Internal memorandum
Memorandum interne

To | A	**Esteban Peralta Losilla, Chief of CSS**	**From | De**	**Xavier-Jean Keïta, Conseil Principal, OPCD**
Date	**31.01.2012**	**Copies|**	**Judge Sang-Hyun Song, President** **Luis Moreno Ocampo, Prosecutor** **Silvana Arbia, Registrar** **Didier Preira, Deputy Registrar** **Paolina Massidda, Principal Counsel Office of Public Counsel for Victims**
Ref.	**OPCD/2012/002/XJK/GD**		
Subject | Objet	**OPCD analysis/ response to Legal Aid proposals**		

1. General observations on relationship between legal aid amendments and jurisprudence of the Court

- Rule 20(1) of the Rules of Procedure and Evidence obliges the Registrar to organize the Registry in a manner "that promotes the rights of the defence, consistent with the principle of a fair trial, as defined in the Statute". To that end, rule 20(1)(b) specifically requires the Registrar to provide such support, assistance and information to the defence as is "necessary for the efficient and effective conduct of the defence".
- These regulatory provisions therefore impose a binding obligation on the Registrar to organize the legal aid scheme for the defence in a manner, which is consistent with both the overarching requirements of a fair trial, as set out in article 67(1) of the Statute, and the objective of effective representation. This is consistent with the finding of Trial Chamber I in the Lubanga case that any "decision taken by the Court as regards legal assistance provided to

the accused should be founded primarily on these fundamental human rights, along with the basic principle of fairness". [1]

- The OPCD is therefore concerned that in citing the principles that have guided the proposed amendments (equality of arms, objectivity, transparency, continuity and economy at para. 4), the Registry has not cited the principles of a fair trial and effective representation. The former (the right to a fair trial) is of particular importance as Court has issued jurisprudence in relation to the amount of legal aid necessary to secure a fair trial.
- For example, in the Lubanga case, the Trial Chamber underscored that in ensuring the accused's right to an effective defence pending the issuance of the trial judgement, the Registry should take into consideration: [2]

  (i) The financial advantage of saving resources by dissolving the defence team as against the disruption that will be caused to the later proceedings;
  (ii) That "[i]t would in all likelihood be wholly unfair to the accused to dissolve his defence team following the closing submissions, leaving one lead counsel, a legal assistant and a case manager, who would - depending on the outcome of the Article 74 Decision - have to recruit a new team and file the accused's appeal in 30 days. It is of note that the prosecution will inevitably be in a far more advantageous position in this regard, since the Prosecutor is not under any obligation to lay off staff following the concluding submissions."[3]
  (iii) That the "level of resources to be allocated to the defence after the Article 74 Decision is rendered will inevitably be a fact-specific determination to be made on a case by case basis"; and
  (iv) That the Registrar "should consult with the Chamber so that an approximate schedule can be determined".[4]

- Even if the Lubanga case law is not necessarily binding in other cases, as a non-judicial neutral entity, the Registry should be strongly guided by such judicial instructions in determining the appropriate method for calculating the legal aid for this stage in other cases. As such, the Registrar should not amend the legal aid policy to avoid implementing the findings of judges as to what constitutes a fair and effective defence for this stage.
- It is also notable that the Statute and Rules give the Assembly of State Parties no role in determining the quantum and details of legal aid

[1] Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06-2800, 30 August 2011 at para. 44.
[2] Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06-2800, 30 August 2011.

[3] At para. 57.
[4] At para. 58.

payments. Rule 21(1) vests the Judges with the overall responsibility for adopting regulations concerning the criteria and procedures for legal assistance. Although regulation 83(1) mandates the Registrar with the responsibility for determining the costs, which are necessary for an effective and efficient defence, the Registrar must execute this obligation in a manner which is consistent with her obligation under rule 20(2) to organize the financial administration of the Registry "in such a manner as to ensure the professional independence of defence counsel". The Registrar must therefore execute her duty to provide sufficient resources to the defence to obtain a fair trial and effective defence, without consideration of external pressures from State parties. The Registrar would therefore be derogating from her duty under rule 20(2) if she were to adopt changes to the legal aid policy, which do not promote fair trial and effective representation, and which are introduced solely to alleviate financial concerns raised by State parties.

- The OPCD also notes that the Court has dedicated considerable time and resources to the finalization of a Strategic Plan for Victims, and a Strategic Plan for Intermediaries. The adoption of such plans and their endorsement by the Assembly of State Parties would create a platform for the Court to justify the expenditure of resources by reference to the goals and objectives of the Strategic Plan.
- It is premature to start cutting the legal aid for the Defence without first finalizing a Strategic Plan for the Defence, then assessing whether the current legal aid policy is consistent with such a Strategic Plan, and finally, determining which amendments to the legal aid policy can be made to further the objectives of the Strategic Plan for the Defence.
- Finally, the OPCD observes that although the current proposals have been sent to the OTP for comment, which would seem contrary to the obligation of the Registrar to ensure the independence of the defence, they have not been sent to the Defence Office at the Special Tribunal for Lebanon for example for comment. Regulation 120(2) obliges ("shall in particular be consulted") the Registrar to consult with "international associations of bars and counsel, as well as associations offering special expertise in fields of law that are relevant to the Court". It is therefore arguable that any adjustments adopted by the Registrar would be invalid, due to the failure of the Registrar to comport to the necessary procedures.
- The OPCD is congnisant of the strict deadlines imposed upon the Registry by the Assembly of State Parties. The OPCD therefore proposes that the most effective and expeditious mechanism of consulting with the defence would be to constitute a working group on defence issues, which is composed of representatives from CSS, the Presidency, the OPCD, defence teams, and the ASP, with observers from, for example, IBA , STL defence office,... This would ensure that the ASP would be aware of the progress of the proposals, and that the defence would have an opportunity to provide effective input concerning the proposals at all stages of the drafting and adoption process. The convocation of a permanent working group on defence issues would

also ensure that there is a vehicle which is available to consider defence related issues (such as cooperation, indigency, legal aid) at short notice.

2. The legal aid allotment as an 'envelope' rather than demarcated rates for certain positions

- It has been confirmed to the OPCD by the Registry that CSS considers the specific sums allotted to each position in the legal aid scheme to be 'guidelines' and that lead counsel has the discretion to distribute these sums as he or she deems fit, subject to the authorization of CSS.
- The OPCD appreciates the need for flexibility within a defence team. Lead counsel also have a duty to their client to ensure the client's best defence. Nonetheless, the OPCD is greatly concerned that this 'envelope' scheme allows CSS to avoid its obligation to ensure that individual defence teams are adequately staffed by proposing to counsel that rather than requesting additional resources to hire additional staff, the counsel can use its existing resources to hire more staff at lower rates. Whilst such an approach may provide a temporary solution to the defence, it will make it harder for the defence team to justify additional resources in the future as due to the number of members on the team, the team will have a superficial appearance of being well-staffed.
- This scheme is also contrary to the principle of equality of arms. The legal aid scheme includes a case manager and legal assistance, who should be paid at certain rates, because the defence needs to have people who are sufficiently qualified to perform the tasks in question. If the lead counsel hires staff at lower rates in order to use the additional funds to supplement other parts of the team (i.e. investigations because CSS has refused to grant additional investigative funds), this will mean that the defence legal assistant and case manager will be paid at lower rates than their prosecution counterparts even though they are required to perform the same tasks, and will need to have the same qualifications. While there are currently many candidates for these positions, the lower salaries will eventually mean that persons, who could be interested in defence work, will choose instead to work for other parts of the Court. This will inevitably impact on the quality and availability of defence lawyers in this field in the future.
- Defence support staff are also in an extremely vulnerable position. They are not protected by the ICC Staff Rules or any employment contract, and it is ambiguous as to whether they are covered by any employment law of domestic systems. Given the current economic conditions, and the availability of support staff due to the imminent closure of the ICTY and ICTR, potential support staff are in a weak bargaining position and therefore do not have the ability to negotiate a proper salary. As noted above, the ICC's Strategic Plan aims to "Attract, care for, and offer career development and advancement opportunities to a diverse staff of the highest quality." It would be entirely discriminatory to apply this objective to Prosecution support staff, whilst denying any protection or regulation to Defence

support staff. It would also not be consistent with the fact that when the ICC first adopted its guidelines and policy regulating legal aid, it committed to a policy based on equality of arms, meaning equilibrium of resources.[5]The Registry defined this as providing the defence with the same rate of pay as equivalent OTP staff, and the same level of resources as an equivalent OTP team.[6]

- Although the distribution of the legal aid within the team is currently subject to authorization by CSS, in the absence of any minimum pay rates, and job descriptions which correspond to these pay rates, the experience of the ICTY demonstrates that Registry authorization does not in itself offer sufficient protection to support staff. Even if the current CSS staff are sensitive to the need to protect the interests of support staff, the absence of explicit guidelines requiring them to ensure that support staff are paid no less than the minimum applicable rates leaves the system vulnerable to abuse should the current staff of CSS be replaced.
- For example, when the ICTY trial legal aid scheme was drafted, the lump sum for support staff was calculated on the basis that support staff would be paid a set rate within the lump sum. Whilst this was clear from the drafting documents included in ICTY budget reports, it was not explicitly set out in the final scheme. Due to a partial indigency decision in Krajisnik, new staff within OLAD, who had not drafted the scheme, were under pressure to provide the Krajisnik defence with as much staff as was possible within the scheme to take into consideration the fact that the defendant had refused to provide any contribution. This exception became the rule, with the present result that support staff can be paid any rate whatsoever – with many being required to work full time for the sum of 800 or 1000 euros a month. A legal aid system must therefore be sufficiently detailed and transparent so that the rights of the defence are not entirely dependent on the discretion of the staff applying it.

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[5] Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons ICC-ASP/3/16 17 August 2004 " Equality of arms: The payment system must contribute to maintaining equilibrium between the resources and means of the accused and those of the prosecution. In this respect, the fees of the members of the defence team are based on the salaries paid in the Office of the Prosecutor (OTP) of the ICC and at the ad hoc Tribunals, increased by 40% to compensate for the increment in professional charges resulting from an appointment."(para 16)

[6] Transcript of 11 May 2004 Marc Dubuisson page 9
12 We could discuss equality of arms all day.
13 Some people would say it is simply being able to accede
14 to the procedure, to accede to criminal procedures
15 in the court. We see it as something broader than that.
16 We would like to strike an equilibrium between the means
17 of the defence and the means of the Prosecutor.
18 So I think that when you see our documents, you will
19 agree that we have achieved that objective.

- The OPCD further observes that the proposal of such an envelope scheme would be contrary to the practice of more recent courts and tribunals, such as the ECCC and STL. The ECCC and STL have recognized the pivotal role played by support staff, and the fact that underpaying them can create a high turn around in defence teams, which is extremely disruptive and ultimately detrimental to the interests of the client. For these reasons, they have increased both the payment and the protection of support staff to promote equality of arms and continuity. For example, at the ECCC, legal consultants are recruited on 6 month consultant contracts at a fixed P3 rate, and support Staff at the STL are recruited on staff contracts (i.e as a P2).
- In order to provide counsel with some degree of flexibility whilst maintaining a fair and transparent legal aid scheme, the OPCD proposes that the legal aid scheme should give counsel the flexibility to determine what positions the team should have, but not how much people occupying those positions should be paid. For example, the counsel may decide that rather than having a P2 with 5 years of experience, it would be better for the team to have a less experienced person, and to use the funds for investigations. However, rather than being allowed to determine how much the less experienced person should be paid, counsel would be restricted to the standard minimum ICC pay rates. For example, if the Counsel decided to recruit someone with 1-2 years experience, then the minimum rate for this person would be the P1 equivalent salary. CSS should also adopt job descriptions which correspond to the different rates of pay to ensure that someone being recruited as a P1 assistant trial lawyer/assistant legal officer is not being required to perform the tasks of a P2 associate trial lawyer/associate legal officer. Flexibility should thus be used to accommodate the individual needs of different teams and should not be exploited to force defence teams to pay their staff less money for performing the same tasks. In sum, support staff who have the same qualifications and job description as either their Prosecution, Victims or Defence counterparts, should be entitled to the same rate of payment.

3. Budget for investigations

- The Registry asserts at para. 16 that " professional investigator currently foreseen in the investigations' budget of defence teams has scarcely been used by the defence teams and therefore can be cut from the budget for investigations". This statement displays a complete lack of understanding of cause and effect. Defence teams have not used the professional investigator funds because it is patently insufficient to have a P4 investigator for only 90 days for the entire pre-confirmation and trial phase.
- The Abu Garda and Mbarushimana cases have demonstrated the efficacy of challenging the credibility and accuracy of prosecution evidence from the beginning of the case, and not waiting for the trial stage. The

Lubanga abuse of process proceedings concerning intermediaries also demonstrated that a diligent defence teams needs to verify the accuracy of all witness statements and key victim applications. This can involve interviewing parents, relatives, teachers etc and obtaining records from hospitals, schools and employers. In the Katanga case, the Trial Chamber also informed the defence that they have an ethical duty to investigate the credibility of all prosecution witnesses, even if they are appear to be pure crime basis witnesses.

- The Registry has also consistently recommended to each Trial Chamber to prohibit the parties from proofing the witnesses once they have travelled to The Hague. The defendant has a right to silence which they should only waive on an informed basis. Counsel therefore have a stringent obligation to examine potential witnesses to determine whether the defendant should waive his right to silence and present a positive defence case. Since counsel cannot meet with the witnesses prior to their testimony, they need to meet with the witnesses in the field. It is therefore necessary for counsel to travel to the field to interview all potential defence witnesses. It is therefore necessary for the defence to have sufficient funds for counsel to travel to the field to conduct a proper interview with all potential defence witnesses.
- On the basis of the above, the right to an effective defence requires that the defence team has sufficient funds to recruit an investigator who can work in the field on an almost full time basis until closing statements. Notwithstanding the fact that the defence may have an investigator in the field, the defence team also requires sufficient funds to permit counsel to travel to the field to conduct a proper interview with potential witnesses identified by the investigator. Counsel may also require an interpreter to assist them to interpret witness interviews and prepare witness statements.
- The amendments proposed by the Registry meet the above needs only partially. Whilst the Registry has recognized that defence teams need to be assisted by a resource person on a full-time basis, the amount allocated to this person (1000 euros) is entirely arbitrary and disproportionate, when compared to Prosecution investigator counterparts. It is also exploitative for the Registry to force the defence to hire persons at rate which fall well below the applicable rates for local staff hired by the ICC or United Nations in the country in question. Exploiting the willingness of locals to work for such minimum sums would be counterproductive to ICC outreach efforts in the country, as would the impression that the Registry considers that defence teams should rely upon under-qualified and underpaid persons to conduct the sensitive tasks of identifying and questioning victims and witnesses in the case. This would therefore directly negate the ICC's strategic goal to "increase support for the Court" amongst affected communities.
- The OPCD submits that a fairer and more transparent system would be to permit the Defence to recruit someone at the G6 step 5 level who will

be paid in accordance with the local rates for a G6 step 5 in the country in question. The salary scales are calculated on the basis of the living conditions and expenses in the country in question and will therefore ensure that the resource person is appropriately funded.

- The OPCD endorses the recognition of the Registry that it is necessary to have an independent allotment for investigative missions, which can be used by counsel/legal assistants or the resource person. The OPCD nonetheless questions whether the amount of 35 000 euros is in any way sufficient. In accordance with 2012 budget statistics, the average budgeted cost of a flight from The Hague to Africa is 1983 euros, and the average DSA for Africa is 161 euros. Assuming a mission length of 10 days, an allotment of 35 000 euros would therefore allow approximately 8–9 missions for one person only for the entire pre-confirmation and trial stage. This can be contrasted to the fact that the OTP requested budgetary funds for 60 missions to the DRC shared between the Lubanga and Katanga and Ngudjolo case, for one year alone.[7]
- The existence of a capped budget also unfairly discriminates against defence teams which must conduct investigations in more expensive countries. The OPCD therefore strongly recommends that the legal aid policy should either increase this amount, or, explicitly state that the allotment of 35 000 is only a preliminary amount, which will be augmented throughout the proceedings to take into consideration the necessary and reasonable needs of particular defence teams.

4. Composition of the defence team during Stage III of the trial (closing arguments until issuance of the judgment)

- The OPCD welcomes the proposal of the Registry to continue remunerating the case manager during this period. The case manager plays a vital role in defence teams. Due to their familiarity with Ringtail and the OTP evidence, their presence is crucial during the drafting of any subsequent notice of appeal/appeal of the trial judgment, whether it be by the OTP or the defence. It is therefore crucial that the defence can ensure the person who was case manager during the trial can stay on in the team for this period.
- Nonetheless, the legal aid policy is ambiguous as to what other resources the defence may be entitled to during this period. As found by Trial Chamber I, the requirements of a fair trial and an effective defence requires that the Registry does not adopt a rigid system, but analyses the specific needs of the defence team in question, and consults with the Chamber to determine the timing of the issuance of the judgment.

[7] ICC Programme Budget for 2009, ICC-ASP/7/9, 29 July 2008, at para 150. This is in addition to the 26 missions requested for general evidence gathering in the DRC concerning new cases/investigations, and the 4 missions requested for the purpose of securing cooperation with the DRC (para 145).

5. Basic remuneration for legal team members

A. Tax free status

- As noted above, when the ICC legal aid scheme was first devised, the Registry committed to providing the Defence with the same level of remuneration as their Prosecution counterparts. There can be no justification whatsoever for paying defence team members less than the amount received by Prosecution staff members, and it would be extremely discriminatory for the Assembly of State Parties to put their stamp of approval on a legal aid system which paid the defence less than their direct prosecution counterparts. The OPCD understands that due to the current economic climate, the ASP is pressuring the ICC to make budget cuts. Nonetheless, notwithstanding this pressure, the OTP budget has still increased by over 10% and no cuts have or will be made to the individual salaries of staff members.
- Accordingly, whilst the the OPCD supports the proposal to obtain tax free-status for defence team members, in particular, because it will ensure that all defence team members will receive the same amount of pay irrespective of the payment rates in their country of origin (and irrespective as to whether they pay tax), this support is subject to the caveat that this proposal should result in the defence obtaining the same net salary and benefits, as received by OTP staff.
- According to the 2007 legal aid scheme, the salaries for defence team members are calculated "according to the gross pensionable salary of a staff member of the appropriate grade, at step V (see para. 56 above), taken from the United Nations system salary tables approved in the autumn of 2006".[8] In its discussion paper, the Registry argues that "absence of any tax exemption on the fees paid to counsel, or to persons assisting them, led to the decision to fix the amount to be paid at the gross pensionable rate". They are therefore proposing to obtain tax free status for defence team members, in exchange for paying them at the net salary rate.
- Whilst the net rate does not include the deductions which are made to staff salary due to pension and insurance deductions, it also does not include the benefits which staff members receive such as the medical insurance contribution and long term care subsidy. If a defence team member is not paying tax to a domestic system, then that person is also not entitled to any tax subsidies in that system, for example, as concerns medical insurance. It would therefore be appropriate, at the very least, to include the medical insurance contribution and long term care subsidy in order to ensure that a defence team member receives the same remuneration as their OTP counterpart.

[8] ICC-ASP/6/4 at p. 18 footnote 2.

- The gross pensionable amounts used by the Registry to calculate these salaries also do not reflect the actual cost to the organization of the equivalent OTP post in question, nor do they reflect the full range of entitlements that the OTP staff member would receive. For example, they do not reflect the average cost of benefits such as relocation and repatriation allowance, education grants for dependents and rental subsidy. In this connection, the OPCD observes that when the ECCC calculated the rate which a defence counsel should be paid in order to ensure that they would receive the same as their Prosecution counterpart, the ECCC explicitly took into consideration the Prosecution pension scheme and medical insurance et cetera, and therefore gave the defence a professional uplift from which pension contributions, medical insurance and bar fees *inter alia* could be deducted. [9]
- The OPCD has prepared a table which compares different possible payment schemes for the defence. The first column contains the basic tax free rates proposed by the Registry. The second column uses the same system employed by the Registry to calculate the salaries, but uses the dependent rate (since most counsel have dependents), and includes the medical insurance contribution as the most basic entitlement. The third column refers to the monthly rate used by the Budget section and the ASP to calculate the average monthly costs of an ICC staff member. This rate is a 'tax free' rate because the ICC does not have staff assessment, and therefore unlike the United Nations salary scale, does not include an additional 20% on these figures – the staff members receives the entire money allocated as salary and entitlements and not just 80%.

Proposed CSS net rate	**ICC net rate (dependent) plus standard medical insurance contributions (this is based on step V)**	**ICC net rate plus all entitlements (pension, relocation, rental subsidy etc averaged into pro rata monthly amount) – Budget does not include steps but just takes an average. This figure represents how much the equivalent OTP position 'costs' the organization and how much money the ASP budgets for the position in question. It is a 'net' amount because the ICC does not pay staff**

[9] Guide to the ECCC Legal Assistance Scheme, Section C, para. 7.

		assessment (which is the UN tax component which CSS is deducting from your salaries)
P5 8221	9143.38	13 000
P4 6956	7708.35	10700
P2 4889	5386.16	7400
P1 3974	4350.19	7400

- The OPCD submits that the rates included in column 3 are the most appropriate reference point because a) they do not include the UN Staff assessment element, which the Registry is proposing to eliminate to compensate for the tax free status b) but they do include all the potential entitlements given to staff on a pro rate basis. The Assembly of State Parties can also not refuse to pay the Defence this rate because it is exactly the same amount that they allocate for the equivalent budgeted post in the Prosecution, Chambers and Registry budget.
- If defence team members are paid at this rate, then it would not be necessary to pay them an additional relocation or repatriation grant at the start of trial as these grants are factored into these rates on a pro rata basis. The use of this rate would therefore greatly simplify administrative costs.

B. Deletion of professional charges

- The underlying rationale for professional charges is not entirely clear. If the purpose of this amount is to enable counsel to provide appropriate office space and equipment to the ICC defence team, then it would be preferable for the Registry to provide office space, equipment (laptops, mobile phones, software, free telephone calls, postage, et cetera) to the defence team itself. This will ensure that unlike the ICTY, where counsel generally pockets the 40% and does not provide any such resources to support staff, the entire ICC defence team will benefit. It is also not possible for counsel to provide alternatives to ICC office space as certain software (i.e. ringtail) only obtains its entire functionality when used on computers in the ICC premises. This proposition will nonetheless require the Registry to be more attuned to the needs and requirements of the defence, and to provide them with the equipment and software the defence actually need and not just the type of equipment and software which would be provided to generic Registry staff members. In this regard, the OPCD notes that CSS has refused to provide defence teams with case map software in the past, notwithstanding the fact that it is used by the OTP and defence teams at the ICTY, SCSL & ECCC. Accordingly, this proposition should result in the Registry providing the

defence with any office equipment and software if it is reasonable to do so, not just if it accords with Registry policy to do so.

- In addition, since the office costs component could previously be used to compensate counsel for bar fees, professional insurance, and contributions to medical insurance and pension schemes,[10] the deletion of the office costs component should be subject to the caveat that:
    - the Registry continues to compensate mandatory membership fees/law society taxation and professional insurance that any defence team member has to be pay in order to practice law before the ICC; and
    - the Registry should provide every defence team member with the same social security entitlements as their prosecution counterparts (i.e. Van Breda and pension contributions) as part of their monthly salary (see Part 5(a) above).

- If the underlying rationale of the ICC costs component is to enable defence counsel to maintain their domestic practice during the proceedings, then the OPCD submits that it is inconsistent to eliminate this office costs component on the one hand, whilst on the other hand paying counsel only 75% during the 'non-presential [sic]' stages of the proceedings, based on the underlying premise that counsel will still receive an income from their domestic practice and cases (see para 29 which presumes that counsel can work for other clients). The ICC can create a presumption that counsel will maintain a domestic practice, without giving counsel the means to maintain such a practice. In order to promote true equality with the Prosecution, the Registry must be consistent. If it eliminates office costs then it should remunerate counsel on a full-time basis throughout the proceedings. Alternatively, if it wishes to pay counsel on a part-time basis on the assumption that counsel will be involved in other cases, then it should pay an office costs component to enable counsel to maintain its domestic practice throughout the proceedings. Even if the Registry provides an office costs component to counsel, since the rationale is to enable counsel to maintain their domestic practice, they should still provide an office within the ICC premises for the ICC defence team. As noted above, an office is required in order to upload and download evidence as this can not be done on computers outside the ICC premises.
- The OPCD has further comments concerning the proposal to remunerate counsel on a part time basis below.

C. Remuneration during non-presential phases for counsel and associate counsel

- The overarching objective of the legal policy should be to ensure the defendant's right to a fair trial. A fundamental component of this right is the

[10] See transcripts of February 2007 consultation.

right to an expeditious trial. It is generally acknowledged that the length of international criminal proceedings needs to be curtailed – this problem is particularly exacerbated with respect to courts which do not have a practice of granting pre-trial provisional release, such as the ICC. There may be a general reluctance from state parties to fund the defence on a full-time basis, but given the complexity of the proceedings and the consequences for the defendant's deprivation of liberty – the objective of the court should be to have everyone who is involved in the case working on a full-time basis.

- It is therefore problematic to design a legal aid scheme with the underlying premise that counsel will not be working on a full-time basis for significant portions of the proceedings. This premise might be acceptable in the context of a 6 week domestic murder trial preceded by 6 months of preparation, but it is not acceptable in the context of international cases, in which some defendants have been provisionally detained for over 10 years.
- Reducing the salaries of the defence during seeming 'fallow' periods addresses the symptoms but not the underlying causes, and is unfairly discriminatory to the Defence. The discussion paper states at para. 31 that "Where the Chamber declares a stay of the proceedings during the trial, the period during which proceedings are stayed would be considered a nonpresential phase." This statement fails to take into consideration the legal consequences of a stay, and the ultimate causes of delay. A temporary stay of the proceedings halts the trial proceedings in order to ensure that the rights of the defence are not prejudiced whilst an obstacle to those rights is being rectified (i.e. until the OTP have effectuated disclosure, or until the defence can conduct investigations in a certain territory). The fact that trial proceedings are temporarily halted does not halt the preparation and work of the parties. To the contrary, since the obstacle causing the stay needs to be remedied, there can be intensive side-litigation and discussion between the parties concerning the nature of the violation and the best means to remedy it. This is demonstrated by the multiple filings in the Lubanga case whereby the OTP attempted to lift the article 54(3)(e) stay after discussions with information providers. The defence also has an obligation to ensure their client's right to a speedy trial by continuing ongoing defence preparation, such as reviewing OTP disclosure, conducting investigations and drafting legal arguments for the final brief. A stay is also invariably appealed. The Defence must therefore prepare a response to the OTP request for leave to appeal, it must respond to the victims applications to participate in the appeal, and it must draft an appeal brief to the Appeals Chamber. Finally, it is notable that the instances in which a stay of the proceedings has been granted thus far have been due to violations committed by the Prosecution. The Prosecution continue to be paid on a full-time basis whilst the stay is in place, and it is self-evident that it would not be efficient or economical for them to start working on new cases rather then focusing on the case at hand. It would therefore be entirely unfair to penalize the defence by reducing their salaries due to a situation which has been occasioned by the fault of the Prosecution. To do so would also create a conflict of interest between the

interest of the client to have the proceedings stayed so that the client's rights are not further prejudiced, and the interest of the client to have his/her team working full time so as to ensure his/her right to a speedy trial.

- For the above reasons, the OPCD submits that there should be a presumption that all members of the defence are entitled to be paid on a full time basis, irrespective of whether there presence in The Hague is required. It may be the case that some counsel wish to work on other cases/trials. In such a scenario, then it might be appropriate to reduce their full time salary to take into consideration the fact that they are allocating their time to other cases. However, this reduction should only kick in if counsel are in fact working on other cases; it should not apply to counsel who wish to dedicate their time solely to this case, and who should therefore be remunerated on a full-time basis.
- The OPCD also reiterates that it is illogical to pay counsel on a part time basis, on the assumption that they will not be in The Hague and will be working on other cases, whilst cutting the budget for office costs, which they would need to maintain their domestic practice.
- Finally, if the rate of counsel is reduced during the pre-trial phase to reflect the fact that counsel is working on more than one case, the percentage not paid to counsel should be redistributed within the team to ensure that the defendant is not prejudiced either by counsel's decision or the legal aid policy.

6. Travel and DSA policy

- The OPCD notes that the proposal to pay counsel the equivalent of a relocation and repatriation grant is consistent with the treatment of ICC staff.
- Nonetheless, there does not appear to be any logical basis for paying these grants to counsel, and not support staff who are required to be in The Hague for the trial, and who are not Dutch nationals/residents. The ICC remunerates all professional staff members for their travel to The Hague and grants them a pro rate relocation and repatriation grant depending on the length of their contract. This right is not solely vested in P4 and P5 staff members. Due to the particularities of the ICC E-Court system, it is necessary for case-managers to base themselves in The Hague, and it is self-evident that legal assistants must be present for the trial. They therefore incur costs in terms of their initial travel to The Hague, and temporary accommodation whilst they find suitable lodgings. The rationale for initial travel to The Hague and at the end of the contract and a relocation and repatriation grant of some sort therefore applies to case managers and legal assistants.
- If, as is proposed in section 5A above, defence team member are paid the rate, which their equivalent OTP post costs the organization, then it would not be necessary to pay relocation and repatriation grant as all entitlements

such as these grants are factored into the monthly amount on a pro rata basis.

7. Observations concerning proposals which are specific to support staff

- Irrespective as to whether the particular proposals set out by the Registry are adopted, the OPCD submits that the Registry should use this opportunity to change the official titles of defence support staff.
- The term 'legal assistant' does not appear in any of the Court's regulatory documents (regulation 68 refers to persons 'assisting counsel'). The term 'assistant' implies that the post is of a paralegal or administrative nature, and therefore does not reflect the fact that persons recruited in this capacity must possess at least five years of relevant experience in criminal proceedings or specific competence in international criminal law or procedure. Nor in such a title consistent with the fact that such persons have been authorized by Chambers to present oral submissions in court, and to examine witnesses.
- Prosecution counterparts who possess the same level of experience, or who perform similar roles are referred to as 'Associate Trial Lawyers' or 'Associate Counsel'. The appearances of justice require that the Court should not create a public perception that prosecution support staff are more qualified or capable than their defence counterparts.
- The amendment of the title of 'legal assistant' to either 'Associate Trial Lawyer' or 'Associate Counsel' will not affect the Registry budget or have any financial implications for State Parties. It will, however, assist the Court to attract qualified candidates to this position, and at the same time, will promote the future employment prospects of current 'legal assistants'. This is consistent with the Strategic Goal of the ICC to "Attract, care for, and offer career development and advancement opportunities to a diverse staff of the highest quality."[11] .

8. Scope of the application of the Legal Aid Policy

- The discussion paper does not specify when it will come into force, and whether it will only apply to new teams or current teams. If the Registrar wishes to adhere to the objective of treating defence team members the same as staff members, then the legal aid amendments should not be applied to current defence teams. The OPCD has verified with Human Resources that neither the UN system or the ICC rules and regulations permit the Court to reduce the salary of a staff member (apart from small fluctuations in post adjustment related to living costs in The Hague and exchange rates). It is also contrary to ICC rules and regulations to require a staff member to perform tasks, which are above their pay grade. The ICC cannot seek to be a

[11] Revised strategic goals and objectives of the International Criminal Court 2009 – 2018, ASP/7/25

'model of administration' as concerns Registry, Chambers and Prosecution staff, whilst engaging in practices which are fundamentally discriminatory and unfair as concerns the Defence. Defence team members have accepted to practice before the ICC on the agreement that they would be paid a certain amount. It would therefore be illegitimate to retrospectively amend such an agreement. In practical terms, it could result in a turnover of current defence staff (legal assistants and case managers do not require the permission of the Chamber to withdraw from a case). This will actually create more costs for the Court as new defence team members are less efficient as they need more time to familiarize themselves with the case, and to acquaint themselves with ICC jurisprudence and procedures.

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