

**INTERNATIONAL CRIMINAL COURT BAR ASSOCIATION
COUNSEL SUPPORT STAFF COMMITTEE**

Annual Report 2017–18

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The Counsel Support Staff Committee (“Committee”) has the honour of presenting to the General Assembly its Annual Report for the period 30 June 2017 to 29 June 2018 (the “reporting period”).¹

I. Introduction

While the Court is celebrating its twentieth anniversary this year, support staff working here have little cause for celebration as they continue to be denied minimum and basic employment rights. The victims and defence support staff we represent do much the same work as their prosecution and Chambers counterparts, but, unlike them:

- are not given employment contracts;
- are paid less and do not receive subsidised health insurance or pension contributions;
- continue to face uncertainty regarding their income tax situation;
- have no formal paid sick leave, maternity and paternity leave, or annual leave;
- have no notice periods or other provisions governing severance of employment;
- have no contractual working hours and often work far in excess of the normal staff working hours for no additional pay; and
- are not protected under the Court’s staff anti-harassment policies, having to rely on inadequate provisions in the Code of Professional Conduct for Counsel.

The Committee has worked to improve the situation for support staff through advocacy, primarily to the Executive Council, as well as conducting internal research on the best way to achieve the necessary changes. We have, for instance, presented to the Executive Council a compelling analysis on why the current situation is unlawful under European Union law, as well as a recent policy document setting out the Committee’s position on the issues above. The latter has been approved for publication, which we hope will ensure that the new Registrar can reform the legal aid policy in a way that takes into account support staff views. The Committee has conducted internal research on many issues relevant to reforming the legal aid policy and is therefore in a position to further assist.

We are, however, extremely concerned with the slow pace of reform, and, pending the new legal aid policy, the Committee has focused on interim measures to alleviate some of the problems. In this regard, we support ICCBA publications of 29 January 2018 (co-written by one of our Committee members) on resolving the income tax issue, and on 2 March 2018 on improving protection against harassment. To assist, we have conducted research on adding provisions to the Code of Professional Conduct for Counsel on prohibiting harassment and discrimination. Further, we have taken steps to improve communication between support staff and the Committee by creating an email address where they can send concerns, and have further suggestions on the way forward on this issue, as well as many others, outlined below.

¹ Pursuant to Article 5(3)(b) of the ICCBA Constitution.

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II. Committee members

The seven members of the Committee during the reporting period were: Francesca Anzovino (Chair), Haydee Dijkstal, Chloé Grandon, Michael Herz, Jennifer Naouri, Tom Obhof, and Grace Sullivan.

III. Meetings

The Committee held its inaugural meeting at the ICC premises on 4 August 2017 and its final one on 13 June 2018. In total, the Committee met five times during the reporting period, with the quorum of four members reached on each occasion. In addition to meeting, the members of the Committee frequently communicated with each other on ICCBA-related matters by email, and collaborated on producing a number of documents together, outlined below. Further, the Chair of the Committee was invited to join an Executive Council meeting to discuss support staff issues on 26 September 2017. Two members of the Committee, Michael Herz and Grace Sullivan, were also members of the Secretariat and, in that capacity, attended nearly all Executive Council meetings between them, as well as various ICCBA events such as the ICCBA affiliation ceremony with the African Bar Association. Lastly, one member of the Committee attended an IT workshop at the ICC on 7 September 2017 on developing the “judicial workflow platform”.

IV. Realisation of the work plan

On 25 August 2017, the Committee submitted a work plan to the Executive Council outlining its aims in respect of strengthening the position of support staff. The Executive Council responded on 15 September 2017, providing a great deal of constructive comments and support for the initiatives proposed. The work of the Committee during the reporting period has been summarised below in the order that those items appeared in the work plan. Recommendations for the new Committee on the relevant issues are also provided in bold in order assist with the handover.

(a) Reform of the ICC legal aid system

Work plan objective: Continue to formulate viewpoints of support staff on the reform of the ICC legal aid system, with a view to promoting and improving their position.

Implementation: The strategy for the Committee at the outset was to monitor the legal aid reform developments and provide a commentary on the new draft policy by the Court once it is issued. This legal aid reform presents, in our view, the best opportunity to achieve a long-term solution for many of the current labour rights problems. We were therefore disappointed that the Court has not yet presented a new draft legal aid policy, or explained how it intends to move forward on this issue. We are further extremely concerned by the Committee of Budget and Finance’s (“CBF”) statement that it “strongly doubted whether the reform could

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realistically be considered by the Assembly [of States Parties]” (“ASP”) at its session in December 2018.² If the ASP does not consider it this year, it appears unlikely that any reform could have effect before 2020. We therefore urge the Registrar to urgently make reform a top priority (taking into account support staff views) and provide the CBF the information they require before their September 2018 session, so that it can be endorsed to the ASP. Pending the reform, it has been necessary for the Committee focus more strongly on interim measures to address the shortcomings of the current legal aid policy, as well as pursue a more proactive strategy. **We recommend that the new Committee continue to strongly advocate for swift progress in efforts to reform the legal aid policy, and in the meantime pursue the interim measures recommended below.**

Income tax exemption

A major and urgent issue for victims and defence support staff – which has caused a great deal of anxiety – is securing formal income tax exemption, as their counterparts in the prosecution and Chambers enjoy. One of our members, Chloé Grandon, has worked on this issue as part of the tax working group for over two years, but there does not appear to be much action on the part of the Court or Dutch authorities. This issue came forcefully to our attention on 3 November 2017, when we learned through the Executive Council that support staff were dissatisfied with what they perceived to be insufficient effort by the ICCBA in making progress on obtaining the exemption. We identified that the dissatisfaction was partly because not enough information regarding the ICCBA’s efforts on the tax issue were being communicated to support staff. In response, we took steps to improve communication between the Committee and support staff (see section IV(a) below). Further, one of our Committee members (as part of the tax working group) helped prepare the report published on 29 January 2018 outlining proposed solutions to the tax issue. The Committee endorses that report, but observes that none of the proposals have so far been taken up.

It is therefore important to focus on securing interim measures until either the legal aid policy is reformed or income tax exemption is secured. In this regard, the Committee monitored and supported efforts by the Executive Council and Legal Advisory Committee in requesting the Court and the CBF to automatically pay out the professional uplift to counsel and support staff (at a rate of 30% and 15%, respectively). The Committee notes with concern, however, that even a 15% uplift would not cover all income tax obligations in the Netherlands, let alone other professional costs. Furthermore, the Committee does not believe there should be such a great disparity in uplift between counsel and support staff, given that many support staff are qualified lawyers in their own jurisdictions with similar professional costs as counsel to maintain. The Committee has recently stated that the tax issue remains a top priority in a document clarifying our objectives in light of the appointment of a new Registrar. **We recommend that the new Committee continue to advocate that one of the proposals in the 29 January 2018 report on income tax exemption be adopted. In the meantime, we**

² Report of the Committee on Budget and Finance on the work of its thirtieth session, 31 May 2018, [ICC-ASP/17/5](#), para. 118.

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recommend that the new Committee advocate that the Court automatically pay out the 15% uplift. Should none of the proposals from the 29 January 2018 report be adopted, we recommend that the new Committee call for an increase in said uplift in the reformed legal aid policy to reflect actual professional costs.

Retention of support staff after closing arguments

On 26 September 2017, the Chair of the Committee also raised with the Executive Council the issue that support staff should be retained after closing trial arguments and pending the delivery of the judgment. Support staff on prosecution teams generally are retained during this period, and much work continues after the closing arguments. **We recommend that the new Committee advocate that the new legal aid policy should provide for the retention of all support staff between closing arguments and the issuance of the judgment, to ensure equal footing with the prosecution.**

Fixed-term or GTA contracts for support staff

The Committee believes that the new legal aid policy should provide for fixed-term or General Temporary Assistance (“GTA”) contracts for support staff. Such contracts would automatically address many of the issues facing external support staff, such as equality of remuneration with prosecution and Chambers support staff, greater job security, proper employment contracts and labour rights, and protection under harassment policies for Court staff. Defence support staff at the Special Tribunal for Lebanon work under GTA contracts, so there is precedent for such contracts working elsewhere. The Committee has raised this issue three times with the Executive Council during the reporting period, as well as once with the Defence and Victims Committees. These discussions have been constructive, and allowed the Committee to take into account views from counsel on the matter. The Committee has recently set out its position on this issue in a document clarifying its objectives in light of the appointment of a new Registrar. **We recommend that the new Committee continue working with the Executive Council, Victims Committee, and Defence Committee on developing a common position on behalf of the ICCBA on obtaining fixed-term or GTA contracts for support staff that it can put forward for the new legal aid policy.**

(b) Labour rights and incorporating them in support staff employment contracts

Work plan objective: Promote the labour position of support staff by including – in any letter of appointment issued by the Registry or agreed between counsel and support staff – provisions setting out the working conditions, rights, and obligations, of counsel and support staff *vis-à-vis* each other and the Court.

Implementation: This issue has been a major focus of the Committee’s work throughout the reporting period. The Chair of the Committee highlighted to the Executive Council on 26 September 2017 that support staff should get paid sick leave, maternity leave, and paternity leave. The Executive Council has been supportive and a constructive discussion has ensued, allowing the Committee to take into account views of counsel on the matter. The Committee

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is of the view that the financial implications of ensuring basic labour rights should be borne by the Court so that victims and defence teams are not forced to make an unfair choice between providing these basic rights to support staff or maximising limited funds for representation in other ways.

The Committee has also taken note of the letter sent by two counsel on 19 February 2018 and a separate letter signed by 44 support staff shortly thereafter, which raise support staff concerns regarding minimum wages, the right to the various types of leave, and notice periods. In response, the Committee has: (i) improved our communications with support staff, so that our constituents receive more information regarding the advocacy we conduct on their behalf and can contact us if they have concerns; (ii) supported the response by the ICCBA on 22 February 2018 outlining the steps the ICCBA had already taken and will take to address the issues raised; and (iii) collaborated with one of the counsel concerned, Melinda Taylor, on these issues.

The Committee has since drafted an advocacy document detailing how the current labour situation for support staff falls short of minimum standards required by European Union law, and emphasising the need for the Court to provide proper employment contracts incorporating minimum labour rights for support staff. This document has been presented to the Executive Council, which provided comments on the paper but did not approve it for publication. Following amendments to the document and resubmission, it unfortunately has still not been approved for publication. The Committee understands the concerns from counsel, such as any personal liability counsel may be exposed to in the event they are contractually engaged with support staff, and the need to also address the situation for privately funded teams. However, we believe that the complete absence of employment contracts and labour rights for support staff is so serious that the issue should be urgently publicised, even if the potential solutions are not yet agreed upon. In this regard, we argue below (section V(b)) that the Committee should, under certain circumstances, be able to publish documents autonomously. **We recommend that the new Committee build on the advocacy document on minimum EU standards already prepared, work with the Executive Council on addressing any outstanding concerns, and forcefully argue for its urgent publication to highlight, without delay, the serious issues raised.**

The Committee also saw the appointment of a new Registrar in March 2018 as an opportunity to make progress on the labour situation, given that he will be the one driving forward legal aid reform. We wished to ensure that the new Registrar was perfectly clear on the Committee's position on these issues, and we therefore produced a document outlining our objectives for support staff, including the need to ensure: (i) proper employment contracts; (ii) paid sick leave, maternity leave, paternity leave, and annual leave; (iii) sufficient notice when terminating contracts; and (iv) reasonable working hours. At the time of writing, this document has just been approved for publication by the Executive Council. **We recommend that the new Committee continue advocating for basic minimum labour rights for support staff. In particular: (i) monitoring the legal aid reform and advocating for the provision of employment contracts and basic minimum labour rights for support staff**

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under the new policy; (ii) in the interim, calling for the Court to provide employment contracts to support staff; and (iii) also in the interim, calling for counsel to voluntarily commit to providing basic labour rights for support staff.

(c) Legal privilege for case managers

Work plan objective: Promote the adoption of legal privilege for case managers, including, in the case of defence teams, ensuring they are entitled to privileged meetings with the client in the detention centre.

Implementation: The Committee began looking at this issue at the start of the reporting period. We reflected on the work done by the previous Committee, including a memorandum sent to the ICCBA Presidency on 8 September 2016. Given the focus on other issues detailed in this report, the Committee has not had the opportunity to produce any formal document discussing this matter. Nevertheless, we are concerned that defence case managers do not appear to be entitled to legal privilege, even when they are fully qualified lawyers in their domestic jurisdictions, while prosecution case managers are accorded privilege irrespective of whether they are qualified lawyers. **We recommend that the new Committee conduct further work on the legal privilege of case managers and make any appropriate representations to ensure that such privilege is properly accorded.**

(d) Amending the “Legal Assistant” title

Work plan objective: Propose amending the title “Legal Assistant” to a title that more accurately reflects the experience and proficiencies required for the role.

Implementation: A member of the Committee prepared an internal document on the issues regarding the proposed title change. It discussed why the title change was necessary, including that it currently adversely impacts legal assistants’ future job prospects, as lawyers outside of the international law field may believe it to be a paralegal or administrative role. Further, the title is not equivalent to that of a person fulfilling a similar role for the prosecution or Chambers. The outline also discussed that there should be no impediment to changing the title, as the term “legal assistant” is not contained in the Court’s legal texts, which speaks of “[p]ersons assisting counsel”³ or “assistants to counsel”.⁴ Alternative titles that were suggested were “Assistant Counsel”, “Legal Officer”, or “Legal Consultant”.

In terms of implementation following this outline, it was recognised that the most feasible way to achieve the title change would be to ensure that it is done as part of the wholesale reform of the Court’s legal aid policy. The Committee understood that there were encouraging signs on changing the title during the legal aid reform discussions. However, as the legal aid reform has not yet progressed since the departure of the previous Registrar, the potential title change remains pending. **We recommend that the new Committee closely**

³ Regulation 68 of the Regulations of the Court.

⁴ Regulation 124 of the Regulations of the Registry.

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monitor the legal aid reform discussions and rearticulate to the Registry the need to change the “Legal Assistant” title to something more appropriate.

(e) Preventing harassment

Work plan objective: Raise awareness of harassment suffered by support staff in the Court’s working environment and advocate for the creation of guidelines aimed at preventing and addressing harassment, including by amending the Code of Professional Conduct for Counsel.

Implementation: The issue of preventing harassment, including sexual harassment, discrimination, and workplace bullying, has been another major focus for the Committee. The Chair of the Committee raised the issue with the Executive Council on 26 September 2017, and asked about the status of the harassment hotline, which it understands is currently being developed by the harassment working group. **We recommend that the new Committee encourages the swift activation of the harassment hotline so that support staff have an independent person with whom they can confidentially discuss any potential incidents of harassment.**

The Committee notes with concern the decision by the ICC Disciplinary Board of 6 September 2017 finding professional misconduct on the part of a counsel, with regard to behaviour of a sexual nature towards a support staff member. The Committee condemns the behaviour, as found by the Disciplinary Board, of the counsel involved. No support staff or any other individual should be subjected to such behaviour. The Committee is also concerned with the finding that the ICC’s administrative instruction on sexual and other forms of harassment (ICC/AI/2005/005) do not apply to counsel, leaving a potential regulatory gap as regards harassment suffered by support staff. The letter sent by two counsel on 19 February 2018 and subsequently signed by 44 support staff raises this issue, which the Committee has carefully noted.

The Committee endorses the declaration by the Executive Council and Professional Standards Advisory Committee on 2 March 2018, in which it considered harassment and sexual harassment to constitute behaviour that falls below the “respectful and courteous” standard required of counsel in Article 7(1) the Code of Professional Conduct for Counsel (“Code”). The Committee further endorses the recommendation that the Code be amended to reflect this. Consequently, the Committee has internally conducted research on lawyers’ codes of conduct on prohibiting harassment from different jurisdictions. This revealed, among other things, that there must also be provisions in the Code to facilitate the effective reporting of harassment, including a requirement that an individual who reports harassment in good faith should be protected from victimisation.

The Committee also notes with concern that the ICC Disciplinary Board decision of 6 September 2017 publicly mentioned by name the victim involved in the incident. The proceedings, which were held in public, also discussed the victim’s identity openly. The

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Committee strongly recommends that the Code be amended to protect the identity and privacy of victims, as well as witnesses, if appropriate.

To this end, the Committee has set out its position on harassment, including the need to amend the Code as described above, in a recent document clarifying its objectives in light of the appointment of a new Registrar. **We recommend that the new Committee, with other committees as appropriate, builds on the research carried out on codes of conduct from other jurisdictions and submits a proposal to amend the Code. The amendments should: (i) prohibit behaviour that amounts to harassment, sexual harassment, discrimination, and bullying, while clarifying what each of these mean; (ii) require counsel to reasonably ensure that the workplace is free from such behaviour; (iii) prohibit the victimisation of an individual who reports misconduct in good faith; (iv) protect the privacy of victims and witnesses in the disciplinary proceedings and decisions. We also recommend, pending the amendments to the Code, that the new Committee encourages counsel to make a voluntary commitment to ensure a workplace free from harassment.**

(f) Creating an internal dispute mechanism

Work plan objective: Promote the creation of an internal dispute mechanism for the resolution of issues between support staff and counsel or ICC staff members.

Implementation: Members of the Committee prepared an internal initial feasibility study on the establishment of such a mechanism. Preliminary issues identified were: (i) which issues could be addressed by such a mechanism; (ii) the parameters of assistance the mechanism could offer; and (iii) the proposed structure for the mechanism. However, it was also identified that there would be great difficulty trying to resolve disputes through such a mechanism when the rights and obligations of support staff, counsel, and the Court in respect of each other had not even sufficiently crystallised. Therefore, the Committee has not pursued further research on the creation of an internal dispute mechanism until greater progress is made on ascertaining and securing these rights and obligations. **We recommend that the new Committee continue to focus on the issue of ascertaining and securing these rights and obligations and ensuring that they are reflected in an employment contract issued to support staff. We recommend that the new Committee work with the Registry and counsel to ensure that any such employment contract also includes a provision on resolving disputes through an internal dispute mechanism.**

(g) Training for support staff

Work plan objective: Liaise with the Training Committee on organising training sessions for support staff.

Implementation: Case management training had been halted in the previous reporting period (2016–17) due to copyright issues with the software used in the training. The Chair of the Committee raised this issue with on 26 September 2017 with the Executive Council, which was in favour of resuming training on case management, having determined that the

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copyright issues were not founded. To this end, members of the Committee were involved in procuring a banner for the ICCBA to use as a backdrop for training videos. This has now been acquired. A member of the Committee was also involved, alongside the Secretariat, in liaising with audiovisual staff from the Court in arranging a room to record videos. The Committee has, however, not yet moved on to the stage of recording training videos. **Now the facilities are in place, we recommend that the new Committee progress to producing training content and recording training videos on issues relevant to support staff.**

(h) Streamlining the application process to join the list of assistants to counsel

Work plan objective: Propose amendments to simplify and speed up the application process to be admitted to the list of assistants to counsel.

Implementation: The Committee has had frequent internal discussions on ideas to streamline the list application process. Although it has not yet produced a formal document on the matter, the Committee notes that the requirement to produce a birth certificate to be admitted on list is onerous and appears to be unnecessary, as a copy of the applicant's passport should suffice. Further, the general delay in processing applications (in some cases applicants have waited over two years for a decision) is unacceptable, and applicants should not have to rely on counsel to request that applications be expedited. **We recommend that the new Committee builds on these points and submits an advocacy document proposing to simplify and speed up the application process to be admitted to the list of assistants to counsel. This should include proposals: (i) to dispense with the need to produce a birth certificate; and (ii) on a deadline for when an applicant must receive a response regarding their application, unless there are exceptional circumstances justifying the delay.**

V. Issues outside the scope of the work plan

During the reporting period, other issues arose that focused the Committee's attention to matters outside the scope of the work plan. These include: (i) improving communication with support staff; and (ii) improving communication with the Executive Council and other committees.

(a) Communication with support staff

Two events demonstrated the need to improve communications between the Committee and support staff, namely: learning about dissatisfaction from some support staff regarding the ICCBA's efforts about the income tax issue, and the letter from two counsel of 19 February 2018 and subsequently signed by 44 support staff raising issues concerning labour rights and harassment. As discussed, it appeared that not enough information was reaching support staff on the advocacy and work the Committee carried out on its behalf, and support staff did not choose to funnel their concerns through the Committee.

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To address these issues, the Committee created an email account (cssc@iccba-abcpi.org) that support staff can immediately reach us on. Further, with some effort, we acquired known email addresses of support staff, so that we can directly send them important messages when necessary. And on 1 May 2018, we sent out a group message to support staff informing them of the new email account, and updating them of the issues we were working on in light of the appointment of the new Registrar. While preparing this communication, the Committee had to request authorisation from the Executive Council for sending the message to the support staff group as required by Section 4(2) and 5(2) of the ICCBA Internal Directive of the Work of the ICCBA Committees (“Internal Directive”). **We recommend that the new Committee consider requesting a blanket authorisation from the Executive Council to send update messages to only support staff (the scope of all such messages being agreed by the Executive Council the first time), so that it does not have to go through the request process each time.**

The Committee discussed more ways to improve communications with support staff. **To this end, we recommend that the new Committee consider ways to continue improving communication with support staff, including: (i) holding periodic consultation hours at the ICC premises for support staff to drop in; (ii) publishing updates on the work of the Committee in the ICCBA quarterly newsletter; (iii) publicising the Committee’s email accounts by posting notices near victims and defence offices; (iv) inviting the President or other senior ICCBA members to hold group meetings with support staff to discuss issues of concern; (v) inviting support staff to complete surveys on important matters that would benefit from a range of support staff views; (vi) liaising with ICC Counsel Support Section on maintaining up-to-date contact details of assigned support staff (and obtaining support staff consent in this regard); (vi) informally discussing any issues with support staff at ICCBA social drinks.**

(b) Communication with the Executive Council and other Committees

During the reporting period, the Committee was fortunate to have two members who were also part of the Secretariat and thus could routinely attend Executive Council meetings, as well as a member who was also part of the tax working group. We were able to learn a lot about the work of these other bodies through these members. Otherwise, the Committee felt that we did not receive sufficient formal information from other committees in order to ensure collaboration or to execute instructions from the Executive Council.

The Committee notes that the ICCBA President suggested in an Executive Council meeting on 3 November 2017 whether updates from our Committee should feature as a permanent agenda item for Executive Council meetings, and whether an Executive Council member should be appointed as a focal point for our Committee. **We recommend that the new Committee explore the option of making support staff updates a permanent agenda item for Executive Council meetings and of having one of its members as a focal point for our Committee. We further recommend that the new Committee explore options to**

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receive routine formal updates on matters concerning support staff arising from Executive Council meetings.

The Committee also endeavoured, towards the end of the reporting period, to provide one of its documents to the Defence and Victims Committees for their comments, according to Section 3 of the Internal Directive. We are grateful for the comments provided, which were valuable in helping us improve the document. **Where time allows, we recommend that the new Committee more frequently invite other committees to comment on the “deliverables” it creates, so that their views are reflected in the document, making it more likely to be approved by the Executive Council.**

The final point the Committee has concerns the authorisation process for communicating its “deliverables”. At present, any documents we create for communicating outside the ICCBA must be reviewed and approved by the Executive Council. As when consulting with other committees, this process provides valuable comments that allows the Committee to take into account other views, for which we are always grateful. However, at times, the Committee has to advance arguments on behalf of the support staff it represents that necessarily conflict with the interests of the members of the Executive Council, which is entirely composed of counsel. While we would benefit from the advice from counsel in such situations, there may be occasions when achieving consensus with them is not possible. In such instances, the Committee believes that it would not be appropriate for the Executive Council to be in a position to authorise or deny the communication of the deliverable. **We recommend that the new Committee discuss with the Executive Council ways to allow the Committee to communicate or publish deliverables without requiring its approval, when the contents of the deliverable conflict with the interests of the members of the Executive Council.**