

DRAFT FOR COMMENTS

Review of the International Criminal Court Legal Aid System

Concept Paper

I. INTRODUCTION

Since the first version of the International Criminal Court (ICC, “Court”) legal aid system (LAS) for defence teams and victims was presented in 2004, the Court has closely monitored it in an effort to ensure its efficiency and effectiveness. The last major review of the LAS was in 2012. The Court is currently undertaking a fresh review of the LAS and welcomes the input of external stakeholders on how best to develop the system on the basis of our experience to date.

As part of this process, the Registrar has commissioned external experts to provide reports containing assessments and recommendations. The first such report, by the International Criminal Justice Consortium (“ICJC Report”), provided an overview of the challenges and concerns at hand.¹ The second report, by Richard J. Rogers (“Expert Report”), provided an in-depth comparative analysis and recommendations for enhancing the LAS.² This Concept Paper gives stakeholders an overview of the current concerns as well as the solutions being considered.

Following your input, the Registry intends to organize a seminar on 20 June 2017 to discuss some of the key issues in greater detail. The Court very much welcomes the views of counsel and civil society on the topics outlined below and looks forward to their participation at the seminar.

¹ James Bethke, Hon. Marcel Lemonde and Andrew Silverman, International Criminal Justice Consortium, *“Report on the Assessment of the Functioning of the International Criminal Court’s Legal Aid System”*, 27 October 2015. Available as an annex to the Expert Report cited in footnote 2 below.

² Richard J. Rogers, Global Diligence LLP, *“Assessment of the ICC’s Legal Aid System”*, 5 January 2017. Available for download at http://www.iccba-abcp.org/legal_aid_report

The Court intends to present an update on the consultation process to the Assembly of States Parties (ASP) at its sixteenth session, to be held on 4-14 December 2017.

a. Why Now?

At its fifteenth session, the ASP acknowledged “the Court’s efforts to continue implementing the legal aid remuneration policy” but stressed “the need for continuous monitoring of the efficiency of the legal aid system to uphold and strengthen the principles of the legal aid system, namely fair trial, objectivity, transparency, economy, continuity and flexibility”.³ The ASP also 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”.⁴

Since the last review in 2012, a large number of cases have fallen under the LAS. This has allowed the Court to identify the strengths and weaknesses of the current system and provided an opportunity to evaluate lessons learned. Furthermore, responses to survey questions put to counsel on the ICC List of Counsel in preparation for the Expert Report have provided further insight into areas that require meaningful consideration. For example:

- Defence and victims’ lawyers engaged under the LAS believed the administration of legal aid could be more efficient and more transparent.
- Lawyers believed that remuneration had fallen below a reasonable level (especially since 2012), that team compositions were insufficient at certain stages of the process, and that the budget provided for investigation was not sufficiently linked to the demands of the

³ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifteenth session, The Hague, 16-24 November 2016* (ICC-ASP/15/20), vol. I, part III, ICC-ASP/15/Res.5, section K, para. 64.

⁴ *Official Records ... Fifteenth session ... 2016* (ICC-ASP/15/20), vol. I, part III, ICC-ASP/15/Res.5, annex I, para. 8.

particular case.

The comparative analysis of other tribunals outlined in the Expert Report demonstrated that legal aid remuneration at the Court falls significantly below legal aid remuneration at other international courts and tribunals.

The Court considers that this analysis, together with the feedback provided by counsel, provides reason to engage in a discussion about whether the Court's legal aid system as a whole meets the requirements of efficiency and effectiveness. This discussion is grounded on the premise of the Court's commitment to ensuring that it can and should attract external counsel who meet the highest standards of efficiency, competence and integrity.

b. Scope and Vision

The aim of the current review is to ensure that the LAS provides the necessary resources for external counsel to effectively represent defendants and victims in cases involving the most serious crimes of concern to the international community. The level of legal aid resources and remuneration should be sufficient to ensure that good lawyers are not deterred from accepting the Court's cases and will provide them with all the necessary support to represent their clients to a high standard. It is considered that a properly funded and efficient legal aid system will enhance the efficiency of the judicial process overall. However, resources allocated to the publicly funded LAS must be justified as *reasonable and necessary*. Through this review process, the aim is to find the "right" level of resources for defence and victims teams, taking note of the comparisons with other international tribunals.

An effective LAS must distribute limited resources in a financially accountable manner – counsel must justify their fees and expenditures – but administrative burdens must be directed toward the goal of accountability; LAS procedures should be lean, meaningful, and transparent.

This Concept Paper aims to give stakeholders a concise overview of the main issues regarding the LAS. It may be read in conjunction with the Registry's Single Policy Document on the Court's Legal Aid System, dated 4 June 2013 ("Single Policy Document") and the Expert Report (which includes the ICJC Report as an annex).

Finally, an effective LAS must also distinguish between the types of legal representation at the ICC. As the principles and values underlying representation for the defence, victims and assisted witnesses differ, the types of support required may also be considered independently.

c. Applicable Principles

The LAS is guided by a set of basic principles enunciated in the Single Policy Document, namely:

Equality of arms: The payment system must contribute to maintaining a balance between the resources and means of the accused and those of the prosecution;

Objectivity: The payment system allocates resources on the basis of the requirements of the case and not on the basis of subjective requirements;

Transparency: The payment system is structured and operated in such a way that it complies with the requirements of budgetary oversight and auditing in the management of public funds without interfering with the confidentiality of the work undertaken or the autonomy of counsel or legal team members;

Continuity and flexibility: The payment system must provide for mechanisms that are flexible enough to adapt to situations as they arise in order to preclude any paralysis prejudicial to the interests of the due administration of justice;

Economy: In conformity with the legal texts of the Court, specifically, regulation 83(1) of the Regulations of the Court (RoC), the legal aid system covers only costs that are reasonably necessary for effective and efficient legal representation.

In accordance with these principles, 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 Expert Report recommends the use of case complexity in relation to the investigation budget, the additional means budget, and the lump sum at the appeal stage. Other tribunals have used case complexity with some success, applying objective criteria to determine the complexity level. For example, at the International Criminal Tribunal for the former Yugoslavia (ICTY) the criteria are as follows:

Pre-trial - Complexity factors that are considered include:

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

Trial – Factors that are considered in determining complexity include:

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

Appeal - Complexity factors that are considered include:

- the number and nature of the grounds of appeal;
- whether there is a cross-appeal;
- whether the Appeal raises any novel legal issues that have not been addressed by the Tribunal's jurisprudence;
- the length of the trial judgment;
- the complexity of the legal and factual issues involved in the appeal;
- the number of documents, and in particular new documents, that have to be reviewed; and
- the sentence imposed by the Trial Chamber.

If properly implemented, the case complexity system may reduce administrative burdens and encourage efficiency. It may also, however, prove more challenging to apply at the Court whose broad jurisdictional scope entails a very diverse caseload – far more so than at ICTY. For these reasons, some may argue that all cases are highly complex. The Court introduces this concept as a key issue for discussion and welcomes stakeholders' views.

II. ASPECTS RELEVANT TO DEFENCE AND VICTIMS

a. Overview

Pursuant to articles 55(2)(c) and 67(1)(d) of the Rome Statute, suspects and defendants who lack sufficient means to pay for legal assistance have the right to be assigned legal assistance by the Court without payment.

Legal aid for indigent victims is discretionary. The Registrar, in consultation with Chambers, may determine the type and level of financial assistance on a case-by-case basis.⁵ In practice, Chambers have ordered several different models for victims' representation, involving teams made up of external counsel and/or staff from the ICC's Office of Public Counsel for Victims (OPCV).⁶ The Registrar aims to support Chambers by providing information

⁵ Regulations of the Court, Regulation 83(2).

⁶ These models have included representation for individual victims/groups as well as "common legal representatives" for all the victims in the case. In some cases, external counsel have led the teams; in other cases, the head of OPCV has acted as the principal counsel.

on the relevant options for victims' representation, along with the respective advantages and disadvantages and the financial consequences. Since the system for victims' representation is still developing, the input of stakeholders is particularly important.

b. Remuneration

In setting fee levels, the Court, like other tribunals, has sought to apply the principle of equivalence, which requires external lawyers to receive remuneration (roughly) equivalent to that of their counterparts in the prosecution. The fee levels of counsel and assistants at the ICC were significantly reduced following the review in 2012. According to independent counsel interviewed for the Expert Report, this reduction was based on incomplete or insufficient information and has resulted in critical underfunding of defence and victims lawyers. The Expert Report supports this view and points out that when external counsel's fees and expenses are compared properly to the equivalent prosecutor's salary and entitlements, the prosecutor's financial remuneration tends to be significantly higher. Furthermore, when the ICC fees and benefits are compared to other tribunals, the ICC fees are significantly lower (for most positions).

Stakeholders are invited to consider solutions to mitigate the concerns relating to remuneration. These include recalculating the fee levels to take into account the full compensation package of comparable prosecutors (i.e. salary plus entitlements and benefits). Stakeholders may consider the recommendation that fee levels should be within the range established at other tribunals.

For more information, see Single Policy Document, pages 16-26 and Expert Report, paragraphs 98-164.

c. Conditions of counsel: Other issues

There are a number of issues being considered by the Registrar that relate to the conditions under which counsel and consultants are engaged. These are important and worth mentioning for completeness. However, it is not envisaged that they would form part of the discussion at the upcoming conference. These include:

- Discussing with the Host State possibilities for tax-free income agreements to minimise (or, in some cases, eliminate) the need to augment fee levels.
- Exploring the possibility of certain benefits to counsel and consultants that are enjoyed by staff. These include paternity and maternity leave, sick leave, and a paid notice period when cases end unexpectedly (for example, due to the death of the accused).

d. Procedures for Monitoring Fee Claims and Other Resources

The current system for processing fees for defence and victims' teams involves action plans, time sheets and implementation reports. While the ICC must ensure that LAS funds are paid for work actually done, all legal aid systems rely to some extent on the accuracy and integrity of lawyers who submit fee claims. Verifying every hour of every fee claim would be extremely costly and time-consuming. The right balance must be found.

In considering this issue, the Court may entertain various options. These include a combination of hourly time sheets (during periods where greater monitoring is required), fixed monthly fees (during periods where minimal monitoring is required), and a lump sum per stage (during stages where the work requirement is relatively predictable, irrespective of duration).

Stakeholders are invited to give their views on the various options, some of which are already in place, including those outlined in the Expert Report, namely:

Pre-Trial Phase

- replacing the current monthly lump sum with an hourly time sheet system modelled on the system applied at the Special Tribunal for Lebanon during pre-trial stage 1 (from assignment until three months before trial), where lawyers are paid for hours actually worked up to a newly set monthly maximum ceiling;
- exempting legal assistants and case managers who work at the seat of the Court from submitting detailed time sheets; and
- reinstating a monthly lump sum for later stages of the pre-trial phase, such as confirmation of charges or three months before trial, as it can be assumed that the defence team is working full-time.

Trial Phase

- removing the need for detailed action plans and time sheets and paying team members a standard monthly fee.

Appeal Phase

- introducing a total lump-sum system for the appeal stage, in which the amount is based on the size and complexity of the case;
- adding some flexibility for exceptional circumstances that may require increasing or decreasing the lump sum; and
- requiring counsel to submit a team composition plan outlining the proposed team members and their respective fees – ensuring that the plan meets the minimum fee rates.

For more information, see Single Policy Document, pages 23 and 24 and Expert Report, paragraphs 202-261.

e. Additional Means

Both defence and victims' teams can request additional staff beyond the basic team composition. For the defence, the Full-Time Equivalent (FTE) system has been used as one of the elements to assess the complexity of cases. Each team accumulates FTE points based on objective criteria, such as the number of

counts submitted by the prosecutor, the number of victims or groups of victims accepted, or the number of pages (per unit of 3,000) in a case file. External lawyers have found the FTE system to be overly complicated, time-consuming, difficult to understand, and purely quantitative. The system for victims is more ambiguous and has also been criticized.

The Court would like to establish and maintain objective criteria for additional resources while also developing a more user-friendly system. Stakeholders are invited to provide their views and may wish to consider the recommendation to replace the current system with one based on case complexity. Under this system, each case could be ranked at the start of the proceedings to determine whether additional resources are required. On the other hand, such an assessment at that stage may prove difficult to make.

For more information, see Single Policy Document, pages 15 and 16 and Expert Report, paragraphs 82-97.

III. ASPECTS RELEVANT TO DEFENCE

a. Indigence

The LAS covers the cost of legal representation for suspects and accused persons who are assessed to be (partially or wholly) indigent. Assessing indigence can be challenging since post-conflict societies are fraught with legal and financial instability, making it difficult to trace assets. To the extent possible, the process should ensure that legal aid is only available for those persons who genuinely cannot afford to finance their defence.

The Court may consider a series of options to enhance the process for assessing indigence, such as updating the written policy to ensure transparency, consistency, and retention of institutional knowledge, or

revising the method of calculating a person's financial obligations. In addition, the Registry will continue to encourage better cooperation with States.

For more information, see Single Policy Document, pages 6-9 and Expert Report, paragraphs 25-31.

b. System for Assigning Counsel

In most cases, the assignment of counsel to an indigent suspect or defendant initiates the processes under the LAS. Counsel and team members may be entitled to claim legal aid for several years. The ICC List of Counsel contains over 600 lawyers. Currently, persons claiming indigence are presented with all 600 curriculum vitae and asked to select a counsel. Stakeholders are invited to consider the Expert Report's recommendation to introduce a "reduced list of lawyers" based on a set of criteria set by the suspect or defendant, with objective monitoring to ensure fairness.

For more information, see Expert Report, paragraphs 191-197.

c. Team Composition

The "core team" at the ICC consists of one counsel, one legal assistant, and one case manager. This core team works during most stages of the proceedings. However, until the first court appearance, only a single counsel is funded under the LAS. An associate counsel is assigned to bolster the core team from the confirmation of charges to the closing statements at trial.

Surveyed defence counsel have raised the concern that the team composition is too slim at the early stages of the process. Counsel believe that a legal assistant should be assigned to help them even before the transfer of the person to the Court, and that the associate counsel should be assigned well before the confirmation hearing. The comparative study in the Expert Report suggests that the ICC's teams are slimmer than those at other tribunals during

the early stages of the process. Some counsel also believe that additional specialist counsel may be required for the appeal stage.

Stakeholders are invited to provide views on how to address these concerns. Example proposals include: from the initial appearance to confirmation, assigning an associate counsel (in addition to the core team) with a reduced ceiling of billable hours (25-40 hours per month); on appeal, ensuring that the lump sum takes account of the need for an associate or specialized appeals counsel assigned to assist the core team. In addition, the Court may explore the possibility of permitting counsel to hire a legal assistant to help with the transfer proceedings.

For more information, see Single Policy Document, pages 10 and 11 and Expert Report, paragraphs 32-57.

d. Investigation Budget

A basic investigation budget of €73,006 is granted to each defence team for the entire case. The budget can be increased on the basis of objective criteria. The Counsel Support Section (CSS) and external lawyers feel that the current investigation budget is set at an arbitrary figure and is often inadequate. It is also low with respect to those of other comparable tribunals.

Seemingly, the current “one-budget-fits-all” approach has failed to service properly the wide range of cases before the ICC, which vary enormously in terms of witness location and case complexity. The current figure may be inadequate for complex investigations and distant witnesses, but too generous for straightforward cases in nearby locations.

Stakeholders are invited to provide views on ways to determine the right level of budget for investigations. For example, this might include basing the budget on the complexity of each investigation and assigning a locally hired

resource person, with local knowledge and language skills, to each team for the majority of the process.

For more information, see Single Policy Document, pages 11 and 12 and Expert Report, paragraphs 58-81.

e. Article 70 Cases

Since Article 70 cases will normally require less work than Article 5 cases, the level of resources should be reduced. This could be done by limiting the team composition, allocating fewer hours for the monthly ceiling during the pre-trial stage, and allocating a significantly reduced lump sum for the appeal phase. Stakeholders may have additional recommendations.

For more information, see Expert Report, paragraphs 265-266.

IV. ASPECTS RELEVANT TO VICTIMS

a. Overview

The survey conducted for the Expert Report identified several areas of concern regarding the LAS for victims. For example, external lawyers felt that they were not granted sufficient information on the available budget to plan their work and teams adequately. Lawyers were also concerned that the administration of legal aid was not organized in a way that fully took into account the role of victims' teams.

The Court considers that measures can be taken to improve budgetary planning and provide greater transparency, which will, in turn, enhance efficiency. The Court may therefore consider options that would allow victims' teams to organize their work more effectively and provide victims with a clearer set of expectations. Stakeholders are invited to give their input.

For more information, see Expert Report, paragraphs 271-274.

b. Indigence

The experience of the Court has been that the process for assessing the indigence of victims may be improved and streamlined. In earlier cases, a large number of victims were asked to complete complex financial disclosures. More recently, an expedited procedure has been implemented.

In principle, non-indigent victims should contribute to the cost of their representation. In practice, however, due to the circumstances of the victims who have so far participated in Court proceedings, the process of determining indigence costs the Court more than it recovers. An unduly burdensome process may even cause victims harm. On this basis, the Court considers that the process may be reconsidered and adapted accordingly.

The Expert Report recommends applying a presumption of indigence for all victims. It argues that determining indigence for all victims is unlikely to provide any overall financial benefit to the Court because (i) nearly all victims to date who have participated in the Court's proceedings have been indigent and (ii) in the unlikely case of a non-indigent victim, his or her contribution to legal aid would be less than the cost of assessing the indigence of all the victims. In addition, it may be considered whether the financial disclosure process may be insulting and re-traumatizing to some of the victims of mass atrocities.

Stakeholders may wish to provide views on this important issue. Should the Court apply a presumption of indigence for all victims and discard the financial disclosure requirement in favour of a simple declaration of indigence? Should the Court retain the possibility of requesting financial disclosure where there is reason to believe that some or all victims are non-indigent? Or should there simply be, as has been suggested by the ICCBA, no indigency requirement at all for victims admitted to participate in a case?

For more information, see Single Policy Document, page 9 and Expert Report, paragraphs 282-286.

c. Establishing an Overall Budget

For a victims' team, the Registry's Single Policy Document suggests the following composition: (i) a single counsel until 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. Where common legal representation is ordered, the resources may be varied after consideration of a number of objective factors, including the role of the OPCV.

Surveyed 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. While budgetary certainty is bound to be a challenge within this evolving system, the Court aims to identify the best solution possible.

Establishing an overall budget, broken down for each stage, would give victims' teams more predictability. Establishing the right level of budget may be challenging, but lessons learned from past Court cases and from the OPCV budget levels may provide guidance. Stakeholders are invited to share their views on how this can be achieved.

For more information, see Single Policy Document, pages 12-22 (*passim*) and Expert Report, paragraphs 287-297.

d. Field Budget

Victims' teams should have sufficient resources to communicate effectively with victims and to gather necessary information, particularly for the reparations stage. This is not easy, considering that cases sometimes involve hundreds or even thousands of victims living in unstable regions. Some victims' teams have complained that the investigation budget of €43,752 is insufficient.

To address these and other concerns, the Expert Report recommends that the investigation (or "field") budget level should be calculated on a case-by-case basis and as part of the overall budget, taking into account applicable Court orders, number and geographical distribution of victims, organization of victim groups, languages spoken, means of transport, security concerns, whether the team can use the Court's field office, and the costs of office space.

Stakeholders may also consider whether at least one field assistant should be engaged for the entire process.

For more information, see Single Policy Document, page 14 and Expert Report, paragraphs 298-305.