ANSWER OF INTERNATIONAL CRIMINAL BAR (ICB) ON THE DISCUSSION PAPER ON LEGAL AID OF THE REGISTRAR

A. Background

1. ICB acknowledges that one of the criteria withheld by the Registrar for the determination of the scope of the legal aid is the basic principle of equality of arms.

The draft UN principles and guidelines on access to legal aid in criminal justice state under 1.1 :

" legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. It is a foundation for the enjoyment of other rights, including the right to a fair trial, as defined in art. 11 para 1 of the Universal Declaration of Human Rights, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process."

The fundamental principle of "fair trial" has, as one of its basic components, the human right of "**equality of arms**" .

It means, basically, that a party to the proceedings should not be put in a disadvantageous position as compared to another party, provided that the elements concerned are within the control of the Court.

The minimum standard that a Court is thus able and has to impose is that the defendant will be put into a position that enables him/her to fully challenge the file of the Prosecutor and to give him/her the means and the time to do this.

The first question, before being able to assess whether the present legal aid can be diminished, which is the item at stake here, is whether the present system meets the said minimum standard.

A brief analysis will show that the present system in place at the ICC does not meet the minimum standard of "equality of arms" and thus that even more reduce it, as planned by the Registrar, will lead the Court into a situation where the "fair trial" will be even less guaranteed than at the present time. ICB considers this to be **unacceptable**.

ICB wants to add to this that rule 20.3 imposes that for purposes such as the management of legal assistance,

"the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties."

The "Coalition" is not such a body and the Registrar has not consulted as is mandatory. ICB invites the Registrar to do so.

"Consultation", moreover, in such a complicated question as to determine which legal aid will meet the said standards, supposes much more than a one-time exchange of documents in such a limited amount of time (some weeks).
It requires, in the opinion of ICB, several work-meetings between experts of the Court and of the said representative bodies of counsel and legal associations during a considerable amount of time.

To the knowledge of ICB such a consultation has never been organized in a proper way. It should be done soon (see below under B.3.1 as to a proper expert ad hoc committee).

Finally, ICB is quite worried by the mentioned "rationale" of the plan to reduce legal aid, being that :

> "***the financial incidence of the increase of the activities of the Court risk to put an excessive burden on the overall budget of the institution.*** "

The increase of the activities of the Court is a natural consequence of the creation of the institution and was an ambition that spoke for itself and that is linked to international justice as such.

Justice moreover has to be regarded has the conscience of a society and cannot be measured and financed according to "market"-criteria.

Finally, an increase in justice-activities could never be a reason to abandon basic standards because of budget reasons. The basic standards of Justice have to be safeguarded by the institution itself, regardless of the costs caused. Without that they would be meaningless.

2.At ICTR the basic defence team is composed, from the very beginning and on a full-time basis, of a lead-counsel, a co-counsel, two professional investigators and a legal assistant or one professional investigator and two legal assistants (5 professionals).

At the ICTR there are no victims as parties in the proceedings.

At the STL, where victims are present as parties, this basic defence team is composed, from the very beginning and on a full-time basis, of a lead-counsel, a co-counsel, a professional investigator, a legal assistant, a case-manager and a linguistic assistant (6 professionals).

At the ICC defence counsel do not only face the Prosecutor, who disposes of an enormous office, with lawyers, experts of all sorts, investigators, computer analysts, etc, office that will have done dozens of missions in the field and that has worked for several years on the concerned file with many specialists, but also faces the legal representatives of the victims.

Defence counsel thus have not only to study an enormous quantity of materials of evidence (thousands of pages,video-recordings, etc.)as disclosed by the Prosecutor, but have also to study hundreds of applications of victims, and this from the very beginning of the pre-trial stage.

The legal representatives of the victims also file briefs and requests that need to be addressed.

The defence has also to organize its own investigations and the defence counsel will have to travel for that. He/she cannot do this and be in The Hague at the same time to conduct the defence at the hearings which will keep going on.

At the ICC the basic defence-team at the pre-trial stage is composed on a full-time basis of a defence-counsel, a legal assistant and a case-manager, plus a "resource-person", on a non-professional and part-time basis (3 professionals).

At the trial phase an associate counsel is added to that on a full-time basis (4 professionals).

One can only come to the conclusion that, at the present time, defence-teams at the ICC are understaffed in a dramatic way, and that, consequently, there is no equality of arms. This was even acknowledged by the Office of the Prosecutor during the pre-trial phase in the Lubanga case. OTP supported the demand for postponement of the confirmation hearings of the defence-counsel for this reason, demand that was rejected though.

Understaffing defence is not only a violation of the principle of equality of arms and of a fair trial, but it will also mean a **de facto more expensive justice** in terms of duration of trials, postponements for all sorts of reasons, etc.

Not being entitled to an associate counsel at the very important and very intense pre-trial stage means that a defence team cannot adequately prepare for the confirmation hearing, most certainly will not be able to conduct its own investigations adequately, and, more than that, will have lost a precious opportunity to already and eventually prepare for trial.

This does, moreover, not stand alone, as :

- granted professional investigation time is limited to an unexplainable reduced amount of 90 days for pre-trial and trial combined, whereas experience has learned that a professinal investigator should work full time during both stages and even often be present at hearings,

(this extreme limitation of professional investigation time is the real cause why some defence teams could be convinced to hire a "resource person" at 1 000 euros/month, in order to enable them to try to have full time "investigators", as required; the registry itself is thus at the origin of

introduction of non professional investigation and not the defence, as wrongly presented in the registry's paper)

- ICC thus wants to abandon the use of professional investigators, whereas experience has learned that the best investigators are local counsel who not only speak the language but also know the conflict, the proper cultural background, the population and, last but not least, the legal implications. It will be impossible to hire these professionals at a rate of 1 000 euros/month.

Limiting investigation time means being put in a totally disadvantaged position versus the Prosecutor, who has had the opportunity and the financial means to investigate in an unlimited way.

It is sometimes heard at the Court that defence-teams would not need to investigate as is mandatory in common law, given the obligation of the Prosecutor to investigate incriminating and exonerating elements equally.

This would mean that one would consider the prosecutor's file as credible and as de facto not subject to the possibility of being challenged, as the means to do this would be refused.

This would be firstly in absolute contradiction with the basic rights granted by art. 67 of the Statute, specifically art 67.1.e. One can indeed not imagine the possibility of calling defence-witnesses and/or finding exonerating evidence without full time investigations.

Furthermore experience has in the meanwhile shown that the Prosecutor does not meet his/her obligation and often does not even disclose exculpatory evidence which happens to be in his/her possession.

The failure to investigate in an exonerating way, if not excusable, is understandable, as the Prosecutor finds himself in a merely accusing exercise, in his/her quest for the perpetrators of the most serious international crimes. It would need a completely separate OTP investigation team to be able to fully examine in an exonerating way in the real sense of the word, and in the correct intellectual mind-status.

It is thus mandatory to leave this to Defence, as is the case in many systems and as is its basic right under the Statute.

Finally, an improperly prepared defence means again a much more time-consuming business, as it is the cause of continuous requests for postponement.

B. Contents of the legal aid

1. Victims : composition of teams

ICB stresses the need to entrust the legal representation of victims equally to experienced counsel. Not doing so would violate the principle of fair trial.

ICB also wants to underline that, in the present system, there is a limit to the amount of victims one single counsel can represent.

As to the "resource person", it is quite obvious that at a rate of 1 000 euros/ month it will be impossible to use the services of a professional, as this is a "salary" that is even insufficient for an intern.

Finally there is no reason to limit the real investigating time in general to two missions of 14 days "to Africa" for two persons.
This is not only a purely theoretical and insufficient limit, but it also is disregarding the concrete needs of each case.

The need for investigating time has to be assessed according to the concrete needs in each case and it belongs to counsel to determine this need.

Deciding on theoretical limits, regardless of the concrete elements of each case, is contrary to the basic rights of the victims.

2. Defence : budget for investigations and team composition

If it were to be true that defence teams have "scarcely" used the professional investigator currently and presently foreseen in the investigation's budget, this would be a very worrying evolution, as experience in international criminal law has shown that professional investigations are essential to a fair justice.

Rather, as explained, some defence-teams were brought to this in order to enable them to extend the imposed limit of 90 days.

Making a standard out of the refusal of full-time professional investigation by cutting professional investigation from the budget, as proposed, would be dramatic, as it would institutionalize a refusal of basic rights (see higher).

ICB thus opposes this proposal very strongly.

ICB also opposes strongly the proposed drastic reduction of the monthly salary of the investigator (there is no reason

why this person would be called a “resource person” but to underline his/her lack of professional quality, which is not acceptable). A salary of 1 000 euro is not even paid to a first year intern and is an amount one cannot live with in a town like The Hague.

As to “team composition” ICB refers to what has been said under A.2.

It is quite obvious that the human resources of defence-teams have to be increased to 7 professionals, given the unique and extreme complexity of cases before ICC, given also the comparison with generally accepted UN standards at ad-hoc Tribunals (see under A.2).

3. Basic remuneration for legal team members

3.1 The Registrar, as to the calculation-base of the lump sum payments for each post in a legal team, refers to the amounts paid for equivalent posts in the Office of the Prosecutor.

ICB however wants to underline that the Registrar only uses the basic net salary (without indexation and readjustments) as a reference and that several parameters are left out here :

-the much more important work-load of a defence-team that has to do a similar job in a much more reduced amount of time which results in working weeks of easily 60 hours,

-the social security and pension advantages linked to the OTP wages, which are not paid to defence team members (the professional costs reimbursed to a defence counsel do not include social security contributions).

-the rental subsidies, rental deductions, overtime and night differential payments, dependency benefits, education grants, travel expenses for spouse and dependents & DSA, mobility allowances, annual leave, sick leave, maternity leave, adoption leave, etc. (at the STL the gross amount for counsel is increased with post allowances)

-The termination indemnity and death grants.

More specifically ICB refers to the UN pension scheme, which is a very high one as a retired UN civil servant gets retirement payments up to 70 % of his last salary. Contributions for this are paid up to 2/3 by the UN. The defence counsel is left without contributions for such a pension scheme, regardless of the fact that he/she will work many years and on a full time basis on a case or several cases. With a net amount of 8 221 euros/ month for fees (about 41,11 euros/ hour), it is impossible to pay pension scheme contributions. This creates serious inequality, as counsel would be refused decent pension benefits.

Also the Registrar is using fixed amounts without regard to the level of seniority and experience. At the STL the basic

amount is adapted according to the UN rates of seniority (art.9.6 of the principles applicable to legal aid). The Registrar here thus again has installed inequality giving cause to a breach of the principle of equality of arms.

Given the considerable complexity of the matter and in the framework of rule 20.3,ICB suggests that an **expert ad hoc committee** would be set up with representatives of the said organizations of counsel and experts of the Court (social security and fiscal), to study the question and make proposals that could install real equality between what is paid to counsel and what is paid to OTP members.

ICB also underlines that the high quality defence counsel who is required in such cases of extreme complexity, in order to keep up the standard of equality of arms and fair trial, has to leave his/her "home office" for several years, which means that he/she will suffer considerable damage in terms of losing clients. This damage is not compensated in the system of the Court and causes inequality versus the members of the Office of the Prosecutor, who suffer no career damage by sitting in a case and who get other kinds of compensation, as listed higher.

Defence counsel moreover get no termination indemnity as the members of the office of the Prosecutor do.

Something has to be done about this crucial aspect.

3.2 The proposal to move from gross-pensionable to **net-payments** is highly damaging to counsel.

The problem here is that the Registrar is departing from a, in most countries, non-existing and highly hypothetical situation, being that a tax exemption regulation as to work at the ICC would possibly be introduced in the home countries of counsel.

As today this is still an exception.

Paying only net amounts to counsel unless they prove having paid taxes means that they will have been paid on a net basis during several years before being able to prove that they have had to pay taxes on these amounts. In the meanwhile they will have had to pay tax advances or will pay high interests on due taxes. This again will cause inequality towards OTP whose members are paid gross amounts and much more than that, as said. This also gives cause to inequality of arms.

The solution to this is, as is the case at the STL, to pay a tax-compensation to counsel upon entering a form and evidence of the tax scheme and rate which is applicable to them, instead of making it dependent on proof that taxes have been paid.

3.3 There could be no question that **compensation for professional costs** could be simply "cut".

This compensation has been decided upon after review by the Registry of many national payment systems applicable in a variety of national Bars.

This compensation concerns the "fixed" costs needed to keep an attorney's office running and to keep being an attorney (such as rent, library, wages of personnel, mortgage-interests, heating, insurances (among them mandatory professional liability insurance), fees paid to interns, car-cost, membership fees to local Bars, continuous education costs, etc.)

Defence counsel cannot function without these offices that allow them to guarantee quality to their clients.

The fact that (from the very beginnings, back in march 2006) infrastructure was offered to defence teams in The Hague in terms of office space, computer equipment with the very specific, complicated and sophisticated ICC software, has never been an argument not to pay the pro rata professional costs that keep running, regardless of the absence of counsel at their home offices.

It must not be forgotten that to be able to keep being a member of the list of counsel, it is mandatory to be a member of a Bar. This means that counsel could not just go away from their national Bars and offices and have to keep paying the said costs, in order to allow them to keep their professional license. Membership of the local Bars guarantee the quality standards of counsel.

Also do counsel have to keep paying their professional insurance premiums.

All national systems provide for the possibility to ask for a percentage on the mere fee to be able to pay these running general costs.

This percentage (after statistic review) goes from 30 % (for very small offices) to 55 % (for big firms).

The Registrar is in possession of these figures and has determined a maximum of 40 %.

There is no ground whatsoever to "cut" these payments.

Doing so would mean that the Court would become reliant on "in-house counsel" which would be contrary to the free choice of counsel and to the principle of independence of counsel (see inter alia in commentary of the Rome Statute, William A. Shabas, Oxford 2010, at art. 67).

The Registrar would then fully become the "employer" of

counsel, which would mean the end of a fair defence for very obvious reasons which even need not to be explained.

At the STL counsel get compensation for their professional costs by way of an individualized calculation system (art. 9.17).

3.4 The remuneration for the "non-presential" phases can best be done on the basis of an hourly rate and time sheets.

It is indeed possible that a counsel would work full-time weeks and even more when he/she is not present in The Hague.

The assumption of an average 75 % work is not grounded on an objective basis and does not reflect reality.

It may also give cause to inequality of arms.

If the full time lump sum payment is to be abandoned, the billing on time-sheet is the only fair option.

3.5 In case of several running mandates there is only one objective system to pay for counsel's services, nl the time-sheet.

Every other system is just a guess and thus unfair in one or other direction.

At international criminal jurisdictions there is a tendency to suspicion of "overbilling" and the practice of ICTR had been to systematically reduce reported hours by assuming for example that one page should be read in a given (and minimal) amount of time, neglecting the fact, to give only one example, that one page has to be read and often to be reread in conjunction with other elements such as later witness statements or disclosed new pieces of evidence.

ICB wants to underline that counsel are professionals who are used to bill only the real time spent on a case and that any suspicion towards them is unjustified and cripples the system seriously.

There is a contradiction in stating that one counsel should not work for more than two defendants and elaborating on situations where one counsel handles "four or more " cases.

3.6 It is unclear why team-members should not be compensated for travel expenses when they have to travel.

At the pre-trial stage there is no "associate counsel" and it will be mandatory to make a team member travel if counsel has to be present at hearings.

This might even be the case at trial level.

Nothing is said here about investigators and it is unclear whether they are considered as "legal team members", in which case they would not be permitted to travel under the present proposal. It can hardly be imagined that they would not travel and it cannot be assumed that their travel costs (which can be very important) would be included in their salary or fees.

The word "compensation" for reimbursement of travel expenses is not very appropriate, as the policy should be that travel expenses are simply even prepaid.

It would not be acceptable that possibility of travels would be dependent on availability of budgets, as seems to be said. Is the same limitation applicable for OTP and if yes, can ICB get the figures ?

The "lump sum" system mentioned is not transparent. What does it include ?

Is it a lump sum (16 182 euros) for the total duration of the trial ? If yes, it seems clear that this might be totally insufficient.

ICB thinks that travel needs can only be assessed on a case to case basis and not in maximum quota.

It is up to counsel to decide for the extent of needs for travel that can differ seriously from case to case.

The accused is entitled to all required "facilities" for the preparation of his/her defence (art. 67.1.b of the Rome Statute).

C. Conclusions

Where it might be a criterion to depart from OTP wages in similar positions as a basis of payment for counsel, the present system is oversimplified and does not take in account the complicated UN payment system which is not limited to the basic wages.

There is no reason whatsoever why a difference should be made between counsel and associate counsel.
The difference that should be made however concerns the level of experience of counsel and readjustments should be made on the basic amount accordingly (see STL system).

Reducing the payment of an experienced and highly specialized counsel to a net amount of 8 221 euros, without any surplus nor reimbursement of professional costs, nor indexation and readjustment for years of experience, and given that a work-week easily amounts to 50 hours (and often even more) means that a counsel is paid net 41,11 euros/ hour.

It is an illusion to keep thinking that for such an amount, which is not even of the level of a trained secretary, the Court will be able to hire the quality defense it absolutely needs for handling cases of extreme complexity and duration.

A first year intern in an average law-firm in Brussels earns easily an monthly amount of 4 500 euros, which is half the amount paid to an experienced counsel at the ICC.

A first year intern in top law-firms in Brussels earns sometimes 8 000 euros a month, gross salary.

ICB is of the opinion that counsel at the ICC should be paid in accordance with the excessive long working weeks they are brought to, given the extreme time-pressure which is put on them and given the extreme complexity of the cases.

At present the defence teams are dramatically understaffed and no "equality of arms" can be achieved accordingly.

It is, in such a situation, out of question that it could even be thought of to reduce the legal aid.

On the contrary, it should be dramatically **increased** as it is much less than is the case at the mentioned "ad hoc" tribunals and, specifically, the STL, which is the newest one.

Finally ICB suggests that the ICC would urgently create a **mixed and expert ad hoc-commission** that would study this very complicated matter and make proposals to the Court and the ASP, in accordance with the spirit and the letter of rule 20.3 of the Rules of Procedure and Evidence, as mentioned in the introduction.

The question of legal aid is crucial to a fair and independent Justice and could not be simplified.

Barcelona, 31 january 2012.

International Criminal Bar (www.bpi-icb.com)