 2011, p. 32 ("OPCD's role in providing legal advice and support is invaluable, particularly for teams that have very little time to familiarize themselves with complex ICC jurisprudence and technical issues. This has the effect of ensuring that proceedings are fair and expeditious").

[101] The Annual Report of the OPCD provides a list of the ICC working groups on which it sits. See *Report of Activities of the Office of the Public Counsel for the Defence* (2014), at p. 8. According to the OPCD staff with whom the assessment team spoke, the OPCD routinely seeks permission to share documents and information provided to the working groups with the external defence teams in order to solicit input from those teams.

[102] See also IBA, *Fairness at the International Criminal Court*, August 2011, p. 29 ("The [OPCD] office is also seen as the institutional voice of the defence").

[103] See *Proposal of the Registrar on the Principles Guiding Establishment of a Victim's Office and a Defence Office*, p. 17.

127. It is not apparent why the OPCD could not continue to play the role of institutional voice for the defence at the Court. It need not, however, be the only voice heard. There is potential significant value to be gained by formation of an association of counsel. Should such an association be constituted, it would seem that there is ample room for its additional perspective to be heard.[104]

128. A final issue concerns the necessity for administrative oversight of the OPCD. Notwithstanding the fact that the budget of the OPCD makes up only a small portion of the overall ICC budget, the funds allocated to the OPCD come from the ASP and accordingly there must be oversight. At present, the Registry provides that oversight. The Registry performs that function through its review of weekly and annual reports submitted to it by the OPCD. Although the assessment team was not able to view the weekly reports, it was told that the reports provide a numeric count of the work performed by the OPCD. The assessment team did receive a copy of the most recent OPCD annual report and it indicates that during 2014 the OPCD provided assistance to 19 defence teams in ICC cases.[105]

129. Although it is beyond the scope of this assessment, and the assessment team takes no position on its merits, it would appear that an alternate approach might be considered in regard to the defence function. Rather than have defence services handled by the Registry, the ASP might choose to create a fifth independent organ of the ICC: a Defence Services Office, similar to the one that exists at the Special Tribunal for Lebanon. (The existing organs of the ICC are the Presidency, the Judicial Divisions, the Registry, and the OTP). Such an office would be given responsibility for performing the defence-related functions currently performed by the Registry,[106] as well as the substantive work currently done by the OPCD. The creation of a Defence Services Office could also present an opportunity to add to the oversight of the performance of appointed counsel, the training of counsel and staff, and the creation of

[104] It appears that the association of counsel under consideration would be comprised of both defence counsel and victims counsel. It remains to be seen how such an association would reconcile the sometimes competing views of those different groups, and whether it will be able to speak as a single voice on contested policy issues. That uncertainty would appear to support the need for retaining the voice of OPCD within the Court's policy deliberations.
[105] *See Report of Activities of the Office of the Public Counsel for the Defence* (2014), at p. 10.
[106] Those functions include certification of counsel, payment of counsel assigned to legal aid cases; allocation of money for expenses, investigations, and expert assistance; review of timesheets and related materials; and technical and logistical support.

performance standards.[107] Finally, it would seem that a Defence Services Office could be an appropriate party to perform the role of institutional voice for the defence in the Court's policy and budget work. However, as stated above, given the short timeframe for the assessment team's report, the team does no more than suggest that creation of such an office is an issue that may be worthy of future consideration.

**Acknowledgments**

130. The members of the assessment team extend their thanks to the numerous ICC staff, external counsels, officials from other international tribunals, and civil society representatives for their invaluable assistance in the fulfilment of the team's mandate. The participation of these individuals, both in making themselves available for interviews and, in some cases follow-up interviews, as well as by providing important documentation, was instrumental to the ability of the assessment team to receive a comprehensive understanding of the ICC legal aid system.

131. In this regard, the assessment team is especially grateful to the Registrar and the Registry's staff for their warm hospitality and logistical assistance.

132. The assessment team also thanks the ICC President Judge Silvia Fernández de Gurmendi, ICC Prosecutor Fatou Bensouda, OPCD Principal Counsel Xavier-Jean Keita, and OPCV Principal Counsel Paolina Massidda, and their staffs, for their kind support. The team members were deeply impressed by the seriousness and professionalism with which these individuals approached the critically important work of the ICC, and by the generous assistance and hospitality they provided to the assessment team.

133. The assessment team extends its thanks to Mr. Christopher "Kip" Hale and Ms. Donna Cline, and others at the American Bar Association, for their reliable support and valued assistance.

[107] Creation of a defence services office would potentially address one of the fundamental criticisms that the assessment team heard in regard to the current legal aid system at the ICC. That criticism is that the Court's conception of "Legal Aid" is too narrowly focused on its policy for payment of counsel and their teams, and that it fails to address in an effective way the many other elements that go into ensuring that defence representation is of the highest quality. The argument is made that what is instead needed is a separate entity, managed by those with experience in defence services, to focus on selecting qualified people to serve as counsel, training those people, overseeing their performance, and taking responsibility for supporting them in their work.

134. Finally, the assessment team wishes to thank its Special Advisor, Ms. Jill E.B. Coster van Voorhout, and her colleagues at The Hague Institute for Global Justice, for their tireless and important contributions to the successful completion of its work, including contributions made to the substance of this Report.

## **Annex I:** Brief Biographies of the Legal Aid Experts

### Honourable Marcel Lemonde

Since July 2012 Marcel Lemonde has been an international consultant in judicial matters, notably for the Council of Europe. He entered the Judiciary in 1976 and occupied the positions of investigating judge in Annecy then in Lyon, Vice President of the high Court of Lyon, Deputy Director to the National school of the Judiciary, judge in the Court of appeals of Versailles and President of a criminal chamber of the Court of Appeals in Bastia and then in Paris. He served as International Co-Investigating Judge of the Extraordinary Chambers of Courts of Cambodia from 2006 to 31 November 2010. Mr. Lemonde was also President of the French association of investigating judges from 1984 to 1987.

### Mr. James Bethke

Jim Bethke serves as the Executive Director of the Texas Indigent Defense Commission. The Commission is charged with implementing a statewide system of standards, financing and other resources for criminal defendants unable to hire attorneys. He serves on the Texas Criminal Justice Integrity Unit and is a member of Texas Criminal Defense Lawyers Association and served as the Chair of its Indigent Defense Committee the last two years. He also is a member of the National Association of Criminal Defense Lawyers. Last year, he received the *Daniel H. Benson Public Service Award* from Texas Tech School of Law. Nationally, he is a member of the National Research & Data Analysis Committee for the National Legal Aid & Defenders Association, past-chair of its Systems Development and Reform Committee, and currently serves as one of its two representatives to U.S. Department of Justice's Global Justice Information Sharing Initiative. He was recently appointed to the American Bar Association's Standing Committee on Legal Aid and Indigent Defense. During the 81st Legislative interim, he served as the presiding officer of the Timothy Cole Advisory Panel on Wrongful Convictions. He is a past-chair of the Juvenile Law Exam Commission for the Texas Board of Legal Specialization and is a Texas Bar Foundation Life Fellow. He is a U.S. Army veteran from the 101st Airborne Division, is a graduate of the University of Texas at Tyler and the Texas Tech University School of Law.

### Mr. Andrew Silverman

Andrew Silverman was the Deputy Chief Counsel for the Public Defender Division of the Massachusetts public defender agency, the Massachusetts Committee for Public Counsel Services, from 1997-2011. As Deputy Chief, he was responsible for management and administration of the Massachusetts statewide public defender programme consisting of thirty offices and more than 300 staff members. From 1980 to 1997, he practiced in both trial and appellate courts, and held various senior level positions in the Public Defender Division, including Criminal Defense Training Director and Director of Special Litigation. In 1999, Mr. Silverman received the

Massachusetts Bar Association Access to Justice Defender Award. He was elected to the American Law Institute in 2010. In 2011, he received the Thurgood Marshall Award from the Committee for Public Counsel Services. Mr. Silverman was coeditor of three editions of the Massachusetts *District Court Criminal Defense Manual*. As a member of the National Legal Aid and Defender Association's American Council of Chief Defenders, he was a principal author of its *Statement on Caseloads and Workloads* (August 2007). He has taught as a visiting assistant professor of law at the New England School of Law in Boston, Massachusetts, and as an adjunct assistant professor of law at Boston College Law School in Newton, Massachusetts.