



International Criminal Court Bar Association
Association du Barreau près la Cour pénale internationale

INTERNATIONAL CRIMINAL COURT BAR ASSOCIATION

RESPONSE ON THE LEGAL AID ISSUE

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I. Introduction

The International Criminal Court Bar Association (“ICCBA”) welcomes the current review of the ICC’s Legal Aid System (“LAS”) and warmly acknowledges the part played by the Registrar, Mr Herman Von Hebel, in initiating reform. It is not before time.

This document is about legal aid at the ICC. It is unique, as it is presented by counsel and support staff in the rare position of having conducted legally aided cases at the ICC, both for the defence and for victims. It is the first time such a perspective has been provided. Our experience is substantial, given the breadth of domestic systems in which we work and the cases we have conducted at the ICC and before other international criminal tribunals. This document should be seen as an effort to reflect the general position felt by the ICCBA’s representative members.

The ICCBA also appreciates the undoubted efforts made by the authors of the two reports and, in particular, the scope of the Expert Report which sought, to the extent possible, the views and opinions of those with direct experience of the court. The International Criminal Court is a unique institution. It is new, not particularly well formed, and decisions taken in its fourteen-year development have not always been for the best. It has a structure that does not lend itself to effective decision making. Coming to it for the first time, and in order to review its legal aid system and suggest improvements, must have been a daunting task.

There is a clear need for an objective and comprehensive review of the LAS that takes full account of the views, experience and concerns of counsel and support staff. At the time of the last legal aid review, in 2012, which led to a drastic reduction in the remuneration of independent counsel and support staff, there was no such consultation. Some part of the reason for the 2012 policy being approved by the ASP was, as Richard Rogers in his report (the “Expert Report”) refers, “*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.*”

In light of that history, the present consultation process is welcomed. In his efforts to consult with the ICCBA, and to receive the views of counsel and their support staff, the Registrar demonstrates a welcome change from his predecessors.

The existing legal aid system must be considered critically and after fourteen years of trial, and much error, the present review may be the last opportunity for the ICC to have a policy that is 'fit for purpose'.

The striking feature of the legal aid changes in 2012 was the drastic cut made to defence and victim counsel's remuneration. In fact, that seems to have been the sole purpose. The objective reasons for criticising the cut will be further addressed below but, for the past five years, it has resulted in defence and victims' counsel and support staff being paid at a level substantially below that received by their prosecution colleagues and found at similar courts.

The role of the Registrar and State Parties dealing with legal aid poses difficulties as both are clearly conflicted. The Registrar is concerned with advancing the financial interests of the Registry, the Prosecutor and the Judges. Even now there is pressure on the Registrar to increase the Judges' salaries and pension entitlement. The State Parties naturally protect their own financial interests and their representatives at meetings of the Assembly of State Parties ('ASP') are exhorted to ensure severe budget restraint. Unfortunately, these interests have been advanced in recent years over the legitimate interests of the defence. The defence has been denied a voice in previous legal aid discussions at the ASP and has not had the support and protection it should have received from the Registry or the State Parties.

When the Expert Report was commissioned in May 2016 it was understood that the review would lead to reform by 2017. Instead, the time line set by the Registrar stretches into 2019. The ICCBA can see no objective reason for such delay which is all the more puzzling given that the Assembly of States Parties, at its 15th Session last November, requested the Court to "*reassess the functioning of the legal aid system and to present, as appropriate, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly at its sixteenth session.*" Given the compelling need for adjustment, particularly to remuneration as demonstrated in the Expert Report, the ICCBA is intent on ensuring that such

essential adjustment is done this year, whether or not the general policy is completed by then.

Legal Aid / L'aide juridictionnelle

The phrase 'legal aid' does not appear in any of the principle documents of the court. The Statute, Rules of Procedure and Evidence, and Regulations of the Court make no mention of it but refer extensively to 'legal assistance', as when dealing with rights of an accused in Article 67 "to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it".

The term 'legal aid' is used in the Registry's document "Registry's single policy document on the Court's legal aid system", and by the Committee on Budget and Finance in its reports, is widely employed at all the international tribunals and in domestic jurisdictions.

It is used to denote the financial support provided to a person in need of legal assistance to assist him or her in circumstances where that party lacks the means to pay for it themselves. The term will be used throughout this document, but part of the difficulty in discussions about legal aid at the ICC is the lack of clarity in the vocabulary. The term 'legal aid' has been generally used at the ICC to denote the financial support provided not only to the accused but also to victims and other recipients. It is important to be clear what we are talking about.

In our own national courts 'legal aid' is readily understood to mean, in the context of criminal cases, the financial help a person receives from the state to pay for his or her defence. But, at the ICC, victims also receive legal assistance and the 'legal aid' to pay for it. Indeed, there are other situations when legal assistance may be provided – such as when a person is interviewed by the prosecution or provided legal assistance as a witness, when the term 'legal aid' is used. And all these situations are paid for out of a fund called 'legal aid'.

It is important to bear in mind the different circumstances when legal aid is provided. To do otherwise, and lump it all together, makes it difficult to identify the function it serves. We should therefore speak of 'defence legal aid' and 'victim legal aid' and

any budget analysis should distinguish clearly between the two, as well as making a distinction for legal support for witnesses under the duty counsel scheme. Victim legal aid should also be clearly distinguished from legal support provided by the OPCV.

A further reason for dealing separately with defence legal aid and victim legal aid is that while the functions met by defence legal aid are broadly well known this is not the case with victim legal aid. Also, the ICC has approached the provision of legal assistance and financial aid to victims in differing ways and it is presently unclear what course the court will adopt in the future

II. The Concept Paper – General Comments

Following our meeting this Tuesday, 25 April 2017, a Concept Paper is to be circulated to stakeholders, NGO's etc, for their comments, preferably in writing, which will then be discussed at a two-day seminar the Registry will hold from 19 to 20 June. That will lead, as the 'Tentative Consultation Timeline' states, to a collating of responses and a draft proposal for a new legal aid policy ("LAP") in July and circulation of that draft proposal in August 2017.

The ICCBA submits that the Concept Paper, which is presently very much in draft, needs to be far more specific in its proposals.

A. Subsequent action

The Concept Paper speaks of presenting "*to the ASP an update on the consultation process at its Sixteenth Session to be held 4-14 December 2017*". This is very disappointing in light of the necessary 'adjustment' that must be made and the fact that six months should be sufficient to provide articulate, supported policies as to legal aid. While a complete policy can surely be prepared for submission to the ASP in time for December, in the event this proves difficult, many areas can be left for future discussion.

B. Applicable Principles (Concept Paper, p. 3)

The ICCBA recognises the appropriateness of the five stated principles and, in particular, that legal aid must be carefully applied.

It should be borne in mind that legal aid is a necessary right provided to those who cannot afford to pay for representation themselves.

Legal aid should be set at a level appropriate to the serious and complex nature of the cases at the ICC and at a level sufficient to attract counsel of skill and experience. If it fails to provide sufficient remuneration and funding the ICC will not function at the level it should, the accused will lack counsel of sufficient ability, and the reputation of the ICC will suffer accordingly.

C. The Expert Report's general findings on legal aid for the defence

As demonstrated by the comparative charts in Part II of the Expert Report, legal aid funding at the ICC is at a very low level and significantly below that to be found at similar institutions, whether it be in terms of individual remuneration or as a percentage of costs.

Key findings in the Expert Report are that:

- legal aid constitutes *“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”)”*.
- *“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%.”* (Expert Report, para. 12)
- *“As an average over the last five years the ICC has spent a lower proportion on defence compared to the other tribunals.”* (Expert Report, para. 19)

Given that legal aid is only 3.25% of the budget, the argument voiced in 2012 that legal aid is a “cost Driver” was, and remains, wrong.

The Report makes the following emphatic observations:

“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.” (Expert Report, para. 21)

“...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.” (Expert Report, para. 24)

The ICCBA wholeheartedly agrees with the conclusions reached.

III. The Concept Paper – Specific Comments

A. Indigence determination (Expert Report, p. 21)

The ICCBA has no comment to make at this time.

(However, the ICCBA notes that there is currently no remedy whereby an accused can be awarded his legal costs in the event of acquittal at the conclusion of a trial or on appeal.)

B. Team Composition (Expert Report, p. 24)

The core defence team consists of one counsel, one legal assistant and one case manager. The ICCBA accepts the concept of a ‘core’ team. That is to say, a basic team, a starting point, but it is difficult to think of a case at the ICC where that has been adequate in the pre-trial and trial phase or where it might be adequate. The Expert Report demonstrates that the ‘core team’ at the ECCC, STL and ICTY is consistently larger than this ‘core team’ and includes at least an associate counsel and extends to the appeal phase.

1. Pre-initial appearance

The initial appearance is the first time a suspect appears at the ICC, whether by summons or by warrant of arrest and transfer.

Prior to initial appearance events will depend on the nature of the case. A person may be detained for months or years prior to making their initial appearance – as happened with President Gbagbo and currently Saif Gaddafi. What happens before initial appearance is important and can significantly effect the development of the case.

For a client and his counsel it is of the utmost importance to review and begin defence preparations (strategy and investigation plans, etc.) immediately following receipt of the Prosecution's Article 58 Application and any underlying evidence, in addition to preparations for the client's initial appearance.

In view of these necessary tasks and duties, the equality of arms principle requires the appointment of a full legal team as soon as feasible, not just upon the initial appearance.

At present, provision is made for only one counsel prior to the initial appearance. Given the possible difficulties posed by the case and the prosecution's dominant position at that stage, and taking into account the significance of the situation, provision of a core defence team (i.e. counsel, legal assistant and case manager) should apply immediately an Article 58 arrest warrant or summons has been issued, and at an earlier time where that is found appropriate by the Chamber to ensure the protection of the suspect's rights. This should be automatic, without counsel having to embark upon the bureaucratic and time-consuming process of requesting additional resources.

For victims' teams both counsel and case manager should be appointed, particularly given the procedural and technical complexities of proceedings before the ICC.

In most cases this will add little to the overall cost of representation as the time line is generally short before initial appearance.

2. After initial appearance

At present, only the core defence team is assigned until after confirmation - counsel, one legal assistant and a case manager. This is inadequate.

Pre-confirmation and pre-trial periods are times of intense 'full time' activity for defence and victims teams. Other than in exceptional circumstances they should receive full monthly remuneration. Only 'limited activity' designations during these phases should be the exception.

As the Expert Report states, *"[a]t 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."*

While the Expert Report supports the appointment of associate counsel after the initial appearance, it suggests that the appointment should be on a reduced basis - *"with a reduced ceiling of billable hours"*. It suggests a ceiling of 25-40 hours per month, depending on the complexity of the case.

The ICCBA considers that figure to be far too low, amounting to a mere few days a month, and too little to provide the support necessary to prepare for confirmation. The defence team is weak and inexperienced with the case at this stage, while the OTP team will have been in place for years preparing the case and with its full team in place, familiar with the intricacies and the available evidence. The defence will be required to process a great deal of disclosed material as well as deal with its own case preparation, consultation, administrative and custody issues.

The time line to confirmation is short and the provision of one additional counsel on a full basis will add very little to overall cost. Confirmation can take place more speedily if the defence is prepared and associate counsel will enable the defence to prepare more effectively for trial in the event of confirmation of the charges. It will

also enable the team to achieve better balance at this important stage as associate counsel will commonly bring different forensic, legal, language or cultural skills.

Following the initial appearance, associate counsel should be added to the core team.

At present associate counsel is not appointed until after confirmation which, given the functions and work that needs to be done, is too late. Under Regulation 83, the Registrar has the discretion to appoint the associate counsel from the initial appearance and that discretion should be so exercised.

3. After closing arguments and before judgement

At present only counsel, on a reduced basis, is retained for this period though, in practice, the Trial Chambers have ordered the retention of case manager and legal assistant, again on a reduced basis, *see, e.g., Lubanga/Ngudjolo, Katanga and Bemba*.

In the phase between closing statements and the delivery of the judgment, the defence needs time to continue its own investigations with a view to collecting evidence of mitigating factors as well as continuing to review victims' applications and any legal and/or factual research. Furthermore, many tasks remain to be addressed between most stages of proceedings, such as organisation of the case file, redactions, witness management and protection issues, pursuing investigative leads for new evidence and addressing client concerns.

The ICCBA notes 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*". (Expert Report, p. 11). While this proposal provides an accused with a definite right to a partially funded legal team during this phase of proceedings the Report underestimates the amount of work to be undertaken.

While the amount of work diminishes when awaiting judgement, the appropriate defence team composition, and its remuneration, will depend on the particular circumstances of the case. For example, in the *Katanga* case there were 166 filings in the final argument to judgement period. Also, the Trial chamber, having retired for six months, gave notice of its intention to consider implementing Regulation 55 which triggered interlocutory appeals and further investigation by the defence.

The Expert Report's suggestion that representation could be limited to a reduced number of claimable hours, such that *“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”* is far too limited. For any periods of 'reduced activity', set out in the current policy document, the need for continuity must be taken into consideration to avoid the situation where the original defence team will be difficult to reconstitute as team members assume other professional commitments.

This is likely to effect support staff more than lead counsel or associate counsel. Support staff are more likely to depart a team in light of significantly reduced pay and uncertain job status. This presents a marked disadvantage to the accused in later stages of the case when such staff, with their case knowledge and function, play an important role. The prosecution team will continue in place and are not disadvantaged. Mechanisms for retaining core support staff, are needed. Such a mechanism will better ensure that counsel can retain those support staff with intimate legal, factual and procedural knowledge of the case and who may have built relationships with witnesses and contacts. To do otherwise risks delays in legal proceedings and / or a lower quality of legal representation if counsel, once judicial activities proceed, must recruit new team members who will then have to become acquainted with a voluminous case record and case file.

Permanent appointment of the core team (or counsel and case manager for victims teams) under a certain percentage of the lump sum during periods of genuine reduced activity is therefore in the interests of the client and the efficient and proper conduct of proceedings and has been recognised as such by Trial Chambers.

It is not team composition that is the determinative cost factor at this stage but, as with other stages, the time it takes between closing arguments and judgement. The ICCBA can identify no justification for judgements taking as long as they sometimes do.

4. Appeal phase

The ICCBA supports the increase in team composition recommended by the Expert Report. There is great value to be had in ensuring that specialist appeals counsel is made part of the defence team.

5. Reparations phase

It is unclear what is being recommended for the reparations stage.

6. Article 70 cases.

The Expert Report suggests that Article 70 cases (Offences against the administration of justice) merit fewer assets than other cases at the ICC. (Expert Report, para. 265)

Article 70 covers a wide range of criminalised behaviour, including giving false testimony, presenting evidence that the party knows is false or forged, corruptly influencing a witness, tampering with or interfering with the collection of evidence, Impeding, intimidating or corruptly influencing an official of the Court, soliciting or accepting a bribe. Many of these offences could, it is accepted, be dealt with in a straightforward manner. They should not require a confirmation process and they should be capable of being resolved in a much shorter trial than mainstream cases.

However, Article 70 cases should not be underestimated. As stated in the ICJC Report, *“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 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.”* (ICJC, para. 76)

The ICCBA does not support the general suggestion that Article 70 cases inevitably require less assets than Article 5 cases. Limiting hours pre-trial will not be an efficient intervention and may well lead to underprepared cases and delay. The prosecution will not be so handicapped.

The Expert report suggests that *“at trial, a single counsel should be sufficient”*. However, that may not always be the case and there may be Article 70 cases that require at least a full basic team of counsel, legal assistant and case manager. The case manager is necessary in all ICC cases given that it is an electronic court and the

complexities of case management that entails. The presence of an associate counsel is an acknowledged safety net against delays caused by health or client difficulties on the part of lead counsel.

Given that many Article 70 cases may be straightforward and expeditious, the legally aided cost will be much reduced in any event.

The ICCBA agrees with the Expert Reports observation that Article 70 cases “*have the potential to vary considerably in terms of size and complexity, the CSS should maintain a flexible approach*”.

C. Complexity as a criterion

The Expert Report refers to a complexity criterion as a determinative of the level of legal aided support in certain specific areas, that is to say, awarding a lump sum to cover all the requirements of a specific function or phase of the proceedings.

The Report states that “*the Court may consider the possibility of introducing the concept of “case complexity” in some parts of the LAS to assist in the determination of appropriate resource levels. The Report recommends its use be confined to the investigation budget, the additional means budget, and as part of the lump sum at the appeal stage.* (Expert Report para 95)

The ICCBA is not persuaded, even to the limited extent suggested, that ‘complexity’ as an over-arching criterion is workable.

Undoubtedly, some cases are so complex as to merit further legally aided support but in all cases, given the ICC’s mandate, its principle of complementarity and the gravity criterion for admissibility, a high degree of complexity must be inferred.

Unlike the ICTY, where cases had a common background and could be compared ‘like with like’, the diverse nature of situations and cases at the ICC would render an over-arching comparative criterion, particularly if applied at the outset, impracticable.

The first two cases tried at the court – *Lubanga* (ICC-01/04-01/06) and *Katanga and Ngudjolo* (ICC-01/04-01/07) - present an interesting example of the difficulty. The *Lubanga* case concerned charges relating to child soldiers, the *Katanga* case, apparently, an attack on one village on one day. The *Lubanga* case occupied 204

court hearing days and currently has over 3,200 filings on record. The *Katanga* case occupied 265 court hearing days and resulted in over 3,700 filings. Nobody would now argue (and certainly not the trial judges in either case) that either case was other than highly complex and both have taken many years to conclude. A review of the record of each case will demonstrate ‘complexity’. Appropriate CSS management is the best guarantee of the need for assets fitting the case.

ICC cases are highly complex and all cases to date have demonstrated a sufficient level of complexity sufficient to undermine the value of the proposal of measuring complexity as a criterion, particularly at the outset of cases. This is not to say that an even more highly complex case should not receive more assets but the starting point must be ‘highly complex’.

There are of course other factors found only at the ICC to distinguish it from other courts and which contribute an added level of complexity – or work – to a case, such as victims participation and the effect of Regulation 55, and other factors.

As to the specific areas suggested in the Review where a lump sum could apply, based on complexity, the ICCBA makes the following comments.

1. The investigation budget

The expert report recommends a separation of the creation of a new “‘*investigation and expert budget*’ to cover expenses related to the substance of the case—primarily *field investigations, experts, and translation*” while “*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’*” (Expert Report, p. 36) The distinction does not appear to effect their constituent functions.

The **Investigation budget** is mentioned in the Concept Paper generally at page 11.

It is worth noting that the original legal aid scheme allocated an investigation budget that was wholly unrealistic and its subsequent increase was both necessary and inevitable. As the ICJC report stated, “[t]here 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.” (ICJC, para. 58)

Consequently, the original amount, of some €24,000 was increased to the present amount available of €73,200 Euros. This is not to say that that present amount represents a realistic maximum;

- *“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.” (ICJC, para. 61)*
- *“an arbitrary figure that was oftentimes inadequate.” (Expert Report, para. 72)*

The €73,000 is not provided to the defence team as a lump sum but represents the amount available for the defence to draw upon following provision of requests and supporting details through mission plans. In the event that the budgeted amount is insufficient, it can be augmented if the defence submit an application for further funds supported by argument agreed with by the Registry. The effectiveness of the system is dependent on good and fair CSS management. That system has worked well to date and provides both flexibility and fiscal control in light of the developments and needs of the case.

It is difficult to see how a complexity/lump sum system will be better or markedly different to the present system. After all, the present system for the investigation budget is, in effect, a lump sum system, and the proposed lump sum system is also to be flexible, *i.e.*, not limited. The one difference is that the initial sum to be made available seems to be dependent on an initial assessment of complexity.

Providing a lump sum, based on the assumed complexity of the case viewed from the outset, is both difficult and impracticable. The defence requirements for investigatory assets can only be properly measured as the case develops, issues emerge and the defence’s needs identified. An attempt to measure a case’s complexity at an earlier stage will be a very unreliable indicator.

Moreover, perceptions of case complexity do not reflect other important factors that

will contribute in large measure to investigation costs – such as where the investigations have to take place, where the witnesses are to be found, whether the defence advances a positive case, what technical and expert advice is required and the timing and completeness of disclosure by the prosecution. Belated disclosure of substantial material is inevitable given the regime of redactions and aggravated by late disclosure of material by the OTP.

The Expert Review mentions that the current budgeted figure “*may be too generous for straightforward cases in nearby locations*”. There has not yet been such a case. It is important to recall that the basic budget available for investigation is not provided in a lump sum but dispensed bit by bit on application and subject to review by the Registry. Consequently, if there were to be a case that did not require the full ‘basic’ amount it should not receive it.

In practice, in all the cases that have gone to trial, the basic amount has proved insufficient. This is unsurprising. Complexity is a direct consequence of the ICC’s mandate, complementarity and mode of investigation. Because of the nature of the ICC’s mandate, counsel work on situations and cases in relation to countries which are still conflict areas (DRC, CAR, Darfur, Libya, Mali), where victims and witnesses are spread over several countries (all cases and situations), without access to the relevant areas (Darfur, Libya, Mali, Georgia), without any legal basis for privileges and immunities (Darfur, Libya, CIV) and while being excluded from the benefit of essential field support for purpose of local transport and security (all cases and situations: current MoUs with UN missions do not include services to Counsel, or on an ad hoc basis only). Because of ICC’s complementarity, Counsel’s actions can also be impeded by domestic proceedings (all situations and cases).

In any consideration of the defence investigation budget, consideration must be paid to the basic principle of equality of arms. A linking of the investigation budget of defence teams to that of the OTP investigation in a particular case is relevant. This will require an increased transparency as to the use of OTP budget per situation/case. It will also require taking into account that OTP teams benefit from field services which are not available to defence teams.

Also, account should be taken of the OTP’s specific budget for witness protection and

the need of a similar budget for defence teams. Provision of interpretation and translation services should be commensurate with the OTP's. The Registry should ensure the provision of the same administrative support as for the OTP, particularly in respect of IT facilities and support in the field which has lagged far behind the facilities provided to the prosecution. Equality of arms must be more than a catchphrase.

In the event of any 'complexity' evaluation process, the Registry should seek and take into consideration the views of counsel as to the base-line complexity of the case and should consult the ICCBA.

2. Resource person

The ICCBA disagrees with the Expert Report's statement that "*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.*" (Expert Report, para. 81). The use of such a person, otherwise known as a 'resource person' was first introduced by defence teams involved in the first cases, both as a useful asset and as a necessary economy given the very low level of the investigation budget. It is unnecessary to impose such a person on teams. It should be left to teams to decide the manner in which they choose to investigate a case. Such a person, often paid very little in comparison to a trained investigator, is not always appropriate. Nor is it necessary to make such a person a permanent feature of the team, as suggested in the Expert Report.

3. Additional Means

The Expert Report suggests that "[t]he 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."

It recommends that "CSS should develop a transparent system to identify the 'complexity' of the case at the start of the proceedings." (Expert Report, para. 94). "...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)." (Expert Report, para. 95)

Applying a ‘complexity’ criteria from the start of the case will, as argued above, be impracticable and, if done, require constant revision and flexibility. The vocabulary used in the Report – ‘significantly’ and ‘exceptional basis’ - does not omen well for flexibility. Flexibility is key to a fair legal aid system and should be used mainly to justify increases in the resources for legal teams.

In effect, the present FTE system already aims at adapting the resources to the complexity of the case. The present system, based on the development of the case, is in effect a form of continuing assessment based on complexity. It is therefore unclear what, if any, benefits will result from changing the present system. The ICCBA fails to understand the difference between FTE and the proposed change.

The current system is complex and somewhat arbitrary and merits extensive review. One factor that should carry weight in assessing a request for additional means is how many prosecution counterparts are working on the same case, itself a good indicator of a case requirements. In addition, a system should be put in place where the CSS can grant additional means despite the fact that the parameters do not amount to one or more FTE’s. The ICCBA agrees that the present system could be simplified, but an alternative and better system has not yet been demonstrated.

4. Expert budget and Expenses Budget

As noted above, the Expert Report favours the creation of a new ‘investigation and expert budget’ to cover expenses related to the substance of the case—primarily field investigations, experts, and translation.

Though this is not dealt with in the Concept Paper, the subject was addressed in the Expert Report where it was noted that “[a]t 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.” (Expert Report, para. 62).

The Report proposes that *“the 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’.”*

The ICCBA agrees that the expenses budget should be solely to meet the personal expenses of the team, should be fair and adequate and meet the reasonable daily expenses and residency requirements of team members and their reasonable travel to The Hague. A monthly allocation, as provided at other tribunals, will reduce red tape.

However, rather than lump the cost of expert evidence with the investigation budget, **expert evidence** should be the subject of a specific application for funding.

There may be cases where little or no expert evidence is required by the defence (such as in the *Katanga* case) while other cases may require expensive expert advice (as occurred in both the *Kenyatta* and the *Ruto* cases where expert telecommunication evidence was obtained, albeit that those cases were privately funded). In practice, some cases will require funding for expert evidence and others will not.

Similarly, with **translation**. Some cases may require extensive translation while other cases may require little or none. The budget allocated to a case by the OTP for translation may be a good indicator of a similar need on the part of the defence.

5. Expenses

Paragraph 144 of the present single policy document states that reimbursement of expenses “*is not extended to other team members [beyond counsel] as they are presumed to be primarily based at the Seat of the Court*”.

Several legal assistants are not based in The Hague and move regularly between their respective countries of residence, or other locations, and The Hague. As professional members of defence or victims teams, support staff who are not based in The Hague should be entitled to claim travel related costs for missions to the Court on the same basis as counsel. There is no reasonable basis for differential treatment of support staff in these circumstances.

6. Appeals

The ICCBA recognises that, of the three specific areas suggested, the appeal stage may best lend itself to a lump sum payment system.

Though little detail is provided, the scheme is also recommended to extend to the Reparations phase.

The Expert Report recommends that “[t]he appeal and reparations stages would apply a lump sum system whereby lead counsel would determine the team composition within the allocated budget.” (Expert Report, p. 11). The argument for doing so is expressed as being “the work requirement is relatively predictable, irrespective of duration.” “The lump sum would be assessed according to the complexity of the case.” (Expert Report, p. 13). The Report again emphasises the importance of remaining flexible to the demands of the case.

That “the work is relatively predictable, irrespective of duration” is not necessarily the case and depends entirely on the issues posed. Assessment of the lump sum on the basis of ‘complexity of the case’ may well be misleading. A ‘complex’ case may well have a simple basis of appeal, and an apparently simple case raise very complex issues.

It is important to bear in mind that the work and effort that goes into appealing a case places great demands on a defence team. At the other courts and tribunals, a larger core team is put in place for appeals than the core team at the ICC.

The Expert Report recommends that “in the event of an appeal, it is reasonable for an associate counsel to assist counsel, at least on a part-time basis.” In practice, all cases so far have been granted associate counsel for appeal, which indicates such appointment is appropriate.

A defence team is currently paid on a monthly basis during the drafting period. The cost of the defence for an appeal is, therefore, a factor of the team’s monthly allocation (dependent on the number of team members) multiplied by the length of the drafting process. The drafting process is subject to statutory time limits and is judicially managed. An appeal is meant to be lodged within 60 days.

Outside the ‘active’ period teams are placed on a much-reduced remuneration. It is, therefore, difficult to see how changing to a lump sum payment based on size and complexity will be an improvement on the present system. The ICCBA suspects that it will lead to less, rather than more, payment and consequently– if the work has to be

done – will be unfair on defence teams.

In respect of the Reparation phase the lump sum system might be workable. The suggestion needs further examination in light of the two cases currently in that phase, further details and discussion.

7. Remuneration

The remuneration paid to counsel and support staff is set out in the Registry’s Single Policy document and reviewed at paragraphs 98-164 of the Expert Report. The ICCBA supports most of its conclusions.

In making its observations, the ICCBA emphasises that they apply *mutatis mutandis* to the victims’ counsel and support staff.

a) *Comparison of fees with other courts and tribunals*

The Expert Report makes a careful analysis of the fees paid by similar courts. These courts have applied the same equivalence principle in establishing fee levels as the ICC purports to have done. The court and tribunals also have the benefit of 20 years of experience in establishing a fair payment regime.

“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.”

It is reasonable to be guided by the levels of remuneration paid at other international courts. The Report observes that “[e]ven 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.” (Expert Report, para. 149)

“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.” (Expert Report, para. 21).

Plainly, the level of fees for counsel at the ICC fall significantly below those at the other courts or Tribunals. There is no evidence that the ASP ever had low fees as an

objective. The present situation came about through incompetence and a casual regard for defence interests within the Registry at the time.

b) Equality of Arms / Equivalence

The first legal aid policy in 2006 appropriately compensated counsel and support staff in accordance with the equality of arms principle. The reduction in fees under the 2012 policy plainly does not. The cuts in 2012, as demonstrated by the Expert Report, led to levels of remuneration falling far below equivalence levels and below those found at all other tribunals. They now stand below the minimum required to ensure quality representation before the Court on a sustainable basis.

The ICCBA endorses the Report's recommendation that "*[t]he 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.*" (Expert Report, p. 59).

It remains the objective of the present system "*to ensure a degree of equivalence between counsel and members of the Office of the Prosecutor, so as to further uphold the principle of equality of arms.*" The 2012 cuts are in plain breach of the stated objective.

In 2012, the substantial cuts made to counsel's remuneration was said to be justified on the basis of two matters that were not in fact true.

Firstly, that the resulting figure better reflected 'equivalence' as it produced a figure that aligned with the 'net' salary of the OTP's equivalent grade – that is the OTP gross salary less deductions that staff made to pension and 'staff assessment'.

In making that assertion the authors of the 2012 scheme significantly misled themselves and the ASP as the net figure quoted failed to take into account the substantial benefits received by a staff member.

The Expert Report reviews the substantial benefits received by an OTP employee on the P5 scale - to which defence or victims lead counsel is equivalent. It concludes that the benefits “*augment the staff net salary figure of €8,022 by around 50%.*”

That figure of 50% is supported by the fact that “*the budgeted total cost for a P5 is €171,100 per annum or €14,258 per month.*” (Expert Report, paras. 140-141)

Secondly, the authors of the 2012 scheme maintained that to maintain equivalence the amounts defence and victims’ counsel paid by way of tax (OTP and staff are tax exempt) and other professional outgoings would be compensated for by the ‘compensation for professional charges’ scheme.

As demonstrated by the Expert Report, the compensation for professional charges scheme is insufficient to compensate the costs it seeks to cover. (Expert Report, para. 137).

As the Expert Report concludes, “*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.*” If equivalence is to be applied, then clearly “*the defence fees should be recalculated to take proper account of the benefits and costs...*” (Expert Report, para. 146)

The following example posited by the Expert Report makes the imbalance very clear:

“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.

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.”

The existing policy fails to meet its basic objectives.

c) Non-monetary considerations

Cases at the ICC are long, lasting several years, and in attaching themselves to such cases independent counsel and support staff make life effecting decisions. The ICCBA is of the view that, from the standpoint of equality of arms, the compensation and benefits accruing to the OTP counterparts of counsel and support staff must be evaluated not simply from a monetary standpoint, but also in terms of the stability, support and mental well-being that such status and benefits provide. The monetary and other privileges that OTP and other staff members of the Court are afforded are presumably aimed not only at attracting highly qualified and experienced personnel. They are also aimed – as the Court’s Staff and Welfare Office would likely confirm – at better ensuring the quality of life and well-being of staff members and their families so that staff members can be consistently productive, effective, efficient and satisfied members of their respective teams / sections in what can often be a demanding and potentially stressful work environment. The defence and victim’s counsel and support staff presently work in a highly insecure environment, and no more so than at the ICC. It is of interest to note that when independent counsel and support staff are provided with an appropriate status, as at the STL, the benefits are close to being similar to those of their employed counterparts.

d) Compensation for professional charges

In seeking to establish a reasonable equivalence, the Legal Aid Schemes at the ICC seek to balance the extra professional costs incurred by those in private practice by providing some measure of compensation for that expense. The scheme is described by the Single Policy Document to be “*for all charges combined (including pension and health insurance contributions) that are directly related to a legal representation before the Court.*” They are further described in the Expert Report as being “*for example, bar fees, chambers fees / office expenses, pension, health care, income and other taxes, etc.*” (Expert Report, para. 100)

The original 2006 scheme permitted an uplift of up to 40% for counsel operating a professional practice on proof of payment. In 2013 the scheme was altered so as to reduce the professional charges element to a maximum of 30% of the basic remuneration of counsel, and 15% of that of support staff. Both figures are plainly

arbitrary and inadequate, taking into account just the significant tax and insurance liabilities counsel and support staff must meet, let alone other professional liabilities.

The Expert Report advises that “[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.” (Expert Report, para. 154)

The system of compensation for what is referred to as ‘professional charges’ needs to be reviewed and revised. It is unclear which costs can be compensated for and which cannot.

The ICCBA nevertheless supports the general approach of the Expert Report. The question is, how to achieve a fair uplift? Any such ‘factored in’ uplift will form part of the final remuneration figure.

In compensating for bar fees, chambers fees / office expenses, pension, health care, income tax, other taxes and expenses, it is evident that just taking pension and health care charges will exceed 30%. As the Expert Report states, “[t]he ICC’s current maximum 30% uplift does not compensate sufficiently for staff entitlements, tax, and the costs of being in independent practice”. (Expert Report, para. 145)

The compensatory element must fairly reflect the professional expenses the policy seeks to cover.

In addition, equivalence must factor in not only the professional expenses incurred by defence and victim members but also take account of their counterpart staff/OTP benefits.

Both the professional expenses compensation element and the OTP/staff benefits element need to be fully taken into account in achieving a commensurate and fair rate of remuneration. The approach of other courts and tribunals strongly supports that method of approach.

Nor should this place a strain on present or future budgets. Legal aid is not a cost driver. The increases in remuneration suggested by the Expert Report, strongly supported by the ICCBA, will not have a significant effect on the total budget of the

ICC. The legal aid budget for the defence in 2016 was €4,521,000, just 3.25% of the total ICC budget for 2016.

The total budget proposed for the ICC this year is €147.25 million. The budget for the OTP is €46,280.200. The Judiciary budget is €13,243.700. The Registry budget is €79,603.000. Even the Secretariat of the State Parties manages to receive €2.920,000 and the Trust Fund for victims €2,502,000.

It is difficult to accept that the court lacks the capacity, even within the present budget, to meet the reasonable and fair demands of counsel and their support staff. The figures support the ICCBA contention that the defence has been underfunded.

IV. Tax

Surprisingly, the Concept Paper makes no mention of this important issue.

The exact tax situation of Counsel and support staff remains unclear and the Registry has only provided limited assistance on this issue. This has led to several individual problems of Counsel or support staff being requested to pay significant amounts to the Netherland's Tax authorities. Sometimes, the ICC Registry has successfully intervened to resolve such cases on an individual basis, other times not, but the broad picture remains unaddressed.

All Staff, OPCD, OPCV, judges and OTP members enjoy tax exemption under the ICC Headquarters Agreement ("HQA") and Agreement on Privileges and Immunities ("APIC"). Independent counsel and support staff are not tax exempted.

This is a major factor of imbalance between the remuneration of OTP, OPCD and OPCV staff members and that of independent Counsel and support staff and must be taken into consideration in an amended Legal Aid Scheme.

An alternative to compensating for such tax payments, and a means of achieving equivalence in this area, is to extend **tax exemption** to all independent counsel and support staff and place them on the same footing in this regard as the Staff or OTP counterpart. This will be 'cost neutral' to the court.

The Expert Report, addressing this issue states “[t]he 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.”

For reasons that are apparent, it would not eliminate the need to raise fee levels, but it would be a major contributor to achieving equivalence and would have the advantage of being no cost to the ICC budget and no further cost to the States providing that budget. It would also remove the current anomaly whereby States effectively reimburse some part of the tax paid by counsel and support staff through the complicated and time consuming process of claim and reimbursement under the professional compensation scheme. In any event that scheme has proved difficult to manage and largely ineffective.

Tax exemption is dealt with favourably, though briefly, in the Expert Report (paragraphs 162-164) which even suggested, cautiously, that there might be a solution in that “*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 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.*”

Whether or not that is the way to achieve tax exemption, or whether there are others ways, such as through a fair interpretation of Article 11(2) of the present ICC Headquarters Agreement, the ICCBA strongly supports tax exemption being extended to all defence and victims counsel and support staff as 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.

Though the tax issue may play a central role in the issue of remuneration for counsel it is also a standalone issue. The ICCBA exhorts the Registry to be pro-active in seeking tax exemption for independent counsel and support staff at the ICC.

V. Minimum Fee Levels

At present, lead counsel can structure their 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 three legal assistants on a third of that salary (see Expert Report, paras 157-160).

As the Expert Report states *“[f]lexibility 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 liveable wage (whilst maintaining their own fees at the highest level).”* (Expert Report, para. 158).

The Counsel Support Staff Committee of the ICCBA has expressed its concern that the flexibility principle, as defined in paragraphs 9 and 44 of the present policy, systematically creates detrimental employment conditions for support staff as well as instability and insecurity. Based on the information available to that committee, it is not uncommon practice that support staff works on a fulltime basis on half a salary or even a quarter, or even circumstances where certain team members were fully remunerated and others not, while fulfilling the same responsibilities. While footnote 37 of the policy states that the Registrar shall ensure that a team member has voluntarily consented to such conditions of employment, in practice, given the limited number of employment opportunities within the ICC framework and the preeminent role of counsel on a defence team, the effective bargaining position of support staff in these circumstances is limited.

The Concept Paper suggests, to avoid the problem of misuse of the flexibility principle, applying minimum fee levels to case managers and legal assistants according to their years of experience.

The ICCBA supports the introduction of minimum fee levels and consideration being given to introducing staggered minimum fees levels for case managers and legal assistants according to their years of experience.

However, The ICCBA observes that neither the assistants hired, nor the hiring Counsel, have an interest in splitting the fees allowed for one person – which are already lower than before other international courts and tribunals – between several persons, as this has a direct impact on the quality of legal assistance. Is the practice happening because the ICC Registry is not providing the necessary assets? The practice could be the direct consequence of a failure of the current system to provide adequate support, forcing a team with a need for such support to take the only available route left open to them.

VI. Procedures for Monitoring Fee Claim and Other Resources

The Expert Report states, at paragraph 183, that “*Lawyers felt deeply frustrated by what they considered to be a fundamental lack of understanding of defence work on the part of CSS management*”. It is important to note that many with experience of working with CSS over many years disagree that there has been such a ‘fundamental lack of understanding of defence work’ by CSS. The principle difficulty has been that the legal aid schemes in place have not been adequate with a consequent frustration on the part of those having to manage it or be recipients of it. There is much that can be done to remove bureaucratic measures that frustrate both administrators and teams.

A. Pre-Trial

As previously noted, the time when the defence team, however constituted, is in place prior to the initial appearance or confirmation will generally be limited and it can be reasonably assumed fully engaged with working on the case. Fixed monthly fees are appropriate. Where for some reason the flow of a case is significantly disrupted, appropriate management intervention can ensure that legal aid payments are adjusted accordingly. Whenever that is necessary it should be done in full consultation with the team and subject to review by the chamber.

B. Post Confirmation to trial

The period between the confirmation of charges hearing and the issuance of the decision pursuant to Article 67(1), is identified in the Concept Paper as a low activity period when, as indicated above, in reality it is not.

The Prosecution usually continues disclosing evidence that needs to be processed and reviewed, and defence teams are requested to file any observations on redactions in that evidence within certain deadlines. The LRVs get a clear picture of the charges and can investigate or collect applications for participation on this basis. Further, it would arguably border on malpractice for a defence team to simply pause its intensive investigative and other work during the pendency of the Article 61(7) judicial deliberations. Given that the Pre-Trial Chamber is mandated to issue its Article 61(7) decision within 60 days of the end of the confirmation hearing, the relatively small cost savings for the legal aid system in the event of a full non-confirmation decision must be weighed against a suspect's right to effectively and efficiently prepare his or her case for a potential trial. The OTP is certainly under no restriction to pause its preparations for a possible trial.

Experience of cases to date indicates that defence teams are fully engaged in preparation prior to trial post confirmation and the fixed monthly remuneration appropriate. The suggestion that a teams' commitment can disengage and then engage just three months before trial underestimates the varied amount of work and preparation that needs to be done.

VII. The List Application Process (Expert Report, pp. 191-197)

The Expert Report states:

- *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.*

The ICCBA agrees with these recommendations. The current list of counsel and assistants is essentially an historic document that has grown year by year and without review or update. There may be names on it of people who have since died or who no longer wish to offer their services or who no longer satisfy the criteria. A system of annual review should be introduced so that the list is kept up to date.

VIII. System for Assigning Counsel

“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;”
(Expert Report, p. 11)

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).

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.” (Expert Report, para. 197)

The ICCBA is opposed to these proposals. The system of assigning counsel must be clear and without interference and seen to be. The ICCBA warns against any form of reduction, presentation or limitation to the list of counsel. Per definition, list counsel fulfill all relevant criteria of experience and qualifications.

IX. Legal Services Contract

The Expert Report recommends at paragraph 201 that:

- *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.*

The ICCBA 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*”.

X. Maternity, paternity and sick leave

The ICCBA proposes that the legal aid policy specifically address maternity, paternity and sick leave for defence and victims team members. Counsel should be permitted to draw upon the ICC Contingency Fund, or, as a second-best alternative, another budget to be created specifically for the purpose of engaging personnel on a temporary basis to replace a team member who wishes to go on maternity or paternity leave to care for a new baby, or who cannot work for an extended (maximum) period due to sickness and/or injury. Such a procedure would place defence and victims team members on more equal footing with their OTP counterparts, who have recourse to such benefits, and better ensure the continuity of high quality legal representation. Given the length of ICC proceedings, the need to formally and properly address maternity, paternity

and sick leave issues for defence and victims team through the legal aid policy is especially pressing.

XI. Notice

Given the length that cases may take and the commitment necessary to do them, the Registry should make provision for those situations where a team may, for no fault of its own, be out of the case due to the accused's sickness, death, or arbitrary decision. Similarly, support team members –who are particularly vulnerable financially, may be unexpectedly relieved of their duties by lead counsel. The OTP will be subject to notice in such a situation and some similar scheme should be put in place for defence and victims teams – perhaps on the basis of one months notice for each year of contract. In privately paid cases such arrangements can be made.

XII. Pre-Trial Fee Claims

The Expert Report states:

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.

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.

[...]

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

[...]

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.

[...]

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 months 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.

The Expert Report recommends the following for this pre-trial stage:

- *Replace the current ‘monthly lump sum system’ with an hourly timesheet system modelled 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.*

The ICCBA 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” (Expert Report, para. 227).

The STL, where the accused are all absent, is a poor example to invoke. As stated above, the work done by teams prior to Trial at the ICC must not be underestimated and in the experience of all counsel who have done cases at the ICC the work needing to be done throughout the process - from initial appearance, through confirmation and up to trial - involves sufficient work to both justify the basic core team (and in some cases additional members) and to raise such a presumption of work and commitment that monthly lump sum payment is both fair and practicable. As stated previously, where for some reason the flow of a case is significantly disrupted, appropriate management intervention can ensure that legal aid payments are adjusted accordingly. Whenever that is necessary it should be done in full consultation with the team and subject to review by the Chamber.

XIII. Trial Fee Claims

At paragraph 248 of the Expert Report, the following recommendations are made regarding trial fee claims:

- *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.*

The ICCBA agrees that the submission of monthly time sheets during the trial stage of proceedings is an unnecessary burden for both counsel and the Registry alike.

Specifying a reduced regime when a trial is postponed for two months is too short a period and is impractical. A team cannot be expected to be stop/go to that degree. As stated previously, where for some reason the flow of a case is significantly disrupted, appropriate management intervention can ensure that legal aid payments are adjusted accordingly. Whenever that is necessary it should be done in full consultation with the team and subject to review by the Chamber. (It is assumed the reference to 150 hours is a reference to payment, if on an hourly basis, of 1/150th of monthly amount /per hour –being €54 / hour for lead counsel and €46/hour for associate counsel at current rates...)

XIV. Appeal Stage Fee Claims

At paragraph 261 of the Expert Report, the following recommendations are made in relation to the payment of fees during the appeal stage of proceedings:

- *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).*

The ICCBA refers to its comments made above concerning Appeals.

XV. Reparations Stage Fee Claims

According to the Expert Report:

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...

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.

The Report then proceeds in paragraph 264 to make the following 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).*

In respect of the Reparation phase, the ICCBA believes that the lump sum system might be workable. The suggestion needs further examination and discussion in light of the two cases currently in that phase.

XVI. Accounting

For administrative and tax purposes, all teams should receive a monthly or quarterly document that accurately reflects the amounts paid to them as compensation and reimbursement of reimbursed expenses. If any claim or payment has been denied or reduced, clear reasons for doing so should be provided and provision for review made.

XVII. Victims’ Representation (Expert Report, pp. 90-104)

Most of the comments made above, particularly regarding remuneration, apply *mutatis mutandis* to victims counsel and their support staff.

Rule 90 of the RPE guarantees victims entitled to participate in the proceedings the right to choose their counsel and the groups of victims to choose their common legal representative, provided that the chosen counsel has the qualifications set out in Rule 22.1. Victims more easily recognize a common legal representative as their spokesperson if the latter has been chosen by a large number of them and has close

ties to the situation they are living in. Subject to the precautions to be taken to ensure representation of the individual interests of each victim and the need to avoid conflicts of interest as provided in Rule 90.4, it is desirable that the Registrar and, the Chambers take account of the choice of victims in any designation or formal approval of a common legal representative.

This is also desirable for budgetary purposes. A lawyer who is familiar with the context and the victims will not need to spend time assessing it, establishing contacts with local communities etc. One LVR informed the ICCBA that their experience suggested that the OPCV contact with community leaders in their particular case was very superficial. What LRV's with knowledge of the community can do in a week OPCV might need three.

As the Expert Report notes at paragraph 272, various models have been used and *“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 the entire process, including during trial, appeal, and reparations stages.”*

The ICCBA notes with great concern the erosion of the right for victims to have counsel of choice and the increasing and inappropriate increase in representation by the Office of Public Counsel for Victims.

It agrees with the Expert that a settled model for witness representation is necessary. The ICCBA believes that model must provide an effective element of choice for victims and a consequent role for independent counsel. A settled model will help CSS to better support victims' team and provide greater clarity for the teams themselves. LRV Counsel have little control over their role or the direction of the case even at the reparation phase, a level of unpredictability they find unfair and increasingly resent.

In any event, representation of victims has different implications and challenges for a legal aid system. The position of victim representation in recent years has been in such a state of flux that it poses difficulties in producing a clear and settled policy, though the general principles are plain. The ICCBA supports the view that the resources allocated to an external advisory team should be equivalent to those granted to a team of the Office of Public Counsel of Victims or mixed teams.

XVIII. Indigence Determination

The ICCBA agrees with the Expert at paragraph 283 that the “*the assessment of victims’ indigence has been a waste of time and resources*”. The Expert proposes that “*a simple declaration of indigence*” should suffice. The ICCBA goes further and submits that a presumption of indigence should extend to **all** those admitted into a case as victims, irrespective of the assets they may possess. The ICC should offer the opportunity of free advice and representation to all those who are the victim of international crimes and admitted as victims into a case.

Implementation of this proposal would require amendment to Regulations 84-85 of the Regulations of the Court and Regulations 131-132 of the Regulations of the Registry.

XIX. Establishing an overall budget – Victims

The Expert Report states:

288. The CSS, given the experience of several cases and OPCV’s current budget, should be 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.

At page 14, the Concept Paper states:

“For a victims’ team, the Registry’s Single Policy Document suggests the following composition: (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. An investigation budget of €43,752 is provided to each team for the entire case. Additional resources may be granted upon justification.”

Footnote 36 of the Expert Report states that “[t]he 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.”

Finally, the Expert Report states:

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

** 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. 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 ICCBA supports the view expressed in the Expert Report that the resources allocated to an external advisory team should be equivalent to those granted to a team of the Office of Public Counsel of Victims or mixed teams.

It also agrees that “[f]lexibility 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.” (Expert Report, para 297)

It is in the interests also of the justice system that the legal representatives selected by the victims and paid in the framework of legal aid have sufficient means to ensure effective representation of the victims. At present LRV’s at the ICC have limited facilities. Legal aid must include the material means necessary for effective work. These include a sufficient budget for travel, contacts with the group of victims and field investigations, as far as possible, office space per team, if not spaces with storage complying with confidentiality requirements, a place at the Court where a

team can meet or make phone calls in a confidential manner and have easy access to the Court's computer system.

Flexibility is very important. In one case the LRV team needed the equivalent of one assistant for much of the time but at other stages had great need for a legal assistant in the field to support counsel on mission. At the reparation phase the team's needs required two, one in The Hague and one in the field. The system should be capable of adapting speedily to these requirements.

The suggestion in the Expert Report that it should be possible to calculate an **overall budget**, presumably at or near the outset of the case, is even less practicable for the Victim's case than for the defence, given that victim's counsel has little control over the direction and management of the trial. Nor is it likely that the full extent of victim applicants will be known at that stage. The Report is anxious to distinguish 'overall budget' from a 'lump sum' though the difference between them remains unclear.

XX. Investigative Budget / Field Budget

According to the Expert Report:

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'...

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

303. 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.

The ICCBA agrees with these proposals, subject to the comments above on 'overall budget'.

XXI. Additional means

At paragraph 307 of the Expert Report, the Expert states that *“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.”*

The ICCBA agrees.

As mentioned in the context of defence teams, Legal Representatives for Victims (LRV's) and their team may not benefit from all field support facilities negotiated by the ICC with external stakeholders, such as UN missions. The field mission's budget should take into account the need for LRVs to meet with the victims, to inform them on a regular basis on the Court proceedings and to receive input as to their views and concerns in order to represent them adequately. This requires a sustainable field presence for the entire duration of the Court proceedings, which is incompatible with the current level of LRV's "investigation budget".

The ICCBA agrees that the title **“investigation budget”** is inappropriate and confusing, as the LRV has no investigatory role as such.

The LRV missions have two purposes - to collect instruction and information from the victims and inform the victims of the proceedings. As to the latter LRV's report that the ICC outreach and other "information" services of the court can disseminate inappropriate if not misleading information regarding the trial to the victims which causes significant difficulties to the LRV's mission. The LRV's should be left to provide information to victims without such interference.

XXII. Remuneration – Victims Representatives

There is no cause to distinguish the LRV's remuneration from that of the defence.

XXIII. Administration of the Legal Aid System for Legal Representatives of Victims

The ICCBA agrees that separate legal aid policies for victims and for defence should be established.

They should be administered separately and distinctly.

“External lawyers who had worked on victims’ teams expressed frustration at the lack of information on the available budget. This made it more difficult for victims’ lawyers to plan their work efficiently”. (Concept Paper, p. 14)

The ICCBA Victims Committee suggests a guide be written for the legal representatives of victims which clearly states the rules and procedures. The representatives from the Bar could also collaborate with writing such a guide.

XXIV. Training

There is no budget allocated for training defence or victims counsel and support staff, nor for duty counsel. The ICCBA requests the Registry to address this omission urgently. Consideration should be given to having a central training committee established for the court to liaise within the various departments and to fund training generally. There is no reason why defence, prosecution and victim lawyers and staff should not benefit from joint training in many areas. It would also contribute to forming a more collegiate atmosphere at the ICC which has, so far, been lacking.

XXV. Providing contingent payments

The ICCBA refers to its earlier request of 27 February 2017 to the ICC Registrar and the latter’s response of 31 March 2017. In the letter of 27 February 2017, the ICCBA invited the ICC Registrar, as an interim measure pending full review of LAS, to amend the current practice regarding compensation for additional charges and to pay it on a monthly basis.

On 31 March 2017, the ICC Registrar rejected this request, on the grounds that (i) the current LAS provides that the payment of professional charges is directly linked to the Counsel's intervention and involvement in Court proceedings and (ii) that it is conditional of the production of supporting evidence / documentation of actual payment of charges and cannot be paid automatically.

The ICCBA renews its request that payments be authorised to be paid on a monthly basis. The measure is both reasonable and cost neutral, since the money claimed was budgeted for in the legal aid budget submissions and accordingly credited by States Parties under the Legal Aid budget and is therefore available.

The ICCBA hereby reiterates its earlier request to have compensation of charges paid on a monthly basis as an immediate interim measure pending completion of LAS review.

A handwritten signature in black ink, appearing to read 'D Hooper', with a long horizontal line extending to the right from the end of the signature.

David Hooper Q.C
President
International Criminal Court Bar Association.

April 24th 2017