RAPPORT DU COMITÉ DE LA DÉFENSE

Constitué de (par ordre alphabétique)

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Informations requises par le Comité Exécutif (mail Leigh Lawrie du 29 mai 2017) :

- **How often the committee met and wether the meetings were face to face meeting.**
- **The extent to which your committees had contact with members.**
- **A summary of decision taken and work done.**
- **The extent to which your committee's original project plan was realised.**
- **Proposal for the future.**
- **Recommandations for greater efficiency.**

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Les échanges qui ont été mis en place entre le président du Comité de la défense et les membres du Comité se sont opérés par courriels et contacts sur SKYPE, par téléphone et dans le cadre de réunions physiques organisées à La Haye par les membres s'y trouvant en poste.

Les uns et les autres étant disséminés dans différents pays, avec pour chacun d'importantes contraintes d'agenda, aléatoires (dossiers nationaux et internationaux), il est apparu très difficile de pouvoir réunir en même temps en face à face ou par visioconférences, les 7 membres du Comité, malgré toute la bonne volonté des uns et des autres.

Échanges SKYPE :

Les premiers contacts ont eu lieu dès avant le 1er août 2016, mettant en évidence les difficultés rappelées ci-dessus, accrues par des problèmes purement techniques liés à la mauvaise qualité du réseau internet, rendant

inconfortable l'organisation de visioconférences les quelques exemples qui suivent en étant l'illustration.

C'est ainsi que le président écrivait ceci le samedi 13 août 2016 :

« *Nous avons, je crois, des problèmes de connexion.*
Je vous propose de me faire parvenir dès que possible vos réflexions sur les éléments figurant dans le courriel que je vous ai adressé ce matin, précision étant donnée du fait que nous ne sommes pas encore en possession des éléments que nous avions sollicités (dont il n'est pas certain qu'ils aient vocation à apporter quelque chose d'essentiel à notre réflexion collective).
Je regrouperai l'ensemble et transmettrai un document récapitulatif à notre secrétaire pour qu'il le complète le cas échéant et le centralise.
Votre bien Dévoué Confrère ».

Le 17 septembre 2016, le président écrivait encore ceci à l'un des membres disponibles : « *peux-tu orchestrer la call conf et tout simplement demander à nos confrères de m'adresser ce week-end leurs suggestions sur la mission qu'ils souhaitent voir confier à notre Comité ?*
J'essaierai néanmoins de vous joindre dès 18 heures ».

La communication au travers de visioconférences a donc été suspendue pour donner lieu à des échanges écrits par mails, plus faciles en finalité à gérer, car n'imposant pas à l'ensemble des membres du Comité d'être disponible à un instant « *T* ».

Il a été envisagé d'organiser des réunions partielles à la cour pénale internationale entre les membres du Comité de la défense y étant présents en permanence, ce qui a été effectivement fait : la capacité des uns et des autres à communiquer a permis aux membres n'y ayant pas participé, d'être parfaitement informés du contenu des échanges réalisés et des propositions d'action abordées.

Le danger de privilégier les réunions « *physiques* » à La Haye et donc de poser pour l'avenir la nécessité pour les membres du Comité de la Défense d'y résider, est donc apparu en filigrane, en ce qu'il créerait une discrimination entre les conseils, quel que soit leur niveau d'expertise et le caractère effectif de missions en tant que conseils de permanence dont le seul défaut serait d'être exercées en dehors des Pays-Bas.

Pour fonctionner au mieux de ses capacités, le Comité de la défense a donc pris le parti de recourir à tous les modes de communication, collectifs ou parcellaires, la seule exigence étant celle de la remontée des informations utiles à l'exécution de sa mission.

Les annexes intégrées au présent rapport sont l'illustration de l'efficacité de la méthode adoptée par le Comité de la défense au cours de sa première année d'exercice (phase pionnière).

Échanges par courriels :

Plus de 150 échanges de courriels sur une année, celui du 13 février 2017 illustrant parfaitement les autres :

« Chers Confrères,

Pouvez-vous me faire parvenir par retour vos réflexions et propositions éventuelles sur le rapport ROGERS, étant précisé que j'ai transmis les miennes propres à Leigh au regard du délai qui nous a été imparti (mercredi dernier et non mars 2017).

Je vous en remercie très vivement par avance.

Cordialement Vôtre.
Michel BOURGEOIS ».

Les réflexions des membres du Comité de la défense ont pu être centralisées entre les mains de son président (voir ANNEXES).

Plan de travail :

Mylène DIMITRI et Xavier-Jean KEITA ont soumis aux autres membres du Comité, avant les fêtes de fin d'année, le projet de plan de travail suivant :

1. Commentaires et contrepropositions éventuelles à réception du Rapport Richard Rogers, d'ici Mars 2017, et Etude des questions d'Aide Légale en phase de réparations.

2. Etudes des difficultés liées au droit à des visites familiales et propositions ou recommandations.

3. Etude et suivi de toutes restrictions disproportionnées et non motivées imposées aux personnes détenues pour leurs communications, et avec l'extérieur (monitoring excessif).

4. Etude et suivi des difficultés particulières en raison d'une lourde charge de travail additionnelle créée par une « divulgation additionnelle » en raison d'un possible dossier sous l'Article 70. Discussion avec les équipes Bemba et Ntaganda afin d'analyser les difficultés concrètes relatives à ces situations particulières.

5. Proposition formelle au Greffier afin de participer à un Groupe de travail sur l'évaluation des meilleures modèles de divulgation et communication de pièces. Avant de faire la proposition, identification de la personne clé qui peut expliquer pourquoi le modèle STL n'est pas applicable.

6. Proposition de sujets pour de ''training'' à soumettre au Comité des Formations.

7. Suivi avec les Equipes de Défense des difficultés au Centre de détention (nouvelles règles internes communiquées oralement sans concertation ni information formelle) afin d'adresser un mémorandum officiel au Greffe.

8. Suivi avec les Equipes de défense de la nouvelle procédure imposée à elles par IT tickets afin de comprendre les raisons motivant ou justifiant cette nouvelle politique et afin d'adresser cette question de façon concrète et appropriée.

9. Rédaction d'une demande formelle au Greffe pour avoir des Licences pour chaque Equipe pour Case map et autres programmes informatiques afin d'établir l'égalité des armes et de moyens techniques et technologiques avec le Bureau du Procureur.

10. Création d'un Groupe email, (Groupe de Veille pour la Défense) ayant pour points focaux Mylène Dimitri pour l'ABCPI et un Membre désigné par les Equipes de défense afin d'échanger, par email, sur toutes difficultés ponctuelles auxquelles les Equipes de défense sont confrontées. Ce groupe permettra d'adresser au Comité de la Défense une liste détaillée, concrète et en ordre de priorité des problèmes qui doivent être adressés.

11. Rencontre privée et confidentielle, à sa demande, avec l'Équipe de Bosco Ntaganda qui souhaite discuter de certains problèmes avec un représentant du Comité de la Défense.

Ce plan de travail a été parfaitement respecté.

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La première année a été une année de rodage, laquelle a mis en évidence le fait que :

- les membres du Comité de la défense avaient besoin de réfléchir à des solutions à des difficultés techniques ou juridiques réelles, rencontrées par les équipes de défense, et qu'il était indispensable de créer parmi les membres des équipes de défense le réflexe de soumettre au Comité directeur toute atteinte aux droits de la défense constatée dans l'exercice de leur mandat,

- les difficultés en question devraient être formulées d'une manière telle qu'elles préservent la confidentialité des informations liées aux dossiers en cours, l'Association du Barreau de la Cour pénale internationale n'étant pas habilitée à être destinataire d'informations confidentielles,

- les membres du Comité de la défense devaient être « *alimentés* » par le Comité exécutif et les autres comités, s'agissant des questions à traiter et des documents ou supports techniques à analyser.

Les premiers écueils auxquels le premier comité de la défense de l'ICCBA-ABCPI a été confronté (qui ne doivent pas être différents de ceux rencontrés par les autres comités), permettront aux équipes constituées après les élections du 30 juin prochain, de travailler de manière plus confortable.

Les premiers sujets de fond qui ont été traités par le Comité de la défense, ont porté sur l'aide juridictionnelle et l'indigence, et le statut social et fiscal des conseils.

Les réflexions liées à ces deux thèmes centraux sont développées dans les annexes au présent rapport, pour en faire partie intégrante, le compte rendu (en langue anglaise) de la réunion qui s'est tenue le 14 décembre 2016 entre certains membres du Comité de la défense et des membres des équipes de défense de la Cour pénale internationale constituant l'une de ces annexes.

ANNEXE I

Meeting with the President of ICCBA David Hooper, Members of the Defence Committee and members of ICC Defence teams

14 December 2016

The Hague

Were present several members of the article 70 case, members of the Bemba main case, members of the Ntaganda case, Blé Goudé case, Gbagbo case and Ongwen case, and some Members of Executive Council, Cyril Laucci, Natalie Wistinghausen, David Young, and Xavier-Jean Keïta.

At the start of the meeting the President of the ICCBA indicated that :

- *The Registrar of the ICC suggested a liaison committee so the defence can have a better access to decision makers*
- *A journalist requested the emails of all Lead Counsels in order to communicate with the teams and in order to be able to follow up in a more efficient manner the ongoing cases. President explained that journalists are no longer funded and cannot afford being at the seat of the court on a daily basis, especially since a great part of the hearings are held in private session. Therefore, journalists quickly loose the thread of what is going on and would like to be able to communicate with Lead counsels.*
- *The President then asked the Defence teams to address problems and issues they are facing*
    - *Defence no longer allowed to raise IT tickets*

A few people from the Defence teams were told that they will stop allowing the Defence to create IT tickets when they face a problem with their computer or the software they are using. Since 2013 Defence were allowed to crate IT tickets.

If someone doesn't create an IT ticket or if the IT ticket is described differently it will not be resolved by the IT department. They cannot send an IT assistance request through their gmail account either because they are told that the IT department or CSS will not act upon a request that doesn't come through an ICC email account.

According to the Defence teams the IT department indicated that this new policy is only applicable to the Defence because Defence is not able to assess how urgent the problem is.

This issue of not being able to create IT tickets and have the IT problem resolved swiftly creates several delays for the Defence teams.

According to the Defence teams, having to go through CSS to request IT tickets is not a solution because CSS has an administration body that is less able to assess the issue then OPCD

The President asked the concerned teams members to draft an email describing the problem.

- *Defence would like to be informed before implementation of internal rules and policies*

Internal policies and administrative rules are changing without prior consultation with the Defence teams.

As a way of example, Defence teams indicated that there was a permanent announcement of a change of policy for interns. Defence teams now have to go through the official internship program before hiring interns. The description of the duties were drafted by CSS and do not reflect what the intern task will be if they end up working with a Defence team.

When interns were requested during deliberation, CSS indicated that no interns should be hired during deliberation because no workload. Defence team indicated that CSS is not in a position to assess the workload of Defence teams.

One team member underlined that this might be related to non EU citizen. This issue might be related to the Dutch government rules requiring interns to have health insurance, etc.

The core of the problem is that the rule changed overnight and some people got stuck on their way for their internship. There should have been prior consultation.

Told by CSS that only 2 interns are allowed to the service of the court. They said it was a security issue.

- *Report of Richard Rogers,Expert appointed by the Registrar for Legal Aid Review*

According to the President the report suggests a fee increase of about 50% from the 1st of January. However, the fee increase will have to go through State Parties their next meeting is scheduled for December next year. Although the Richard Rogers report is a good start the important battle will be with the State Parties.

A Defence team member asked whether the report addresses the issue of indigency. If they increase the fees they might reduce the number of accused funded. A suggestion was made to read the public version of the Bemba contempt filing on this issue.

- *Office space*

There is a space issue. Only 3 teams have an office space. This raises confidentiality issues. There is no flex office in C towers where the article 70 offices are located.

- *Disclosure issue*

OTP wants to change the rules of disclosure and copy the ICTY model. The issue is that whatever the Prosecution decides, the Court will implement and the Defence teams will have to deal with the new rule or policy. A suggestion is made that the ICCBA and the Defence teams need to react before the implementation. It was further suggested that a court wide disclosure group be held in order to hear the Defence opinion and suggestion on the matter

There is a coordination committee but contrary to the ECCC and the STL, the Defence has no chair. This coordination committee meets once a month.

Another issue related to disclosure is that Defence can't upload disclosure. They have to do physical disclosure by CD.

- *Software*

Case map and stamping tools for evidence are an issue for Defence teams. OTP has the most advanced software and for the Defence teams they were told 2 years ago that the court no longer has any licenses for additional Defence team.

In addition to the lack of licenses for those software, when a license is given the software is installed on one computer only. It creates logistical problems since an entire Defence team has to share one computer when several members need to use the software.

- *Tax issue*

Imposition and tax issue. Defence teams are asking what has been done and if there is a subcommittee created under the ICCBA to address this issue. President indicated that Emmanuel Altit is responsible for addressing the tax issue and Defence teams can follow up with him with their specific questions or suggestions.

- *Detention Unit policies*

Detention center has implemented verbal new rules and detainees are very unhappy. When a complaint is filed before the registry, Defence is usually successful but something has to be done in order for the Commander of the Detention Unit to follow the procedure and to cease the implementation of new verbal regulations.

- *Defence committee inaction*

At the end of the meeting the President underlined that the most inactive committee has been the Defence committee. The Executive Council is very disappointed with the Defence Committee as they haven't done much in the past 6 months and they need to be more proactive.

- *Regular meetings with Defence teams*

A Defence team member indicated that her team would like to be able to discuss specific Defence issues with a Defence representative in order to have one voice with the Decision makers. President David Hooper also indicated that in order to address the issues swiftly and efficiently these sessions with the Defence team members and the ICCBA should be held every month.

Done in The Hague,

14 December 2016

Mylène Dimitri & Xavier-Jean Keita

Président du Comité de la défense.

ANNEXE II

Report on the tax situation of persons intervening before the International Criminal Court who are not staff members and fall under the legal aid system

Introduction:

The legal aid system was created so that all Accused and victims benefit from the best quality representation. The objective is to ensure that indigent Accused have access to a legal team with a high level of professionalism, expertise and experience, ready to devote all their time to the Defence of a particular Accused. This also applies to legal representatives of victims.

This objective can only be achieved if they receive a decent retribution. The question of what constitutes a decent retribution was settled when it was decided in other international or hybrid tribunals that Defence teams get a salary mirrored on the salary scale of the office of the Prosecutor.

A first point to note is that in the legal aid system, nothing is planned for retirement, medical insurance or other family benefits, contrary to what ICC Staff members get.

The Staff of international criminal tribunals being exempted of tax, the amount of the retribution is net. For the members of the Defense/LRV teams to receive an equivalent amount, the amount of the salary received in the context of legal should be net as well. In other words, the net salary received in the context of legal aid must be tailored in a way to be equivalent to the salary received by Staff members of the Court at an equivalent salary scale.

Any amount taken away from this net salary would therefore lead to a break in the balance which would put in jeopardy the spirit in which the legal aid system was created and put back on the table the question of what is a decent salary.

As a consequence, the question of the tax exemption is fundamental in any discussion on legal aid reform since it determines the level of remuneration : there is little effect of obtaining a small increase of remuneration when 50% of that is then to be paid to the tax authorities. In 2

other words, the tax exemption issue is crucial because it determines the reality of what remuneration is received by members of Defense/LRV teams.

State of the problem:

In reality, those who fall under the legal aid system are treated differently because depending on the tax policy followed by their own respective local tax

authorities, they might or might not be subject to pay taxes for the same work, or might be subject to different taxes. How can this be remedied ?

At the ICC, the Assembly of State Parties (ASP) thought that it would solve this problem by providing for a system of compensation for charges, which would include any compulsory professional charges to be paid by Counsel, health insurance and any relevant income tax to be paid by members of the Defence teams.

This system seems to be designed, at least in theory, to allow for members of the Defence teams to receive adequate compensation for taxes paid. In practice, the policy does not reach this objective.

Indeed, the amount that can be recuperated under the scheme is limited to 30% of the salary for Counsel and 15% of the salary for support staff. These limits only allow Defence team members to recuperate a marginal amount of expenses in terms of charges due by Counsel, such as compulsory professional charges owed to national bars, health insurance, let alone income tax, which comes in addition to that and can reach up to 50% of the salary in some cases.

Two other factors contribute to the inefficiency of the system in reaching its goals.

First of all, it should be noted that over the years, the base salary payable to Defense teams members has decreased and no longer corresponds to the equivalent salary scale for Staff members of the Court.

Second of all, it should be noted the daily reality of trying to benefit from the professional charges compensation scheme. There is considerable paperwork involved and unclarity as to 3

what exactly is covered by the scheme. As a consequence, the reality of actual reimbursement can sometimes deviate quite significantly from the theory of what charges can be recuperated. This is a more general problem with the legal aid system : its overburdened bureaucracy. Defense teams are micromanaged by CSS in ways that hinder the work of the Defense and takes away considerable time and ressources in trying to fulfill all the requirements without which Defense teams cannot be paid or have access to basic material needs to do their job.

As a consequence, the current system falls very short of reaching its objectives.

To illustrate, a Lead Counsel based in Amsterdam, has to pay: (1) 40 or 50% income tax on his income received through legal aid; (2) professional charges- Dutch Lead Counsel spends € 45.000 a year for professional costs (insurances, Bar Association and other professional charges etc.), while a request for reimbursement of professional charges through the ICC will cover a maximum of € 30.000: (3) expenses, including travel costs to the Court and

back to Amsterdam (by train and bus) which are about € 1.000 per month. Since the Prosecution gets all its insurances, travel costs and all other financial benefits paid by the ICC, whereas this is not the case for Defence and LRV team members, especially not the ones who live in The Netherlands, it is more than safe to state that the imbalance between a Lead Counsel and a Prosecutor is unacceptable.

Another example: a case manager earning € 2.000 a month located in the Hague working full time in the ICC is obliged to pay tax at a rate of 42%, which is for foreigners in The Netherlands not enough to live with. Without case managers, Lead Counsel cannot perform their duties.

It should be noted that solving the problem of taxes will not solve everything, because it will be necessary afterwards to solve the problem of the professional charges paid by members of Defence/LRV team and, when that member is registered before a national bar, solve the specific problem of compulsory professional charges, for there to be true equality between Defence and Prosecution.

Steps taken : 4

In August 2015, representatives of some Defence teams met with persons part of a delegation mandated by the ASP to evaluate the legal aid system. These persons were given written documents which included detailed proposals in relation to the tax exemption and more generally with lega laid policy. However, the report produced did not take this into account, with no proposals in relation to taxes.

In order to solve the problem, an informal working group was set up.

A first meeting was held with representatives of the Registy on the 19 october 2015, which was followed by a number of email exchanges.

Registry representatives seemed receptive to the concerns expressed by the members of the working group, but put forward administrative obstacles that limit the possibly for the Registry to solve this issue directly. On 30 June 2016, the Registrar sent a letter to the working group indicating that « the issue of taxation must be necessarily addressed in the context of the consideration by the Assembly of States Parties of the total package of legal assistance paid by the Court ».

Proposals :

Two avenues are available to deal with the issue : 1) dealing directly with national Dutch authorities 2) revising the legal aid remuneration system to take into account the actual expenses of Defence team members. These proposals are inspired from the ones made by the informal working group.

I. Dealing directly with national tax authorities

1. The tax authorities of which depend directly members of the Defence/LRV teams

National tax authorities have on occasion dealt with similar issues.

For instance, the incomes of external experts acting on behalf of the UN are exempt from tax, as is the case for those acting on behalf of the European Council (translators, etc).

According to Article 18 of the General Agreement on Privileges and Immunities of the Council of Europe "Officials of the Council of Europe shall […] b) be exempt from taxation 5

on the salaries and emoluments paid to them by the Council of Europe". The notion of "official" should be understood according to the Arrêté du 18 janvier 1954, article 1 « les dispositions de l'article 18 (…) b) s'appliquent à tous les agents permanents et à tous les agents temporaires du Conseil de l'Europe ».

It has been decided (Tribunal Administratif de Versailles, 10 mai 1994, n°87-2778, Première Ch., Missirliu, GJF 11/94 n°1240) that « en vertu de l'Accord général sur les privilèges et immunités du Conseil de l'Europe ratifié le 10 mars 1978, un interprète de conférence internationale à titre temporaire auprès de cette organisation est fondé à demander le bénéfice de l'exonération des impôts nationaux sur les émoluments qui lui sont versés par cette organisation ».

Along the same lines, adopting the perspective of national authorities, it is interesting to note that in a case concerning Counsel appearing before the ICTR, le Court of Quebec considered that « *l'ensemble des éléments mis en preuve permettent de retenir l'intégration de la requérante au TPIR », that « de l'ensemble des éléments mis en preuve, le Tribunal est d'avis que la requérante faisait l'objet d'un rattachement hiérarchique et que sa prestation de travail était suffisamment encadrée pour que l'on conclut à l'existence d'un contrôle de sa prestation de travail et à l'existence d'un lien de subordination même si le contenu professionnel relevait de sa compétence », that « les éléments mis en preuve permettent de conclure que, lorsque travaillant pour le TPIR, la possibilité de profits et de pertes était inexistante pour la requérante et que son mode de rémunération était caractéristique d'un contrat de travail » and concluded that « la requérante a démontré de façon prépondérante que ses revenus gagnés en 2000 et en 2001 à titre de Conseil principal commis d'office d'un accusé indigent provenaient d'un emploi auprès du TPIR, un organisme spécialisé relié à l'ONU*» from which it followed that she was not legally obligated to pay to the tax authorities of Quebec any taxes on income earned at the ICTR received under the legal aid system. (Veilleux c. Québec (Sous-ministre du Revenu, [2006] J.Q no 4313 2006 QCCQ 3973, Nos : 200-80-000784-031, 200-80-000783-033, 19 April 2006).

In other words, to the same question that we are asking ourselves here in relation to Counsel appearing before the ICC, the Court of Quebec has given the following answer: the activity of a Lead Counsel is comparable to that of any official of the ICTR and that as a consequence 6

any income received under the legal aid system is tax exempt.

With these examples in mind, the working group has proposed two avenues in dealing directly with national tax authorities :

1. That the registry send a letter to all members of the Defence/LRV teams indicating that from the perspective of the Registry, these members must be assimilated, from a professional rather than administrative perspective, to Court Staff so that the legal aid system be truly effective. This would enable members of the Defence/LRV teams to contact their national tax authorities directly and explain the nature of the work done and ask, in their own name, an equivalent tax exemption to that perceived by the Staff of the Court. The problem here is that the Registrar does not want to substitute itself for national tax authorities by providing any guidance in this respect. Moreover, the Registrar has indicated that he could not directly send such information, as discussions about legal aid with the outside world was a prerogative of the ASP.

2. As a consequence, the second suggestion made to the Registry, as a fall back plan, is to ask that any Counsel who would make the request be provided with a letter explaining that from a professional perspective, there is no prima facie reason to not put members of Defence/LRV team are considered by the Registry on the same level of members of the office of the Prosecutor.

2. ***Dealing with Dutch tax authorities***

If that solution is too complicated to set up, or might result in an unequal treatment of Defence team members, due to the fact that national tax authorities might have different approaches, a solution could be for a global negotiation to be conducted with the Dutch tax authorities, at the condition that the objective of this negotiation be a complete tax exemption. This negotiation could not be led by Counsel, but would need to be conducted by Registry, with mandate of the ASP.

In that perspective it is important that the ICCBA make both the Registry and State parties aware of the situation and concerns expressed by members of the Defence/LRV teams and put forward concrete proposals such as the ones outlined in the present report. 7

II. Reforming the legal aid system

A second solution is to find an internal solution to the Court, i.e, to revise the legal aid system, and more particularly the compensation for professional costs system, to take into account the reality of the financial situation of Defense team members when calculating their gross and net salary.

Several points need to be made in that respect :

- The net income should mirror that of the income of the staff of the Court, notably from the Prosecution, as was envisaged explicitly by the drafters of the legal aid system. As a result, the income of Lead Counsel should be that of a P5, the income of an Associate Counsel should be that of a P4, the income of a Legal Assistant should be that of a P3 and the income of a Case Manager should be that of a P2.

- To this sum should be added the amount of the income tax paid to domestic tax authorities. In other words, this added sum is the equivalent of the "gross pensionable" for staff of the Court. It should be, according to European tax regulations, approximately 40 to 50% of the net income.

- Finally, to this sum should also be added the amount of professional charges. These charges are sometimes extremely high for Counsel and Support Staff registered before a national bar and can reach up to 50% of the income received through the legal aid system (see the example above). Accordingly, the 30% and 15% for Counsel and Support Staff respectively, currently provided for the reimbursement of professional charges should be increased to 40 or 50% of the current sum, depending on the actual cost of the charges paid at the domestic level (in the previous legal aid system, the amount that could be reimbursed in relation to compulsory charges paid by Counsel at the domestic level was 40% of the income received through legal aid).

These proposals are not unreasonable. In fact, inspiration for their implementation can be found in the legal aid system at the Special Tribunal for Lebanon, which provides that 8

Counsel can recuperate both professional charges and taxes paid. On this last point, the STL legal aid policy explicitly explains that this is necessary «In order to achieve parity between counsel for the Prosecutor and counsel for the Defence, taking into account that defence counsel may incur income taxation while staff members are exempt ». This parity is at the heart of what the ICC should be trying to achieve with the legal aid system.

Conclusion:

This issue goes beyond the financial interests of a handful of individuals. It strikes at the core of the principle of equality of arms at the ICC and the respect for the role of the Defence and LRVs as a pillar of the ICC. With no

equality of arms, means and treatment, there can be no fair trial and the whole international justice system is at risk.

To accept that members of the Defence and LRV teams, particularly Lead Counsel, see their income received through legal aid reduced by more than half and therefore that they will earn 50% less than their counterparts at the Prosecution, is to accept a sort of "low cost" system, which would de facto not allow highly qualified professionals to appear before the Court. This was most certainly not the intention of the creators and drafters of the legal aid system, who wanted accused persons and victims to get the best possible representation, in order for justice to be rendered in the best and fairest way possible.

There is no other viable choice than to exempt Defence team members from paying income tax if they are going to be able to have a decent standard of living, which is a necessary condition for them devoting themselves entirely and full time to cases of such importance and complexity that require their full implication and utmost dedication. It is a question of fairness. It is a necessary condition in order to guarantee that high profile and highly experienced lawyers will continue to participate in the ICC's proceedings. It is also a necessary condition to ensure true equality between the Defence and the Prosecution.

It is crucial that the ICCBA stress the importance of this issue in any discussions with both the Registrar and the ASP. It is a fundamental question that is too often ignored that that 9

should not be allowed to be drowned in the broader discussion of the legal aid reform, however important they also are.

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Emmanuel Altit

Fait le 27 septembre 2016 à La Haye, Pays-Bas.

ANNEXE III

RÉUNION DU COMITÉ DE LA DÉFENSE DU 25 JANVIER 2017

To: ICCBA Presidency

From: ICCBA Counsel Support Staff Committee

Date: 20 January 2017

Re: Observations on the Expert Report entitled 'Assessment of the ICC's Legal Aid System'

I. Introduction

1. The ICCBA Counsel Support Staff Committee ("Committee") commends the work of the Registry-appointed Expert, Richard J. Rodgers, and in large part agrees with the core findings of his report entitled 'Assessment of the ICC's Legal Aid System' ("Report"). Many of the Report's findings and proposals are similar to the views expressed by the Committee in its 'Observations on ICC legal aid system' ("Observations"), submitted to the ICCBA Presidency on 27 September 2016. The Committee stands by the Observations and the Addendum thereto.[1]

2. Further to the invitation of the ICCBA President, the Committee respectfully submits the below discrete comments on the Report.

II. Observations on the Expert's Report

3. The Committee endorses the Report's recommendation that 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*" (Report, p. 59).

4. With respect to the issue of taxation, the Committee also endorses the Report's recommendation that, at least as a starting point, "*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***" (Report, p. 60). However, the Committee respectfully underlines that such an agreement should clearly include all members of defence and victims team (as more specifically alluded to at paragraph 163 of the Report). Further, the Committee submits that any such agreement should provide retroactive protection from the imposition of host state taxation, or the revised legal aid policy should itself provide retroactive compensation for host state taxes that have been paid by legal team members.

5. The Committee also endorses the Report's recommendation (in line with the Observations, paras. 29-30), that CSS "introduce minimum fees levels for case managers and legal assistants according to their years of experience", while still retaining Lead Counsel's hiring authority under the flexibility principle (Report, pp. 59-60).

6. The Committee endorses the Report's proposal that, should the legal aid system shift to a complexity of case resource allocation system (as recommended by the Report and similar to the Committee's views (Observations, paras. 12-15)), "CSS should work with the ICCBA and be guided by the ICTY experience" in "develop[ing] the complexity criteria" (Report, para. 95).

7. The Committee disagrees with the Report's proposal that "Counsel would continue to act alone up to the initial appearance" (Report, p. 11). For the reasons set out at paragraphs 16-19 of the Observations, **the Committee reiterates its view that as soon as a legal aid funded suspect has appointed a permanent Lead Counsel, such suspect should be entitled to the appointment of a full compliment of legal team members.**

8. The Committee notes with some appreciation the Report's finding that: "*After the closing arguments and before judgment team members would be granted a (significantly) reduced ceiling of hours to complete necessary tasks*" (emphasis added) (Report, p. 11). While this proposal provides an accused with a definite right to a partially funded legal team during this phase of proceedings, for the reasons set out at paragraphs 22 to 24 of the Observations, **the Committee submits that a reduced lump sum amount, as opposed to a ceiling of hours, is the more appropriate approach to remuneration during this phase of a case.** Further, for the reasons set out at paragraph 22 of the Observations, the Committee believes that the Report, while acknowledging the existence of important post-closing argument duties (see Report, para. 55), may underestimate the amount of work to be undertaken.

9. The Committee **does not agree** with the Report's proposed application of a maximum hourly ceiling payment system, as opposed to fixed monthly fees, for "much of the **pre-trial phase (up to the confirmation of charges or three months before trial**)" (Report, p. 13). As partially addressed at paragraph 21 of the Observations, these pre-confirmation and pre-trial periods are normally ones of intense 'full time' activity for defence and victims teams, **which should continue to be included in the fixed monthly fee system** (and indeed 'limited activity' designations during these phases should be the exception not the rule).

10. The Committee additionally notes that adoption of a ceiling of hours – at any phase of proceedings – would result in victim and defence team members being unable to go on leave without their fees being reduced. **In contrast, their counterparts in the OTP benefit from a certain number of guaranteed leave days per year without any diminution in their monthly remuneration. Accordingly, if a ceiling of hours system were to be adopted for certain phases of proceedings, the Committee submits that victim and defence team**

members should be entitled to 'bill' a certain number of days-off to ensure equitable treatment with their OTP counterparts.

11. While the Committee does not take a view on the Report's proposed 'redefinition' of the expenses budget, **the Committee reiterates its position at paragraph 32 of the Observations that: "*As professional members of a defence or victims team, support staff who, with the agreement of counsel, are not based in The Hague, should be entitled to claim travel related costs for missions to the Seat of the Court on the same basis as counsel. There is no reasonable basis for differential treatment of support staff under the SPD in these circumstances*."**

12. **The Committee endorses** the Report's recommendation that "CSS introduce a legal services contract" to be signed by defence team members on legal aid funded teams and that CSS "provide standardised official payment slips to each defence team member" (pp. 71-72).

13. **The Committee endorses** the Report's proposal that some CSS administrative resource savings could be appropriately achieved through payment of "legal assistants and case managers in full, without the need for timesheets, providing they work at the seat of the Court" (Report, para. 227).

14. The Committee notes with concern the Report's very limited analysis and discussion of Article 70 cases (Report, paras. 265-266).

END

(TEXTE REÇU :

"**For the attention of the Defence Committee and Vice President.**

Various issues were raised by defence team members at the December defence liaison meeting and some appear to me to be particularly relevant for the defence committee. I would appreciate some feed-back on the issues by the end of January please.

1. **INDIGENCY**. In the forthcoming legal aid review, and bearing in mind the Rogers Report, we should be careful that any changes in the indigency criteria and processes do not make it hard for suspects to get legal aid.

Melinda Taylor makes the following observations :

Although Mr. Bemba is the only accused at the ICC currently required to contribute to his Defence- this issue (and the formula used to calculate indigence) can have significant implications for a number of future teams. This was the case at the ICTY where several defendants were found to be partially indigent. ***As a result, the Defence*** *received 25% or 50% less fees,* ***and had no way of recouping the rest from the defendant****.*

At the ICC – the issue is further complicated by the fact that the ICC has determined ***that it has the power to freeze the accused's assets pre conviction****. They did this in both the Bemba Main case, and the Article 70 case (i.e. Judge Tarfusser ordered States to freeze the assets of Mangenda, Kilolo, Babala and Arido as well).*

There are two main issues arising from the above:

1. *The fact that the ICC does not have the resources or expertise to a manage a complex asset freeze over a prolonged period of time – as reflected by the fact that unlike domestic states, the Court took no steps to preserve the value of Mr. Bemba's assets – which resulted in a significant depreciation of key assets (some are completely worthless now);*

The formula developed by the Registry to calculate how much an accused should contribute is mathematically incorrect and unfair, i.e.
a. It fails to deduct from the overall value of property or credit the accused for contributions that have already been made to Defence costs;
b. It fails to take into account annual depreciation;
c. Unlike 'fines' (which the Statute limits to 75% of an accused's assets for Article 5 and 50% for Article 70) – the Registry has no upper limit as concerns the maximum amount an accused can be compelled to contribute to their defence. It is possible that an accused might lose all of their assets, then be acquitted, and receive no compensation. This is particular unfair in light of the fact that the costs of Defence at the ICC are much higher than for domestic proceedings (including due to the impact of victim participation).

This is the link to the public redacted document we filed on this – which sets out these issues in more detail.
https://www.icc-cpi.int/RelatedRecords/CR2016_25743.PDF"

OBSERVATIONS : Les conseils disposent de bien moins de moyens et d'expertise pour garantir le blocage d'avoirs appartenant aux suspects et le paiement et des frais et honoraires de l'équipe : autant il rentre dans la mission de la Cour pénale internationale de s'assurer du fait que toute personne accusée disposera des moyens techniques et humains lui permettant d'assurer sa défense devant elle, autant est exclu de celle des Conseils de devoir se préoccuper de cette question d'intendance et de prendre le risque d'assurer la défense d'un accusé sans avoir la certitude d'être payée pour l'exécution de leur mission

Nous nous heurtons à la même difficulté en France lorsqu'un avocat est désigné comme avocat de permanence lors d'une audience precise dans le cadre d'un dossier pénal : le fait d'être de permanence ne signifie pas que l'avocat est avocat gratuit : cela signifie qu'il accepte d'être rémunéré dans le cadre de l'aide juridictionnelle dès lors que le prévenu en fait la demande : la difficulté est que si la demande n'est pas acceptée, l'avocat qui serait même détenteur d'une convention d'honoraires avec son client du moment, pour le cas où celui-ci ne serait pas admissible à l'aide juridictionnelle, doit, après prestation "courir" après ce client, le plus souvent sans espoir d'encaisser quoi que ce soit.

Nous ne devons pas reproduire ce système a-normal devant la Cour pénale internationale.

Il n'appartient pas non plus aux Conseils de rentrer dans des calculs d'apothicaire en cas d'admission partielle potentielle de l'accusé à l'assistance judiciaire : il faut imposer le principe d'une rémuneration DUE PAR LA COUR PÉNALE INTERNATIONALE et payée par elle QUELLE QUE SOIT LA SITUATION DE FORTUNE DE L'ACCUSÉ, à charge pour la Cour de prendre toutes les mesures de garantie lui permettant de se faire rembourser le cas échéant les sommes dont elle aura pu faire l'avance, sur les biens de l'accusé.

"2. **OFFICE SPACE**

Complaint was made of a lack of office space with some teams not having any. Is that so? Also that there was no 'flex office' in C tower. Can the DC please report back to me as to what the situation is please."

OBSERVATIONS :

"3. **DETENTION UNIT**

I understand that there have been some changes in the rules governing day to day life in the Detention Unit that have led to concern and some anxiety among those detained. The point raised by Melinda Taylor was that there may be good sense in having '**House rules'** - as I understand is the ICTY system. There is no 'house rules' for the ICC detainees and it has been suggested that it would be a good idea to have such settled parameters. I have written to the Registrar raising this for future discussion and would be grateful for the DC view."

OBSERVATIONS : OK pour l'établissement d'un règlement intérieur.

"4. **HEALTH INSURANCE**
I am unfamiliar with the issue, but I understand from one counsel that, in his opinion, it is important for team members to have health insurance. I have raised this today with CSS and the Registrar and raise it with you also as it seems to me to be a serious issue. I do not know what the situation is with staff, or whether any staff scheme can be extended to the independent bar and team members. I raise it here as it will be a subject for future discussion with the Registry. Of course, it is equally relevant for victim team members and I will also ask their view."

OBSERVATIONS : Les Conseils devraient être alignés s'agissant de leur protection sociale, sur les règles applicables aux équipes du Procureur : simple application d'une règle de parallélisme des formes nous rapprochant davantage du principe du procès equitable, de manière à ne pas voir amputer dans des proportions trop importantes, leur remuneration aujourd'hui "brute".

"5. **DUTCH MFA CARDS**
Concern was raised by one counsel that the MFA cards, which have to be shown with their passports by non EU members when travelling, specify the holder as being 'defence'. I don't know what the Victims representatives have on their MFA cards. Apparently some members are sensitive to this, and point out that it could be particularly problematic when travelling to a country which may be sensitive to the defence role. Again, I would welcome your view on the issue."

OBSERVATIONS : La mention "défense" est effectivement problématique. Les Conseils devraient simplement pouvoir voyager sous le label "COUR PÉNALE INTERNATIONALE" sans precision de fonctions, et bénéficier d'un statut "diplomatique".

"A number of other issues were raised of which you are aware. I have addressed several of them to the Registry – including, wi-fi. IT tickets, insufficient case map software and stamping tool, the restriction on interns coming only through the internship programme, changing such rules without notice, and the need to be in on any change in the disclosure procedure. I remind you of those issues should you also wish to contribute to the discussion on them."
Michel Bourgeois, 24 janvier 2017

1 The ‘Addendum to Observations on ICC legal aid system’ was submitted to the ICCBA Presidency on 29 September 2016.

Michel Bourgeois, 24 janvier 2017.

ANNEXE IV

OBSERVATIONS DU COMITÉ DE LA DÉFENSE SUR LE RAPPORT ROGERS

ASSESSMENT OF THE ICC's LEGAL AID SYSTEM (LAS)

(DOCUMENT DE TRAVAIL)

Figurent en GRAS les dispositions du rapport ROGERS appelant des observations particulières de la part des membres du Comité de la défense.

En gras et gros caractères trouve-t-on les observations qu'elles ont appelées de leur part.

(p. 6) 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.**

DÉFINIR.

(p.7) Analysis of the current LAS and recommendations for improving **the efficiency and effectiveness of the LAS for** both **DEFENDANTS** and victims.

(…) The questionnaire made clear that « **sufficient resources** » means « **the minimum** (p. 8) **level of resources that are reasonable and necessary for an effective defence, not the ideal level** ».

DÉFINIR.

10. « Lawyers must expect to justify their exenditure 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 accoutability process**. (…) The LAS should be smart and efficient.

FIXER LE CADRE, SUR LES PROPOSITIONS QUI SERONT FAITES PAR LES ÉQUIPES DE DÉFENSE QUI SONT LES MIEUX PLACÉES POUR

DONNER *UN AVIS ÉCLAIRÉ SUR LES PROCÉDURES À METTRE EN OEUVRE.*

(p.9)

11. Second, since the LAS is publicly funded, only those **funds that are reasonable and necessary to ensure the effective representation for defendants of victimes should be granted under the LAS**. Lawyers cannot expect the LAS to offer the level of resources sometimes provided in privately pad cases. However, there is a **minimum level of legal aid under which high quality counsel will stop accepting cases and / or will unable to provide adequate representation** (…).

LÀ ENCORE, LES ÉQUIPES DE DÉFENSE SONT LES MIEUX PLACÉES POUR FOURNIR DES ÉLÉMENTS DE DÉTERMINATION DE CE SEUIL, AU REGARD DES CONTRAINTES AUXQUELLES ELLES ONT ÉTÉ OU SONT CONFRONTÉES DANS LEUR PROPRE DOSSIER ? NOMBRE D'HEURES ? TÂCHES EFFECTIVES ?

(p.10) –
- i. liste système et ressource
- ii. composition de l'équipe

(p. 11) - iii investigation et expert budget
- v. rémunération

(P 12) **RÉMUNÉRATION** :

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:

(DÉTERMINER AVANTAGES / INCONVÉNIENTS ÉVENTUELS)

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 (p. 14) 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.

(p. 15) **PART II : LEGAL AID FOR DEFENCE**

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**.

(p. 16)

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

(p. 17)

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**.

(p. 18)

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 cocounsel at the ICC continue to lag behind the other tribunals**.

(p. 19)

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**.

(p. 20)
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**.

(p. 21) <u>INDIGENCE DETERMINATION</u> :

B. <u>Analysis</u>

(p. 22)

C. <u>Recommendations</u>

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.

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 :

OBSERVATIONS MB : Les conseils ne disposent pas des moyens humains et judiciaires qui leur permettraient d'identifier et de bloquer des avoirs appartenant aux suspects pour assurer le paiement et des frais et des honoraires des membres de leur équipe : autant il rentre dans la mission de la Cour pénale internationale de s'assurer du fait que toute personne accusée disposera des moyens techniques et humains lui permettant d'assurer sans tarder sa défense devant elle, autant est exclu de celle des Conseils, le fait de devoir se préoccuper de cette question

d’intendance et de prendre le risque d’assurer la défense d’un accusé sans avoir la certitude d’être payés pour l’exécution de leur mission

Nous nous heurtons à la même difficulté en France lorsqu’un avocat est désigné comme avocat de permanence : le fait d’être de permanence ne signifie pas que l’avocat est avocat gratuit : cela signifie qu’il accepte d’être rémunéré dans le cadre de l’aide juridictionnelle dès lors que le prévenu en fait la demande : la difficulté est que si la demande d'aide juridictionnelle est rejetée (ce qui n'est fait qu'après l'audience, après que l'avocat a plaidé pour son client imposé), ledit avocat (même détenteur d’une convention d’honoraires avec son client du moment, pour le cas où celui-ci ne serait pas admissible à l’aide juridictionnelle), doit, mais après prestation “courir” après ce client, le plus souvent sans espoir d’encaisser quoi que ce soit.

Nous ne devons pas reproduire ce système a-normal devant la Cour pénale internationale.

Je suis personnellement partisan d'un système dans lequel :

.l’accusé serait systématiquement pris en charge à titre « provisoire » au titre de la LAS

.le Greffe serait en charge de la détermination des avoirs dont l’accusé serait propriétaire et de leur mise sous séquestre pour :

- **permettre à la CPI de se faire rembourser les sommes qu’elle aura pu payer à titre provisionnel à l’équipe de Conseils,**

- **permettre à l'équipe de Conseils d'être garantie du paiement effectif de ses frais et honoraires, fixée par convention avec l'accusé, dès lors qu'il apparaîtrait a posteriori que celui-ci ne serait pas « indigent » au sens de la LAS, ou ne le serait que partiellement.**

Le principe d'égalité des armes comme la nécessité d'assurer la meilleure défense possible des accusés, justifient le fait que les équipes de défense n'aient pas à gérer des questions financières auxquelles l'équipe du Procureur n'est pas confrontée.

Il n'appartient pas non plus aux Conseils de rentrer dans des calculs d'apothicaire <u>en cas d'admission partielle potentielle de l'accusé à l'assistance judiciaire</u>.

.il faudrait donc imposer le principe d'une :

- **prise en charge à titre provisionnel par la Cour pénale internationale au titre de la LAS de tout accusé, jusqu'à ce qu'ait été déterminé son patrimoine et qu'aient été « séquestrées » des liquidités mobilisables à tout moment sous la signature du Greffe, permettant d'assurer :**
  - **le remboursement à la Cour des sommes dont elle aura fait l'avance,**
  - **le paiement des frais et honoraires qui auront été négociés avec l'accusé ne pouvant bénéficier de la LAS ou n'y étant que partiellement admissible.**

(p.22-23)

C. **<u>Recommendations</u>**

The Registry should seek to create better working relationships with LAS Report, Jan 2017 Global Diligence LLP is a Limited Liability Partnership registered in England and Wales with registration number OC383469 23

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

Les recommandations figurant dans le rapport relatives à ce point, deviendraient sans objet.

(p. 24) : **TEAM COMPOSITION**

(p. 29)

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.

(p. 30)

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 ».

(p. 31)

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.

(p. 33)

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'

(p. 36)

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 likely complexities of defence investigations.

(p. 41)

VIII. REMUNERATION

(p. 42)

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.

(p. 49)

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.

(p. 56)

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.

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).

(p. 57)

vii. Minimum Fee Levels

(p. 58)

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**.

(p. 59)

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).

OBSERVATIONS MB: Les Conseils devraient être alignés s'agissant de leur protection sociale, sur les règles applicables aux équipes du Procureur : simple application d'une règle de parallélisme des formes nous rapprochant davantage du principe du procès equitable, de manière à ne pas voir amputer dans des proportions trop

importantes, leur rémuneration aujourd'hui "brute". Leur rémunération devrait également être nette d'impôts,

(p. 60)

IX. EXPENSES

(p. 64)

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

(p. 67)

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.

(p. 70)

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).

(p. 71)

c. Legal Services Contract

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.

(p. 72)

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.

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.

(p. 78)

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

(p. 82)

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.

(p. 83)

F. Appeal Stage Fee Claims

(p. 86)

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

(p. 87)

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).

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ANNEXE V – NOTE Moriba DIALLO

En application de l'art21 des Statuts de l'ABCPI, notre comité doit prendre en considération les intérêts des suspects et des victimes et formuler des propositions à l'intention du comité des avis juridiques, au conseil exécutif et à l'assemblée générale sur toutes questions intéressant la défense.

Le droit à la défense tel qu'envisagé par la CSDH et les principes fondamentaux de la CPI, recouvre entre autres, le droit de disposer du temps, des facilités et des moyens de défense.

Aux termes de la règle 83(1) du règlement de la cour, l'aide légale couvre les coûts raisonnablement nécessaires à une représentation légale effective et efficace.

L'évaluation de ce coût doit relever essentiellement de la responsabilité du conseil sous l'œil vigilant de l'ABCPI et de la cour, le cas échéant.

Il doit en outre être clairement indiqué que les versements effectués au titre d'honoraires, ne doivent aucunement être retirés par quelque autre astuce. Nous devons demander avec insistance que l'aide légale soit nette de tous impôts et ou taxes.

L'équité du procès, dans le sens de l'égalité des armes étant une dimension importante du procès pénal international, nous devons nous inscrire résolument dans la voie d'un traitement équivalent à celui du bureau du procureur. Ses agents représentent environ 380 fonctionnaires pris en charge dans trois divisions avec des moyens d'enquête en coopération avec les structures des Etats, des moyens matériels, humains, financiers, logistiques…

L'ABCPI doit se donner les moyens de s'organiser tant au niveau de la Haye qu'au niveau des barreaux locaux.Le principe des délégués du Président de l'AIJA dans les pays quand nous étions plus jeunes, pourrait être une piste à explorer pour asseoir une base de structure au niveau des pays dans lesquels des enquêtes sont ouvertes.

CONDITIONS DE TRAVAIL : Le statut diplomatique devrait s'imposer sinon pour tous les avocats inscrits sur la liste des conseils, du moins pour tous les membres du conseil exécutif et des huit comités. Ce sont des avocats qui sont nuit et jour à la disposition de la cour et qui peuvent être requis à tout moment.

Enfin, dès l'instant où les honoraires sont connus dès la constitution, la provision doit être de droit et immédiate.

Bien à vous

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Rapport clos le 16 juin 2017
Michel Bourgeois
Président du Comité de la Défense.