



**SUBMISSION ON LEGAL AID
MADE TO THE COMMITTEE ON BUDGET AND FINANCE
BY THE INTERNATIONAL CRIMINAL COURT BAR ASSOCIATION (“ICCBA”)**

1. The ICCBA President has the honour of addressing to the Committee on Budget and Finance (“CBF”) the submissions below in relation to the Legal Aid Scheme before the Court. This is done in accordance with paragraph 62 of Resolution ICC-ASP/15/Res. 5 of 24 November 2016 inviting the ICCBA to report to the Assembly of States Parties (“ASP”) on its activities. The ICCBA respectfully requests the CBF to make the following recommendations to the Sixteenth Session of the ASP on 4-13 December 2017:
 - a) That the ASP should decide that, pending completion of a full review of the Legal Aid Scheme, the professional uplift for compensation of charges provided under the current Legal Aid Scheme:
 - i. shall be paid automatically on a monthly basis together with the fees of Counsel and support staff, without the need to submit supporting documentation; or
 - ii. in the alternative, shall be paid in advance on a monthly basis together with the fees of Counsel and support staff, and that the verification of supporting documentation submitted at the end of the year be made a *pro forma* process; and
 - b) That the ASP should amend the ICC Budget structure or financial rules so that legal aid funds cannot be reallocated by the ICC Registrar for other non-legal aid purposes pursuant to rule 104.3 of the Financial Rules and Regulations: this could be achieved by an amendment to the budget structure, insulating the legal aid budget as a separate budget or special account, or by inserting a specific caveat to the ICC Registrar’s authority to reallocate funds in the Financial Regulations and Rules – whichever way is deemed most appropriate by the CBF and the ASP.

BACKGROUND

2. Based on the outcome of two subsequent reviews of the Legal Aid Scheme in 2015-2016, the ASP requested the ICC to submit “proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly” at its Sixteenth session in December 2017 (ICC-ASP/15/20). The Registrar issued a draft Concept Paper on the Review of the International Criminal Court Legal Aid System and held a Seminar on 19 June 2017. The draft Concept Paper reads that, instead of the requested proposals for adjustments to the legal aid remuneration policy, the ICC Registrar intends to present an “update on the consultation process” at the Sixteenth Session of the ASP.
3. The ICCBA invited the ICC Registrar to review his intended timeline and speed up the review and proposal process in compliance with the ASP instruction. The ICCBA also proposed the implementation of certain interim measures pending a full review of the Legal Aid Scheme in order to improve the current situation at no cost for States Parties. Both requests were denied.
4. At the same time, a report submitted by a consultant hired by the ICC Registrar (“the Rogers Report”) acknowledged that the level of remuneration for Counsel and support staff before the ICC is the lowest of all international tribunals. The ICCBA submits that the current situation cannot remain unaddressed for an indefinite period of time. Mindful of the need to ensure

efficient and transparent use of the legal aid funds budgeted and authorized by the States Parties, the present Submission requests the CBF to recommend to the Sixteenth Session of the ASP the immediate and cost-neutral interim measures mentioned in paragraph 1 in order to improve the level of remuneration of Counsel and support staff without increasing, at this stage, the level of legal aid. Such interim measures can be implemented immediately, pending the completion of a full review of the existing Legal Aid Scheme by the Court.

I. AUTOMATIC OR ADVANCE PAYMENT OF PROFESSIONAL UPLIFT

5. A measure identified in the Rogers Report that can be implemented pending a full review of the Legal Aid Scheme without generating extra legal aid costs is the automatic payment of the professional uplift of 30% for Counsel and 15% for support staff for compensation of charges factored into the hourly and monthly fee rates. On 31 March 2017, the ICC Registrar refused this interim measure primarily on the basis that the payment of the additional uplift cannot be automatic and had to be conditional on the production of supporting documentation of actual payment of charges. The ICCBA respectfully disagrees with this analysis and is of the view that the Registrar has the authority to issue a policy decision implementing the proposed measure without derogating from the existing Legal Aid Scheme. In the absence of such a policy decision, the ICCBA now raises this issue before the CBF for recommendation to the ASP.
6. The Registry's Single Policy Document on the Court's Legal Aid System (ICC-ASP/12/3), which defines the current Legal Aid Scheme, provides that the compensation of charges is not paid automatically: costs compensated must have a direct link with intervention and involvement in Court proceedings, and it is conditional on the production at the end of the year of supporting documentation of actual payment of charges. This provision does not preclude the advance payment of the uplift for compensation on a monthly basis in addition to legal fees and the yearly verification of actual payment of charges. In any case, as long as Counsel and support staff remain potentially liable for income tax (up to 52% in the Netherlands), the totality or a significant portion of the uplift is thereby absorbed irrespective of other side activities, thus creating a presumption that the full compensation of charges is, in any case, justified, without prejudice to other charges.
7. This presumption is sufficiently strong to justify the automatic payment of the uplift without the need for supporting documentation of actual payment of charges. The ICCBA therefore respectfully requests that the ASP direct the Registrar to pay the professional uplift of 30% for Counsel and 15% for support staff automatically and waive the requirement for this supporting documentation until the completion of a full review of the Legal Aid Scheme. In the alternative, the ICCBA respectfully requests that the ASP decide that the professional uplift be paid in advance and factored into the hourly and monthly fee rates, without the need for an onerous process for verifying supporting documentation. The ASP should therefore decide that, until the completion of a full review of the Legal Aid Scheme, the verification of documentation at the end of the year be made a *pro forma* process. These simple solutions would reduce the bureaucratic expenses linked to the current way charges are verified. Either measure should be implemented with immediate effect and would come at no cost for States Parties, who already allot these amounts for compensation of charges in the annual legal aid budget.

II. PREVENTING REALLOCATION OF LEGAL AID FUNDS

8. The ICCBA has noted that, for various reasons (which would appear to include a lack of transparency or guiding documents in relation to entitlements), only a small portion of Counsel and support staff entitled to receive the uplift for compensation of charges have been claiming it and/or receiving it in full or at all. A substantial amount of Counsel and support staff's compensation under the Legal Aid Scheme, which is budgeted for each year by States Parties as

part of the legal aid budget, never reaches Counsel and support staff. This unpaid portion is neither returned to States Parties nor is it added to the budget of the following year. In the absence of publicly available actual numbers, it is presumed that the unpaid portion of the legal aid budget is reallocated to the financing of Registry operations each year.

9. Under the current legal framework and budget structure of the Court, the Registrar, as first administrative officer of the Court, has the authority to reallocate the unutilized portion of the legal aid budget within the Registry budget pursuant to rule 104.3 of the Financial Rules and Regulations. All that this would require is a simple reallocation of resources among organizational units within the Registry, namely from CSS to other sections, such that the budget meant for payment of legal aid is used for other expenditures. It does not even need to be reported to the CBF or ASP. This way of reallocating resources means that the legal aid budget appears inflated when in fact it is not being allocated for the benefit of Counsel and support staff, and ultimately to ICC legal aid-assisted defendants, victims and witnesses. If this situation is not rectified, any augmentation to the legal aid budget – such as the one proposed in the Rogers Report – would primarily increase the portion and amount of the legal aid budget which the Registrar would have authority to reallocate to other ICC Registry operations and not pay to Counsel and support staff, who are the intended recipient of these funds.
10. Should the ASP grant the first request regarding the professional uplift above, the issue of the potential reallocation of the unpaid portion of the legal aid budget should automatically be mitigated, as more of the budget allocated for legal aid would indeed be spent for that purpose. To safeguard any unpaid portion of the legal aid budget remaining, the ICCBA respectfully requests, as a second urgent interim measure, that the CBF recommends that the rules governing the legal aid budget and/or the structure of the 2018 ICC budget be amended to prevent reallocations of legal aid funds for other purposes. Such measures would increase the transparency surrounding the Court's legal aid funding. It is suggested that any solution should ensure that the system remains flexible enough to provide for the contingency extension of the legal aid budget in order to face unforeseen expenses and continue to honour the ICC's financial obligations under the Legal Aid Scheme. The CBF could, for example, request that the Court create a separate "Major Programme" within the budget structure to outline legal aid costs.
11. The CBF may also recommend the making of a clear distinction in the legal aid budget between funds allocated to the payment of Defence fees, legal representatives' fees and fees paid to Counsel assisting witnesses for the sake of better transparency. The ICCBA defers to the CBF experts to determine the most appropriate and cost-efficient solution. It simply draws the attention of the Committee to the fact that creating a special account funded by assessed contributions, pursuant to regulation 6.5 of the Financial Rules and Regulations, for the purpose of legal aid, may also present some advantages in terms of efficiency, such as the potential to report or record unexpended funds from one financial period to the next.
12. Finally, the ICCBA would be grateful for an opportunity to address the CBF in person to provide further information in support of the present Submission and to answer any questions from the CBF.

Respectfully submitted,



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President
ICCBA-ABCPI