



Office of Public Counsel for the Defence
(OPCD)

Comments on the International Criminal Court
Registry's Consultation on the Legal Aid System*

4 July 2017

* *The views expressed herein are those of the OPCD alone and do not reflect the views of the International Criminal Court.*

Table of Contents

I.	Introduction.....	2
II.	Observations and Recommendations	4
A.	Indigence determination.....	4
B.	Team composition	5
C.	Investigation budget and expenses	7
D.	Additional means.....	10
E.	Remuneration (including compensation for professional charges)	11
F.	Administration of the legal aid system	14
G.	Fee claims during various stages of proceedings	17
H.	Article 70 cases	20
I.	Providing leave days and and notice periods	21
J.	Role of the OPCD.....	22
III.	Conclusion	25

I. Introduction

The OPCD has, from the beginning, advocated for the provision of all necessary resources for Defence Counsel and their support staff. The Registrar has the practical duty to ensure that indigent defendants are provided with adequate resources,¹ which he carries out largely through the Court's legal aid system.

In light of the current review of the Court's legal aid system, the Registrar has invited comments from stakeholders on reforming the provision of legal aid at the ICC. The OPCD hereby provides its comments on the exercise. It does so as a wholly independent office tasked with representing the general interests of the Defence before the Court.² We emphasise that we are not allowed to receive instructions from the Registrar in this regard.³

Our independence and mandate afford us a unique opportunity to comment objectively on the Registry's review process of legal aid, and, given that we are paid as staff members, we have no personal financial interest in the outcome of the review. Indeed, although the Regulations of the Registry allow us to claim legal aid when representing a person entitled to legal assistance,⁴ we have never done so even when assigned such representation.

The OPCD has had the benefit of seeing a number of documents that were already submitted. The purpose of this commentary is to collate the many views that have already been expressed, and identify where there is common agreement on issues, and where further work and discussion needs to take place. We hope that, with the relevant views in one document, the Registrar can take steps to prepare the draft proposal for the reformed legal aid system as quickly as possible. Thus, this commentary takes into account information in the following documents:

- The Registry's single policy document on the Court's legal aid system, ICC-ASP/12/3, 4 June 2013 ("Legal Aid Policy");
- International Criminal Justice Consortium ("International Consortium"), A Report on the Assessment of the Functioning of the International Criminal Court's Legal Aid System, 27 October 2015 ("ICJC Report");
- Richard J. Rogers, Assessment of the ICC's Legal Aid System, 5 January 2017 ("Rogers Report");
- The Registry's Draft Concept Paper, Review of the ICC's Legal Aid System, 7 April 2017 ("Legal Aid Concept Paper");
- International Criminal Court Bar Association ("ICCBA"), Response on the Legal Aid Issue, 24 April 2017 ("ICCBA Response");
- International Bar Association ("IBA") Comments on 'Concept Paper: Review of the International Criminal Court Legal Aid System', 9 June 2017 ("IBA Comments");

¹ The Registrar is required to "[p]rovide the defence such facilities as may be necessary for the direct performance of the duty of the defence". Rule 20(1)(b), Rules of Procedure and Evidence. The Registrar is required to determine all the costs that the Court must cover by virtue of being reasonably necessary "for an effective efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs, and daily subsistence allowance". Regulation 88(1), Regulations of the Registry .

² Regulation 77(2) of the Regulations of the Court.

³ Regulation 144 of the Regulations of the Registry.

⁴ Regulation 144(4) of the Regulations of the Registry.

- Michael Karnavas, Commentary to Registry’s Concept Paper, Review of the International Criminal Court Legal Aid System, 16 June 2017 (“Michael Karnavas’s Comments”);
- Common Position Paper submitted by a group of 40 List Counsel and Support Staff (“Common Position Paper”), presented by Dr Cyril Laucci on 19 June 2017. This document has since been endorsed by a total of 55 members of List Counsel or Support Staff.

The OPCD’s own assessment and observations are provided in the text boxes. Please note that only the views relevant to the provision of legal aid to defence teams (or where common to both defence and victims’ teams) are reflected in this document. As outside of its expertise, the OPCD takes no position on the necessary funding for victims’ teams.

II. Observations and Recommendations

A. Indigence determination

To determine indigence, the Legal Aid Policy relies on objective criteria that take into account the means at an individual's disposal, as well as his or her obligations to any dependants.⁵ The International Consortium suggested that CSS be afforded greater resources to conduct financial investigations into the accused's assets, and that the Court should consider instituting a process by which an accused who refuses to liquidate available non-essential assets may be found to have waived the right to proceed with Counsel paid for by the ICC.⁶ The Rogers Report recommends several developments to the current system:

1. The Registry should seek to create better working relationships with relevant state actors to ensure cooperation in the financial investigation of assets;
2. The CSS should draft an updated indigence policy document incorporating the new procedures, approaches, and calculations;
3. 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;
4. 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.⁷

There were no new comments on the issue of indigence determination after the Rogers Report, except from the ICCBA, which noted 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".⁸ The IBA stated that it had already provided input on the process for making the indigence determination for accused persons and for victims.⁹

The OPCD notes that there is no opposition to the recommendations on indigence determination in the Rogers Report. The OPCD observes, however, in relation to Mr Rogers's fourth recommendation, that the concept of assessing financial obligations that reflects real costs has already been considered in the past.¹⁰ These past considerations should be taken into account when creating the draft proposal for adjustments to the Legal Aid Policy.

The OPCD does not endorse the International Consortium's suggestion to institute a policy whereby an accused who refuses to liquidate certain assets may be found to have waived the right to Counsel paid by the Court. The issues concerning liquidating assets for the purposes of funding one's legal fees is fraught with difficulty in a cross-jurisdictional setting, and such a proposal leaves the real risk that defendants may go unrepresented in proceedings. This would also present a false economy to the Court, as having unrepresented defendants would result in serious delays in the proceedings.

⁵ Legal Aid Policy, p. 7.

⁶ ICJC Report, paras 92-94.

⁷ Rogers Report, pp. 22-23.

⁸ ICCBA Response, p. 9.

⁹ IBA Comments, p. 2.

¹⁰ See Interim report of the Court on legal aid: Alternative models for assessment of indigence, 6 May 2009, ICC-ASP/8/4, paras 16-20, 23.

The OPCD sees merit in the ICCBA’s observation that there is no remedy for an acquitted person, who engaged Counsel privately, to be awarded his legal costs in the event of an acquittal. It is common practice in some States for such orders to be made, with costs awarded to the acquitted person for the cost of legal representation at the rate it would have been had it been under legal aid. The OPCD fully supports bringing this issue to the attention of the Registry as a matter of priority, but separately to the legal aid review, so as not to delay the development of the draft proposal.

B. Team composition

Under the Legal Aid Policy, indigent accused are entitled to representation by a core team composed of: one Counsel, one Legal Assistant, and one Case Manager, with an additional Associate Counsel being assigned at trial. This core team operates throughout proceedings except for prior to the first appearance before the Pre-Trial Chamber, and the period between the conclusion of the closing statements and the judgement, when only one Counsel is assigned. The Rogers Report makes the following recommendations in relation to team composition:

1. 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);
2. After the closing arguments until judgement, 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;
3. The lump sum allocation for the appeal should take into account the need for an Associate Counsel, at least on a part time basis;
4. Additional resources beyond the above should fall under the discretionary budgets of ‘additional means’ and ‘investigation and expert budget.’
5. In relation to Article 70 cases: limiting the team composition – in many cases, a Counsel and a field investigator should be sufficient during the pre-trial phase, depending on the allotment of hours. At trial, a single Counsel should be sufficient;

The ICCBA accepted the concept of a core team, but considered the current core team to be inadequate, and acknowledged Mr Rogers’ observations that core teams at other tribunals are consistently larger.¹¹ The ICCBA also suggested that a core team should be assigned immediately after an arrest warrant or summons has been issued, or at an earlier time if found to be appropriate by the Chamber.¹² It further suggested that full monthly remuneration should be given pre-confirmation and pre-trial, given the intensity of legal work during that period. An Associate Counsel should be added to the core team following the initial appearance, but it argued that allocating him or her 25–40 billable hours per month is too low for this phase of proceedings, and that the Associate Counsel should be provided on a full-time basis.¹³ The ICCBA also suggested retaining Defence teams after closing arguments and before the judgement, but that allocating 25 hours for Counsel and 75 hours for support staff per month is too low, given the high amount of work that continues in this phase, and the need to ensure

¹¹ ICCBA Response, p. 9.

¹² ICCBA Response, p. 10.

¹³ ICCBA Response, p. 11.

team continuity.¹⁴ It also supported Mr Rogers’s recommendation for team increases during appeal phase, but found his suggestions regarding reparations unclear.¹⁵ The ICCBA suggested that, as all cases have so far been granted an Associate Counsel on appeal, it indicates that such appointment is appropriate as a matter of course.¹⁶ The ICCBA did not support Mr Rogers’s general contention that Article 70 cases inevitably require fewer assets than Article 5 cases, noting that the ICJC Report’s statement that 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”.¹⁷ The ICCBA did not consider that a single Counsel at trial would be sufficient for Article 70 cases, and stated that two Counsel, a Legal Assistant, and Case Manager would be necessary.¹⁸

The IBA considered that the overall application of a “case complexity” criterion for resource allocation at the ICC is “neither effective nor practical”, because the ICC cases vary widely and are hard to compare objectively.¹⁹ The IBA recommended, therefore, an approach that considers changes to the “core team” throughout the proceeding, by providing for a core team composed of: “two counsels, one assistant to counsel, one case manager, and an evidence review assistant, with the ability to expand or alter based on justified needs and phases”.²⁰

Michael Karnavas is of the view that the core team should be composed of: Lead Counsel, Co-Counsel, Legal Consultant,²¹ Case Manager, and Investigator.²² He disagreed, however, with Mr Rogers’s recommendation on the “one-size-fits-all” approach of determining what number of staff is needed at the outset and emphasised the need for flexibility.²³ As for Article 70 cases, Mr Karnavas argued that Defence Counsel should not be reduced to only having an Investigator during pre-trial proceedings and acting alone during trial proceedings. He believes that a Case Manager and Legal Assistant are also necessary during the proceedings.²⁴

At the Legal Aid Seminar of 19 June 2017, many participants commented that the core team is too small, particularly in comparison to other tribunals, and that a substantial workload remains after closing arguments and before judgement, justifying the retention of Defence teams.

The OPCD notes that the following recommendations are widely agreed upon, and should therefore be the starting points for the draft proposal:

- (i) that the core team should be increased to include an additional Counsel;
- (ii) that this core team, including an additional Counsel, should be appointed as of the initial appearance;²⁵ and

¹⁴ ICCBA Response, pp. 12-13.

¹⁵ ICCBA Response, p. 13.

¹⁶ ICCBA Response, p. 22.

¹⁷ ICCBA Response, p. 14, referring to ICJC Report, para. 76.

¹⁸ ICCBA Response, p. 14.

¹⁹ IBA Comments, p. 6.

²⁰ IBA Comments, p. 7.

²¹ Michael Karnavas uses the term “legal consultant” in place of “legal assistant”. See Michael Karnavas’s Comments, p. 31.

²² Michael Karnavas’s Comments, p. 13.

²³ Michael Karnavas’s Comments, p. 28.

²⁴ Michael Karnavas’s Comments, p. 30.

²⁵ The OPCD notes that involving associate counsel right from the pre-trial stage has also been under consideration since at least May 2014. See Registry report on ways to improve the legal aid procedures, 22 May 2014, ICC-ASP/13/6, para. 13.

(iii) that the Defence team (and not just Lead Counsel) should be retained after closing arguments and before judgement.

The issues remaining for resolution are:

- (i) what the ceiling of billable hours should be for the additional Counsel appointed after the initial appearance, and
- (ii) what the ceiling for billable hours should be for the Counsel and support staff who are retained between the closing arguments and before judgement.

The OPCD agrees with the ICCBA that allocating 25-40 billable hours per month to additional Counsel in the pre-trial phase is too low, and that intensity of the work at this phase justifies an additional Counsel being retained on a full-time basis. There is a strong argument that having a fully-resourced Defence team at the pre-trial stage -up against a Prosecution team that has had substantially longer time with the case - will generate greater efficiency down the line by allowing the Defence to field a stronger case at the confirmation phase. As highlighted, this potentially weeds out weak cases at that stage, and also focuses the issues more efficiently for trial.

The OPCD also agrees with the ICCBA that allocating 25 hours for Counsel and 75 hours for support staff per month is too low given the greater workload ICC cases tend to have compared to other tribunals in light of, among other things, the variety of situations and the victims participation framework. Furthermore, the Prosecution team does not suffer the same disadvantage during this period in respect of its teams. Retaining a Defence team on a full time basis during this period is the only way to ensure equivalency with the Prosecution; this prevents the deleterious effect of team members having to find other paid employment during that time period, which, in turn, creates gaps in the team that could lead to delays on appeal.

Furthermore, the OPCD observes that the ICCBA and Mr Karnavas disagree with Mr Rogers's proposal to limit the size of a Defence team for Article 70 proceedings. For reasons outlined below, the OPCD suggests that this recommendation is not adopted for the draft proposal.²⁶

C. Investigation budget and expenses

The Legal Aid Policy provides each Defence team with a basic investigation budget of 73,006 EUR for the entire case, which can be increased depending on the complexity of the Prosecution case. In addition, each Defence team receives a flat fixed-rate monthly allowance of 3,000 EUR to cover "reasonable necessary expenses", which must be pre-approved by the Registry.²⁷ This is meant to cover miscellaneous expenses (such as office supplies, translation costs, and expert advice), and travel.²⁸ With regard to travel, the Legal Aid Policy currently provides that travel reimbursement "is not extended to other team members [beyond Counsel] as they are presumed to be primarily based at the Seat of the Court".²⁹

The International Consortium acknowledged that 73,006 EUR falls far short of the actual investigation resources needed,³⁰ and suggested that consideration should be given whether Chambers should make the initial decision on authorising funds for investigations and experts

²⁶ See below, pp. 20-21.

²⁷ Legal Aid Policy, para. 140.

²⁸ Legal Aid Policy, para. 141.

²⁹ Legal Aid Policy, para. 144.

³⁰ ICJC Report, para. 61.

instead of the Registry.³¹ Further, the ICC’s Office of Internal Audit concluded that the process for the payment of expenses “is cumbersome and lacks clarity” and suggested creating “clear guidelines” to cover assessment procedures and information on which expenses are remunerable.³² The Rogers Report stated the ICC expenses budget covers an “inelegant mix”, and suggested that the expenses should be separated as follows:

- Professional expenses – such as ‘office costs’ / stationery should not be included in the expenses budget at all. These expenses should already be covered by the uplift for professional charges;
- Expenses related to the substance of the case – such as experts, translation – should fall under a redefined and augmented investigation and expert budget;
- Case related personal costs – such as travel and accommodation – should remain under the expenses budget.³³

The Rogers Report made the following recommendations:

(i) Investigation and expert budget

1. 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;
2. 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’;
3. The savings from the reduced expenses budgets should be moved into the investigation and expert budget;
4. A new standard investigation and expert budget should be set according to the assessed complexity of the investigation;
5. 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 bases (at local fee rates);
6. 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;
7. 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.³⁴

(ii) Expenses

8. Redefine the expenses budget so that it covers only case-related personal costs, primarily travel, and accommodation;
9. Expenses related to the substance of the case – such as experts and translation – should fall under the investigation and expert budget;

³¹ ICJC Report, para. 62.

³² ICJC Report, para. 56, referring to Audit Report (FINAL) (Audit on Legal Aid) (3 September 2014), pp. 11-12.

³³ Rogers Report, p. 63.

³⁴ Rogers Report, pp. 36-37.

10. 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 EUR per month, for each engaged full time. During the trial stage, this should be around 1,500 EUR, for each counsel engaged. The provisions requiring counsel to obtain pre-approval and prove expenses should be removed;
11. The ‘savings’ from the expenses budget (3,000 EUR minus the amount paid) should be moved into the investigation and expert budget.³⁵

The ICCBA commended the effectiveness of the current system to a certain extent, and expressed doubt whether Mr Rogers’s recommendation of a complexity/lump sum system would be better than the system at present, given that complexity is difficult to assess, particularly at the outset.³⁶ The ICCBA proposed linking the defence investigation budget to that of the Prosecution’s investigation costs to ensure equality of arms.³⁷ It further disagreed with Mr Rogers’s recommendation that each team be allocated a locally-hired resource person.³⁸ Although the ICCBA agreed that the expenses budget should solely be to meet the personal expenses of the team and should be allocated monthly, it disagreed with consolidating the budgets for experts and investigations, preferring expert evidence to be the subject of a specific application for funding, given that the need for expert evidence varies case-to-case. It argued that the same applied to translation needs, and that the budget allocated to translation by the Prosecution may be a good indicator of a similar need on the part of the Defence.³⁹ With regard to travel expenses, the ICCBA observed that several legal assistants are not based in The Hague and “move regularly between their respective countries of residence, or other locations, and The Hague”, and therefore argued that they should also be entitled to claim travel related costs on the same basis as Counsel.⁴⁰

The IBA considered that the case complexity criterion is “not an accurate or effective means to allocate the investigation budget”, because such a determination at an early stage of the case is not determinative of the level of investigation a Defence team must undertake to provide an effective defence, which must take into account many specificities and be able to evolve to the case.⁴¹ The IBA further noted that requiring experts’ costs to be covered from an expenses budget is inconsistent with the reality of cases and standards at other tribunals, particularly as it anticipates that the need for experts will become more urgent in ICC cases.⁴² Further, it notes that the limited resources available may incentivise some Defence teams to cut costs by hiring locally based resource persons instead of a professional investigator, and thus suggests increasing resources for Defence investigations, with the objective of supporting teams in hiring professional investigators.⁴³

Michael Karnavas disagreed with putting a monetary value on investigative services, suggesting that any such value would be arbitrary and often inadequate.⁴⁴ He suggested that Defence Counsel can only determine his or her investigative needs once familiar with the disclosure material and case.⁴⁵ Mr Karnavas suggested implementing an investigative budget based on a

³⁵ Rogers Report, p. 64.
³⁶ ICCBA Response, pp. 17-18.
³⁷ ICCBA Response, p. 18.
³⁸ ICCBA Response, p. 19.
³⁹ ICCBA Response, pp. 20-21.
⁴⁰ ICCBA Response, p. 21.
⁴¹ IBA Comments, p. 7.
⁴² IBA Comments, pp. 8-9.
⁴³ IBA Comments, p. 9.
⁴⁴ Michael Karnavas’s Comments, p. 14.
⁴⁵ Michael Karnavas’s Comments, p. 14.

number of billable hours that are transferrable, so that if they are not used for investigations, Defence Counsel can use them for other needs of the case, such as drafting submissions.⁴⁶ Further, he raised questions as to who assigns the proposed local resource person, and to whom this resource person would report.⁴⁷

The OPCD notes that the ICCBA supports Mr Rogers's recommendation that the expenses budget should solely be to meet the personal expenses of the team in relation to its work on the case, and not for any of the substantive aspects of the case. The OPCD agrees with the rationale that has been put forward by Mr Rogers, namely that it may create a conflict between Defence teams's needs in respect of personal expenditure (e.g. an apartment in The Hague) and substantive expenses (such as translation).⁴⁸ The OPCD notes that this proposal is not inconsistent with the IBA's comments that the 3,000 EUR monthly budget may be inadequate as an expert budget in certain cases. The OPCD suggests that the draft proposal should therefore include a separate expenses budget for the personal expenses of the legal team, as recommended.

There is no agreement yet on how to formulate the investigation and experts' budget(s), but the investigation budget, in particular, has been found to be insufficient in every discussion held since the implementation of the 2013 Legal Aid Policy. There are two points of commonality, however: (i) that a "case complexity" criterion is not an appropriate method to determine the investigation budget; and (ii) that each case may have differing requirements in respect of experts, and that a predetermined set budget may be inappropriate. The OPCD therefore suggests that the draft proposal develop alternative methods to determine an approximate investigation budget, but stresses that this budget must be subject to change according to the needs of the investigation, the extent of which may only be realised at a later stage. The fact that the need for experts varies from case-to-case suggests that there would be difficulties in consolidating the investigation budget with the experts' budget, and there may have to be a separate assessment for experts, as well as translation.

The OPCD suggests that the proposal to allocate funds for a locally hired resource person be reconsidered, given the reservations expressed by the ICCBA and IBA on this issue. The OPCD suggests that any such funds stay in the overall budget for investigations and/or experts, and be available for Counsel to be used as they see fit to advance the investigations.

The OPCD further suggests that these proposals be considered carefully: (i) the ICCBA's recommendation that the travel budget be extended to support staff; and (ii) Mr Karnavas's suggestion that an investigative budget, if based on billable hours, be transferable to other aspects of the Defence case.

D. Additional means

Under Regulation 83(3) of the Regulations of the Court, the Registrar may provide accused with additional means upon request and justification. The Legal Aid Policy adopts a Full Time Equivalent ("FTE") formula allowing additional resources to be allocated to Defence teams depending on the parameters of the case, which include the number of counts submitted by the Prosecutor, the number of victim participation applications, and the number of pages added to

⁴⁶ Michael Karnavas's Comments, pp. 29-30.

⁴⁷ Michael Karnavas's Comments, p. 15.

⁴⁸ See Rogers Report, para. 78.

the case file, among other things. The Rogers Report made the following recommendations in this regard:

1. Replace the current FTE system for assessing additional means by one that relies on the overall complexity of the case;
2. With the assistance of ICCBA, the CSS should develop transparent criteria for ranking cases according to complexity;
3. The maximum level of additional resources required at each stage, if any, should be pre-determined according to the complexity and provided upon justification;
4. Decisions rejecting requests should be properly motivated.⁴⁹

The ICCBA felt that applying a complexity criterion from the start of the case would be impracticable, and sees no significant benefit of replacing the current FTE system with a new – not too dissimilar – system. On the other hand, it believes that the current FTE is still complex and somewhat arbitrary, and thus merits extensive review. It advocates linking the assessment of additional means requests to the level of resources the Prosecutor has allocated to the case.⁵⁰ The IBA considers the application of the case complexity criterion would be neither effective nor practical, given that cases at the ICC vary widely, but recommended instead an increase to the core team as mentioned above.⁵¹

Michael Karnavas agreed with the Rogers Report that the FTE system should be replaced by the case complexity model applied at the ICTY, which allows for additional resources to be made available upon a showing that such resources are reasonable and necessary.⁵²

The OPCD notes that there is no consensus on how to determine the release of additional resources. The ICCBA, IBA, and Mr Karnavas all expressed different views on the subject. The OPCD supports no particular approach, but suggests that the eventual system should not be arbitrary and, to the extent possible, be user-friendly.

E. Remuneration (including compensation for professional charges)

In line with the principle of equivalence, the remuneration of Defence team members as set in 2007 was based on the gross pensionable salary of comparable staff members in the Prosecution. In 2012 the Bureau on Legal Aid decided that pegging the remuneration to gross salary was not justified given that Counsel could recover income tax payments and other benefits could be recoverable through the compensation for professional charges scheme. The remuneration of Defence team members was thus adjusted to reflect, instead, the net salary of their comparable Prosecution colleagues,⁵³ which led to a considerable reduction of pay. The compensation package also includes reimbursement of additional reasonable expenses incurred in the course of the execution of his or her mandate, up to a maximum of 3,000 EUR.⁵⁴ Counsel who are appointed on more than one case at the ICC are only eligible to be paid half the normal rate for their subsequent cases.⁵⁵

⁴⁹ Rogers Report, pp. 40-41.

⁵⁰ ICCBA Response, pp. 19-20.

⁵¹ IBA Comments, para. 7. See above, p. 6.

⁵² Michael Karnavas's Comments, p. 27.

⁵³ Legal Aid Policy, paras 84-85.

⁵⁴ Legal Aid Policy, para. 93.

⁵⁵ Legal Aid Policy, paras 103-115.

The International Consortium heard views from Defence Counsel that the remuneration was inadequate, while Registry officials generally seemed to believe that the amount of pay was adequate. It was unable to form a view on this issue, however, because the Registry failed to provide historical information regarding payments made to Defence teams to compare with the pay of Prosecution staff members.⁵⁶ The Rogers Report found that senior staff in the CSS were of the view that Defence Counsel remuneration was insufficient, while all lawyers interviewed “were in complete agreement that the fees for counsel and assistant counsel were unreasonably low”.⁵⁷ The Rogers Report made the following recommendations:

(i) Fee levels

1. 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;
2. The fee levels should be within the range established at the other tribunals;
3. The fee levels should be augmented to reflect the results of this calculation (subject to a tax-free agreement being reached);

(ii) Professional uplift

4. 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

5. 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;
6. 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

7. 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).

The ICCBA is of the view that the reasons justifying the 2012 reduction of Defence remuneration was based on false premises, and endorsed the Rogers Report’s first recommendation to recalculate fee levels using the equivalency principle, taking proper account of staff benefits, professional costs, and income tax, and to ensure that this falls within the range

⁵⁶ ICJC Report, paras 49–52.

⁵⁷ Rogers Report, paras 129–130.

established at other tribunals.⁵⁸ It added that staff members in the Prosecution also derive non-monetary benefits in terms of “stability, support, and mental well-being” from their status as staff, while external counsel and support staff work in a “highly insecure environment”.⁵⁹ The ICCBA called for the review and revision of the professional charges compensation system, and supported Mr Rogers’s approach to factor in the uplift into the hourly and monthly fee rates, adding that such an automatic uplift must take into account both the professional expenses incurred by external Counsel, and the benefits received by Prosecution staff members.⁶⁰ As for minimum fee levels for counsel support staff, it supported their introduction and consideration being given to staggering these levels according to the person’s years of experience.⁶¹ On the tax issue, the ICCBA urged the Registry to be proactive in seeking tax exemption for independent Counsel and support staff, which must apply retroactively to taxes already paid, although this would not eliminate the need to raise fee levels.⁶²

The IBA supported the recommendations in the Rogers Report and the ICCBA Response on recalculating the fee levels, as well as calling for the positive resolution of the tax exemption issue, to establish a level of overall remuneration that is “reasonably equivalent to counterparts in the prosecution and before other international criminal tribunals”.⁶³

Michael Karnavas suggested that fee levels for Counsel should be roughly equivalent to what is provided to Defence Counsel practising before other international criminal tribunals and courts, rather than to prosecutors, given that Defence Counsel are independent and can seek other projects through their private practices. He recommends adopting a case complexity model for setting the fee levels of counsel, providing: (i) a lump sum at pre-trial; (ii) a lump sum at trial (alternatively, a maximum of 180 hours per month to Lead Counsel and Co-Counsel could be provided each month, based on an hourly rate commensurate with their years of experience), and (iii) a combination of a lump sum and additional hours, based on the complexity of the case and “any peculiar needs that may require additional time and resources”.⁶⁴ Mr Karnavas disagreed with the Rogers Report on the professional uplift model, arguing that it should not be embraced for the legal aid system at the ICC. He stated that the same model led to inequity at the ECCC, with experienced Counsel, depending on where they are from and their office costs, receiving far less than Counsel with less experience.⁶⁵ He agreed, however, that Defence staff should be protected by a minimum salary threshold.⁶⁶ He further agreed that the Registrar should attempt to obtain income tax exemption for independent lawyers and consultants.⁶⁷

The Common Position Paper stated that the automatic payment of the 30% (for Counsel) or 15% (for support staff) uplift to compensate for professional charges is justified by the sole fact that Counsel and support staff are liable for income tax. It therefore requested that this uplift becomes automatic in addition to the payment of fees, with immediate effect, and apply

⁵⁸ ICCBA Response, pp. 23-25.

⁵⁹ ICCBA Response, pp. 25-26.

⁶⁰ ICCBA Response, p. 27.

⁶¹ ICCBA Response, pp. 30-31.

⁶² ICCBA Response, pp. 28-29.

⁶³ IBA Comments, p. 6.

⁶⁴ Michael Karnavas’s Comments, pp 20-23.

⁶⁵ Michael Karnavas’s Comments, p. 23.

⁶⁶ Michael Karnavas’s Comments, p. 24.

⁶⁷ Michael Karnavas’s Comments, p. 24.

retroactively, so that any non-paid portion of this uplift since 2013 be paid by the Court upon presentation of the appropriate documentation.⁶⁸

The OPCD shares the ICCBA's view that the legal aid budget was reduced in 2012 on a flawed basis. Calculating Defence Counsel's pay according to comparable Prosecution staff members' net salary fails to take into account all the staff entitlements, benefits, and security of employment that the latter receive, while the professional uplift that is meant to compensate the difference is wholly inadequate at 30% for Counsel and 15% for support staff.

The OPCD considers that this decision in 2012 has experienced a test period sufficient to indicate that it is unsustainable and unfair and must be corrected without delay. If the Registrar is not able to present the draft proposal before the Assembly of States Parties ("ASP") in December 2017, then there is great merit in the Common Position Paper's proposal to apply the uplift automatically with immediate effect as an interim remedy, given that this uplift is already budgeted. The OPCD is of the view that this position is logically justified given that Counsel and support staff are already obliged to pay income tax on their earnings, at a rate that will very likely be higher than 30% and 15% respectively, to say nothing of medical insurance and other benefits enjoyed by the Court staff.

For the longer term, the draft proposal must increase the remuneration for Counsel to address the current unreasonably low remuneration, which fails to adhere to the equivalency principle, and is the lowest among the rates paid to Defence team members at the international criminal courts and tribunals, as demonstrated by Mr Rogers. There is strong support from the ICCBA and IBA for Mr Rogers's proposal that the hourly and monthly fee rates include an uplift to take into account the professional expenses incurred by external Counsel and support staff, and the benefits received by Prosecution staff members, although care should be taken to address Mr Karnavas's concerns about potential inequity.

There is unanimous support for the introduction of minimum fee levels for Counsel support staff, as well as for staggering these levels to reflect the person's years of experience. This prevents exploitation of support staff, and creates an opportunity for support staff to progress in seniority as a reward for staying within the same team, thus fostering continuity, and enhancing the level of case memory within the team and the overall quality of representation.

The OPCD takes particular note of the unanimous view urging the Registrar to negotiate with the Government of the Netherlands on amending the Headquarters Agreement so as to include an income tax exemption for external Counsel and support staff for earnings paid by the ICC. The OPCD has routinely advanced said same in past discussions and wholeheartedly endorses this proposal. The OPCD understands that this is a complex issue requiring specialist advice on Dutch and international tax laws, as well as public international law, but observes that the principle of equivalence between Prosecution and Defence remuneration provides a compelling reason justifying the pursuit of such agreement.

F. Administration of the legal aid system

Under the current system, Counsel must establish an action plan for each six-month phase detailing all the activities he or she deems most appropriate to represent the client, as well as submit timesheets at the end of each month, and an implementation report at the end of each

⁶⁸ Common Position Paper, pp. 1-2.

phase of proceedings, or every six months.⁶⁹ The International Consortium heard complaints from Counsel regarding the bureaucratic burden in seeking remuneration and reimbursement for expenses, which was partly acknowledged by Registry officials.⁷⁰ The Rogers Report heard similar complaints regarding the administration of legal aid and,⁷¹ and that there was a lack of appreciation for Defence needs.⁷² Furthermore, it observed that the process to apply for the list of Counsel took too much time.⁷³ It made the following recommendations:

(iii) Administration of the legal aid system

1. CSS should re-invent its management style with the aim of being more responsive to Registry requests, and more service-oriented towards lawyers;
2. 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;
3. The Registry should provide CSS with a new IT system (with training) to administer the budgets and fee claims;
4. 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;
5. The responsibility for training counsel should be passed to the OPCD and ICCBA.

(iv) List system

The Application Process

6. The list of documents to be submitted with an application to the list should be revised and reduced;
7. 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;
8. The CSS should replace its ‘review panel’ with a more efficient system.

Assignment of Lawyers

9. 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.
10. The system should be fair, transparent and open to monitoring (for example, by the ICCBA).

(v) Legal Services Contract

11. 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;

⁶⁹ See Regulations of the Registry, Regulation 134. See also Legal Aid Policy, para. 123. In considering the action plan, the Registrar may consult the legal aid commissioners. See Regulations of the Registry, Regulation 136(1).

⁷⁰ ICJC Report, para. 57.

⁷¹ Rogers Report, paras 186–187.

⁷² Rogers Report, paras 188–189.

⁷³ Rogers Report, paras 194–195.

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

The ICCBA agreed with the Rogers Report's recommendations on streamlining the list application process, and further added that there should be a system of annual review to ensure that the list is kept up to date.⁷⁴ The ICCBA opposed, however, Mr Rogers' s proposals on the assignment of lawyers. It argued that the system assigning counsel must be clear and without interference, and seen to be so, warning against any form of "reduction, presentation, or limitation to the list of counsel".⁷⁵ It endorsed, on the other hand, the Rogers Report's recommendations to introduce a legal services contract and provide standardised official payment slips.⁷⁶ It added that teams should receive a monthly or quarterly document that accurately reflects the amounts paid to them as compensation and reimbursements. It stated that these documents should reflect any claim or payment that has been denied or reduced, and provide clear reasons for doing so as well as provide provisions on review.⁷⁷

The IBA supported the Rogers Report in relation to providing more details to the ASP, diplomats, Judges, and others on how legal aid is spent.⁷⁸ It suggested that the legal aid budget could, for instance, be broken down the budget to indicate "the number of persons employed and at what level; the number of investigation activities; and the number of ad hoc and duty counsel assigned and the length of assignments".⁷⁹ The IBA further encouraged streamlining the list counsel application process in line with the Rogers Report.⁸⁰

Michael Karnavas agreed with the Rogers Report with regard to the recommendations on providing the indigent defendant a reduced list for the purposes of selecting Counsel, commenting that the proposal is unclear, however, on who gets to decide "who should be included or excluded from the reduced list", and that no objective criteria have been developed.⁸¹ He added that Defence team members should receive one-year renewable legal services contracts to ensure stability.⁸²

The Common Position Paper expressed concern that, since only a small portion of Counsel and support staff entitled to receive the uplift were actually claiming it, this unpaid portion of the legal aid budget might be being reabsorbed into the overall Registry budget instead of being used to remunerate the Defence. It expressed further concern that the only way to detect this is to verify the actual amounts paid out to Counsel, which the Registry failed to disclose to the International Consortium.⁸³ The Common Position Paper proposed that the ASP amend the ICC budget architecture so as to insulate the legal aid budget from the rest of the Registry's budget, and such that "absorptions and re-affectations [into the Registry's budget] would become illegal without the prior authorization of the ASP".⁸⁴

⁷⁴ ICCBA Response, p. 33.

⁷⁵ ICCBA Response, p. 34.

⁷⁶ ICCBA Response, p. 34.

⁷⁷ ICCBA Response, p. 40.

⁷⁸ IBA Comments, p. 10, referring to the Rogers Report, para. 190 (recommendations).

⁷⁹ IBA Comments, p. 10.

⁸⁰ IBA Comments, p. 10, referring to the Rogers Report, p. 70.

⁸¹ Michael Karnavas's Comments, p. 28.

⁸² Michael Karnavas's Comments, p. 25.

⁸³ Common Position Paper, pp. 1-2. See ICJC Report, fn. 24 and para. 52.

⁸⁴ Common Position Paper, pp. 1-2.

The OPCD agrees with Mr Rogers’s recommendation, supported by the IBA, that the budgetary documents presented to the ASP, diplomats, Judges, and others better placed to make decisions on the legal aid system be detailed, and provide breakdowns as to how the money is spent. The OPCD is concerned that presenting only the global figure without such breakdowns makes it an “easy target” for budget cuts, as highlighted by the Rogers Report.⁸⁵ As also identified Mr Rogers, the ICCBA, and the IBA, at 3.25% of the total ICC budget for *both* Defence and Victims’ teams, the Legal Aid budget is not a “cost driver” as has been claimed, and is considerably smaller than the legal aid budget (as a percentage) at other tribunals. It is also dwarfed by the budgets of most other departments at the ICC. As it has suggested in the past, and suggested by the IBA, the OPCD supports the Legal Aid budget being a separate code in the ICC proposed and approved budget documents – with line items indicating, e.g., total number of Counsel paid (by type – Defence, Victims, Witness, Independent), total number of support staff paid (in each category), total missions funded – to provide the States Parties clearer information about how that 3.25% of the budget is actually spent.

The OPCD observes that the Rogers Report recommended that the responsibility for holding training sessions for Counsel and assistants on substantive issues should move from the CSS to the OPCD in conjunction with the ICCBA. The OPCD notes that it has organised certain trainings in the past in the absence of a dedicated ICC Bar Association or any real budget to do so; it is happy to explore the ways of providing the utmost training to the Defence in conjunction with the ICCBA in the future.

The OPCD further observes that there is strong agreement for streamlining the list counsel application process as recommended. There is, however, disagreement on whether the list of counsel should be reduced according to criteria that may be set by the indigent accused when presented to him or her. This issue should be explored further in consultation with the ICCBA.

The OPCD also notes the strong support from the ICCBA and Mr Karnavas on Mr Rogers’s proposal to introduce legal services contracts and payslips to external Counsel and support staff, to provide greater certainty on the terms, provide periods of stability, and facilitate such things as obtaining rental contracts and bank accounts in the Netherlands.

The concern expressed in the Common Position Paper regarding accountability for unpaid portions of the professional uplift budget is shared by the OPCD. In this regard, the OPCD supports the proposal to isolate the legal aid budget from the Registry’s budget to ensure that all that is budgeted for legal aid is used for the benefit of representing the accused (and victims). If the legal aid budget takes the shape of a trust, there may be scope for the legal aid commissioners envisaged in Regulation 136 of the Regulations of the Registry to act as trustees.

G. Fee claims during various stages of proceedings

The Rogers Report made the following recommendations with regard to fee claims during the various stages of proceedings:

(i) Pre-Trial Fee Claims

1. Replace the current ‘monthly lump system’ with an hourly timesheet system modelled on the system applied at the STL during pre-trial stage 1;

⁸⁵ Rogers Report, para. 185.

2. Lawyers should be paid according to the number of hours actually worked (once approved), on each case;
3. The CSS should determine monthly maximum hourly ceilings according to the stage of the case;
4. Detailed timesheets should not be required for legal assistants and case managers who work at the seat of the court.

(ii) Trial Fee Claims

Once trial has commenced:

5. Remove the requirement for defence team members to submit action plans;
6. 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;
7. Pay team members the monthly fee according to the agreed monthly lump sum rate, representing 150 hours of work;
8. 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 actual hours worked;
9. 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.

(iii) Appeal Stage Fee Claims

10. 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;
11. The total lump sum system should retain some level of flexibility, both to increase and decrease the total fund, in exceptional circumstances;
12. 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).

(iv) Reparations Stage Fee Claims

13. Introduce a total lump system for the reparations stage. The amount should be based on the likely hours required by the defence team;
14. The total lump sum system should retain some level of flexibility, both to increase and decrease the total fund, in exceptional circumstances;
15. 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).

With regard to the pre-trial phase, the ICCBA noted that the reasonable assumption is that a Defence team would be fully engaged with working on a case, meaning that fixed monthly fees are appropriate unless the flow of a case is significantly disrupted.⁸⁶ This includes the period between confirmation of charges and trial, which it observed was a period of significant activity due to the Prosecution disclosures that usually take place during this time.⁸⁷ The ICCBA

⁸⁶ ICCBA Response, p. 31.

⁸⁷ ICCBA Response, p. 32.

endorsed paying Legal Assistants and Case Managers in full, without the need for timesheets, provided that they work at the seat of the Court.⁸⁸ For the trial phase, ICCBA observed that a “reduced regime when a trial is postponed for two months is too short a period and is impractical”, arguing that a team cannot be expected to be “stop/go” to that degree.⁸⁹ In relation to the appeal phase, the ICCBA recognised that, “of the three specific areas suggested, the appeal stage may best lend itself to a lump sum payment system”, although warned that assessment of the lump sum on the basis of “complexity of the case” may be misleading, given that complex cases may have simple appeals, while simple cases may raise complex appeal issues.⁹⁰ The ICCBA suspected, further, that changing to a lump sum payment based on size and complexity will unlikely be an improvement of the present system, as it may lead to less, rather than more payment.⁹¹ Lastly, for the reparation phase, the ICCBA observed that the lump sum system might be workable, but that further examination was necessary.⁹²

The IBA agreed with the Registrar’s view that the legal aid system procedures should be “lean, meaningful, and transparent”, and supported the Rogers Report’s recommendations to streamline the procedures to monitor fee claims laid out at pages 8–9 of the Registrar’s Legal Aid Concept Paper.⁹³

Michael Karnavas mostly agreed with the proposals in the Rogers Report, although urged caution. In particular, he commented that information required on timesheets should be kept to a minimum, and that monthly flexible action plans are preferred. Further, while being paid for actual hours worked according to timesheets may sound equitable, Mr Karnavas argued that this would fail to take into account periods where the hours worked exceeds the monthly ceiling.⁹⁴

The OPCD observes that, with the exception of a number of issues raised by the ICCBA, there is a level of agreement on Mr Rogers’s proposals concerning fee monitoring procedures. The ICCBA’s argument that fixed monthly fees are appropriate at the pre-trial stage is consistent with Mr Karnavas’s view that remuneration should not necessarily reflect the hours indicated on timesheets. Either way, the OPCD supports the proposition that the information on any monthly timesheets should be kept to a minimum to reduce the administrative burden.

Further, the OPCD considers that the Court should recognise the dedication with which Defence Counsel and support staff carry out their work the vast majority of the time, which often exceeds the number of hours allocated to them and for which they are remunerated. The assumption that defence teams are fully engaged with working on a case at most stages of the proceedings is therefore a fair and reasonable one. While difficult to make as a ‘proposal’, the subject of ‘trust’ in the Defence Counsel and team members, as discussed in the Legal Aid Seminar of 19 June 2017, is something that should be fostered in these proposals and in the ICC culture, more generally.

The OPCD suggests that the draft proposal takes into account the views expressed by the ICCBA in relation to two months being too short a period of postponement to be considered as triggering a period of reduced activity. The OPCD notes that there is widespread agreement

⁸⁸ ICCBA Response, pp. 37–38.

⁸⁹ ICCBA Response, p. 39.

⁹⁰ ICCBA Response, pp. 21–22.

⁹¹ ICCBA Response, p. 21.

⁹² ICCBA Response, pp. 22–23, 40.

⁹³ IBA Comments, referring to Legal Aid Concept Paper, pp. 8–9.

⁹⁴ Michael Karnavas’s Comments, pp. 26–27.

that a lump sum payment system is appropriate for both the appeal and reparations phases, although suggests that the ICCBA’s concern regarding basing the lump sum amount on the “complexity of the case” be carefully considered.

H. Article 70 cases

As noted by the IBA, in 2014 the ASP requested the Court to “consider ‘policy options’ regarding the level of legal aid to be provided by the Court to indigent accused in Article 70 cases, ‘including the establishment of specific criteria and a quantitative ceiling, as appropriate’”.⁹⁵ In addition to the team composition recommendation detailed above, the Rogers Report also made the following recommendations regarding Article 70 cases:

1. Allocating fewer hours for the monthly ceiling during the pre-trial stage;
2. Allocating a significantly reduced lump sum for the appeal phase.

The ICCBA did not support Mr Rogers’s general contention that Article 70 cases inevitably require fewer assets than Article 5 cases, noting the International Consortium’s statement that 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”.⁹⁶ The ICCBA agreed, however, with Mr Rogers’s observation that Article 70 cases “have the potential to vary considerably in terms of size and complexity” and that “the CSS should maintain a flexible approach”.⁹⁷

The IBA supports a cautious approach in distinguishing Article 70 cases from Article 5 cases. It observes that the Article 70 cases to date have shown that they may involve multiple accused or rely on complex evidence, which are factors that increase the resources needed. The IBA emphasised that legal aid for Article 70 cases be evaluated on a case-by-case basis, “with the possibility to evaluate the complexity of the case”.⁹⁸ It noted that this approach is consistent with findings of the Trial Chamber in the *Bemba et al.* Article 70 case, in which it held that the Rome Statute does not make a distinction between Article 5 and Article 70 in terms of legal aid entitlement. It further noted that, in this decision, the Chamber ruled that the Registrar is obliged to take into account the “actual needs” of the legal aid applicant, the need for an “efficient and effective defence”, and the “interest of justice in the given case” when allocating legal aid, regardless of whether it is an Article 5 or Article 70 case.⁹⁹

Michael Karnavas disagreed with the Rogers Report, and argued that resources for Article 70 cases should not be reduced so as to inhibit Defence Counsel from adequately defending the accused to the highest standards.¹⁰⁰

The OPCD notes that there is universal agreement from respondents that Article 70 cases are not inherently less complex than Article 5 cases, and that the legal aid for Article 70 cases

⁹⁵ IBA Comments, p. 7, referring to ICC ASP, Resolution on the Programme budget for 2016, the Working Capital Fund and the Contingency Fund for 2016, scale of assessments for the apportionment of expenses of the International Criminal Court and financing appropriations for 2016, ICC-ASP/14/Res.1, 26 November 2015, Section J, para. 14.

⁹⁶ ICCBA Response, p. 14, referring to ICJC Report, para. 76.

⁹⁷ ICCBA Response, p. 15.

⁹⁸ IBA Comments, p. 8.

⁹⁹ IBA Comments, p. 8, referring to *Prosecutor v Bemba et al.*, Decision on the Defence Applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, ICC-01/05-01/13-955, 21 May 2015, para. 35.

¹⁰⁰ Michael Karnavas’s Comments, p. 30.

should therefore be evaluated on a case-by-case basis. The OPCD takes note of the decision on this issue by Trial Chamber VII, as highlighted by the IBA, which held that the provisions of the Rome Statute “do not support an argument that there is inevitably a difference in the entitlement to legal aid between the accused in Article 5 and Article 70 proceedings”.¹⁰¹ It further held that the “actual needs of the legal aid applicant and the interest of justice in the given case must be fully taken into account in the required decision of the Registrar, regardless of whether they concern Article 5 or Article 70 proceedings”.¹⁰²

The OPCD therefore suggests that the draft proposal exclude Mr Rogers’s recommendation to limit the size of Defence teams in Article 70 cases, as mentioned above,¹⁰³ as well as the recommendations to allocate – as a matter of course – fewer hours as the monthly ceiling at pre-trial and a reduced lump sum for the appeal. No provision limiting the resources for Article 70 cases should be included in the draft proposal.

I. Providing leave days and notice periods

The Legal Aid Policy currently does not address maternity, paternity, and sick leave for external Counsel and support staff. The ICCBA suggested that the draft proposal address these benefits for defence team members. Furthermore, it argued that Counsel should be permitted to draw upon the ICC Contingency Fund, or, as an alternative, another budget created for the purpose of engaging personnel on a temporary basis to replace team members on maternity or paternity, or those who cannot work for an extended period due to sickness or injury. This would place defence teams on a more equal footing with the Prosecution, and better ensure continuity of high quality legal representation.¹⁰⁴ The ICCBA further proposed that defence team members be provided with notice periods in their contract similar to Prosecution staff, in the event that, through no fault of their own, they are forced out of the case.¹⁰⁵

Michael Karnavas also suggested that legal consultants and case managers be provided with maternity and paternity leave, as well as 2.5 days paid leave per month, among other things. He argued that not according legal consultants and case managers such benefits that staff enjoy, when they essentially perform the same role, constitutes discrimination.¹⁰⁶

The OPCD agrees with the suggestions made by the ICCBA and Mr Karnavas that Defence team members should benefit from the equivalent of maternity leave, paternity leave, annual leave, and sick leave, so that they enjoy the same benefits as their Prosecution counterparts. The OPCD further recommends that the draft proposal consider the ICCBA’s suggestion that Counsel should be permitted to draw upon a fund or budget for the purposes of engaging personnel on a temporary basis to replace team members on maternity or paternity leave, or those who cannot work for an extended period due to illness. There is merit in the suggestion, given the small sizes of Defence teams, and the substantial effect a period of prolonged absence of a member can have on the team.

¹⁰¹ *Prosecutor v Bemba et al*, Decision on the Defence Applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, ICC-01/05-01/13-955, 21 May 2015, para. 36.

¹⁰² *Prosecutor v Bemba et al*, Decision on the Defence Applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, ICC-01/05-01/13-955, 21 May 2015, para. 37.

¹⁰³ See above, p. 5.

¹⁰⁴ ICCBA Report, p. 34.

¹⁰⁵ ICCBA Report, p. 35.

¹⁰⁶ Michael Karnavas’s Comments, pp. 22–23.

The OPCD recalls that the Legal Aid Seminar of 19 June 2017 discussed the benefits of offering Defence support staff General Temporary Assistance (“GTA”) contracts – similar to how support staff are employed at the Special Tribunal for Lebanon. At this seminar, the Principal Counsel of the OPCD suggested that any support staff employed as such could fall under the administrative oversight of either the OPCD or OPCV, to ensure their independence. The OPCD suggests that this option be considered further with all stakeholders, as such an arrangement would automatically accommodate the concerns raised above.

J. Role of the OPCD

The OPCD was created in 2004 by the ICC Judges through the Regulations of the Court for the purpose of representing and protecting the interests and rights of the Defence.¹⁰⁷ It carries out this mandate as a “wholly independent office”, with Counsel and assistants within the Office who “shall act independently”.¹⁰⁸

The International Consortium assessed what the appropriate role for the OPCD should be, and whether its independence is justified.¹⁰⁹ The International Consortium found that the OPCD “is providing a valuable service to the defence in cases before the Court and thereby contributing to the ICC’s goal of fairness in proceedings”.¹¹⁰ It added that the OPCD is “well situated” to serve a “valuable role” in presenting an institutional voice of the Defence within the ICC, having “accrued credibility with Court officials over its more than ten years at the ICC”, and having the “institutional memory of those who have participated in earlier policy and process discussions”.¹¹¹ As such, Court stakeholders “reinforced the view that the OPCD is respected within the Court and is regarded as a knowledgeable and informed defence voice”.¹¹² The International Consortium added, as an issue that “may be worthy of future consideration”, the creation of a “fifth independent organ of the ICC: a Defence Services Office, similar to the one that exists at the Special Tribunal for Lebanon”. Such an office, it stated, would have responsibility for performing Defence-related functions currently performed by the Registry, the substantive work currently done by the OPCD, and the role of institutional voice for the Defence in the Court’s policy and budget work.¹¹³

The Rogers Report found that, among independent Counsel interviewed, there was a “general consensus that the OPCD had provided valuable assistance to Counsel – particularly in the early years of the ICC – and had successfully carved out a reputation for independence”.¹¹⁴ The Rogers Report simply made one recommendation:

1. The OPCD should aim to be more transparent by providing greater details of its services, on-going tasks, and accomplishments on a regular basis.¹¹⁵

The OPCD appreciates the acknowledgement of a general consensus that it has provided “valuable assistance to counsel” and “successfully carved out a reputation for independence”.¹¹⁶

¹⁰⁷ See Regulation 77(4) of the Regulations of the Court.

¹⁰⁸ Regulation 77(2) of the Regulations of the Court.

¹⁰⁹ ICJC Report, p. 44.

¹¹⁰ ICJC Report, para. 124.

¹¹¹ ICJC Report, para. 125.

¹¹² ICJC Report, para. 125.

¹¹³ ICJC Report, para. 129.

¹¹⁴ Rogers Report, para. 268.

¹¹⁵ Rogers Report, p. 89.

In addition to providing assistance to Counsel, the OPCD plays a role in promoting Defence interests within the ICC (through preparing documents such as this one, among other things), serving as the institutional memory of the Defence by creating memoranda and manuals on the ICC's case law for the benefit of Defence teams, and directly representing accused within limited circumstances, particularly at the early stages of a Situation or a case. In our view, these functions play an important role, complementing the resources provided to Defence teams through the legal aid system and helping to contribute to achieving equality of arms. As we have asserted previously, the discussion on the OPCD's role is one that is ancillary to the review of the legal aid system; however, the OPCD embraces discussion of several points raised related to the institutional Defence presence in the Court and, therefore, submits the following for further consideration in parallel to the important legal aid discussions.

The OPCD welcomes any criticism provided in the spirit of constructive dialogue. In this regard, it acknowledges the Rogers Report's recommendation that the OPCD should aim to be more transparent. The OPCD would like to note that it makes great efforts to ensure transparency to the Registry, Defence teams, and, where possible, external stakeholders. Pursuant to Regulation of the Registry 146, the OPCD provides weekly administrative updates and fortnightly budget updates, as well as an annual report of its work, and participates in biweekly meetings with the Division of Judicial Services. The OPCD also produces detailed budgets each year for Registry submission to the Committee of Budget and Finance, and has provided anonymous statistics on the assistance it provides overall to Defence teams for budgetary purposes. The OPCD also provides weekly updates to the Defence teams summarizing court filings, provides quarterly updates on the OPCD's activities (which includes information on updated and new legal memoranda), and where necessary consults Defence teams on their views when it is invited to provide comments on the Registry's policies and documents. Furthermore, the OPCD is the only ICC office that provides internal and external stakeholders with a factsheet clearly outlining its mandate and day-to-day work, and has provided presentations wherever permitted – both internal and external – to help stakeholders and interested parties better understand our work.

Nevertheless, the OPCD always strives to improve the service it provides, and will explore ways to improve transparency, taking into account the independence of our Office, as well as the duty of confidentiality we owe to the Defence teams. One way we could improve our external transparency is for the OPCD to be featured on the ICC's website, along with an explanation of our mandate. The OPCD has requested the Registrar twice in the past to facilitate the creation of such a page on the new ICC website, and we would like to renew said request.

On a final note, the OPCD urges the ASP to give serious consideration to the International Consortium's suggestion regarding the creation of a fifth independent organ of the ICC, in the form of a Defence Services Office. The IBA made a similar proposal in 2011, stating that, a "defence organ would reflect, at an institutional level, the principle of equality of arms".¹¹⁷ It would allow such a Defence office to determine its own budget – as the Prosecution is able to do – and would "significantly ameliorate many of the difficulties that Defence Counsel currently face, including obtaining state cooperation".¹¹⁸ With institutional equality, the Defence would have a representative body to present views at the ASP, the Plenary of Judges, and in the Coordination Council ("CoCo"), which would provide a level playing field with the

¹¹⁶ Rogers Report, para. 268.

¹¹⁷ IBA, Fairness at the International Criminal Court, August 2011, p. 35.

¹¹⁸ IBA, Fairness at the International Criminal Court, August 2011, p. 35. See also IBA, Fairness at the International Criminal Court, August 2011, p. 34.

Prosecution. And with control over its own budget, an independent Defence organ could result in a net gain in savings for the Court, through reducing administrative burden and improving efficiency.

The OPCD notes that the ICJC Report supporting the debate for an independent Defence organ comes after both the IBA recommendations in 2011 and the Registry's Experts Conference of 24 March 2015, at which similar issues were discussed. This demonstrates the growing force that exists for the proposal. The OPCD believes that the recent creation of an external association, the ICCBA, was a necessary step in strengthening the collective interests of Counsel. Now that the ICCBA is established, this momentum must proceed with further serious discussion on the creation of an independent Defence organ; as an internal yet independent organ, it would complement and empower the external ICCBA, finally address a procedural power imbalance between the Prosecution and the Defence, and help secure the rights of accused before the ICC in the future proceedings.

III. Conclusion

The OPCD notes that several of the issues raised have been discussed for years, and even before the 2012 decision to reduce the legal aid budget. That reduction was a retrograde step for the Court and the rights of the accused and the victims and must be remedied as soon as possible. The OPCD is concerned that no proposed remedy is slated to be suggested to the ASP until, at least, the Seventeenth Session of the ASP in 2018.

If the Registrar is unable to present a reformed legal aid proposal before the ASP in December 2017, the OPCD urges, in strong terms, that he take interim steps to address the situation. This includes, at least, automatically paying out the professional uplifts of 30% for Counsel and 15% for support staff, without the need for documentation, as requested by the ICCBA and recommended by the Common Position Paper.¹¹⁹ Furthermore, the Registrar should also make every effort possible to persuade the Dutch Government to amend the ICC headquarters agreement so as to exempt external Counsel and support staff from paying income tax on their earnings, which is a view that carries universal support. In the alternative, the OPCD urges the Registrar to pursue other arrangements with the national fiscal authorities to achieve the same result in the interim.

The OPCD believes that the ICJC Report and the Rogers Report, as well as the Legal Aid Seminar, are important steps towards addressing the current state of legal aid for the Defence, which has been universally acknowledged as being inadequate at the ICC.

We hope that the views expressed in the responses to the Registrar's invitation for comments, including this one, will be carefully considered when developing the draft proposal for amending the legal aid system. The OPCD hopes it will be a transparent and inclusive process going forward in the next stages of making the necessary amendments and, as always, remains ready to assist throughout the process.

¹¹⁹ Common Position Paper, pp. 1-2.