RESPONSE FROM THE DEFENCE TEAMS OF MR LUBANGA, MR BEMBA, MR MBARUSHIMANA, MR NGUDJOLO AND MR BANDA & MR JERBO TO THE REGISTRY'S "DISCUSSION PAPER ON THE REVIEW OF THE ICC'S LEGAL AID SYSTEM"

The Registry proposes substantive cuts to the budget dedicated to the Defence teams appointed under the legal aid regime[1]:

- A 50% reduction of the investigation budget ;
- 18 to 24% reduction of the remuneration of counsel and their assistants, these cuts being more substantial for certain phases of the proceedings ;
- 75% reduction of the remuneration of the ressource person ;
- Abolition of the professional investigator post for Defense ;
- Abolition of the compensation paid to counsel for their professional charges ;
- Reduction of the compensations for the travel costs between the counsel's country of residence and The Hague ;
- Etc.

It appears that there is no equivalent to such drastic cuts in the budget of any other organ of the Court, and in particular in the Office of the Prosecutor.[2] This leads to the conclusion that the means of the Prosecution were preserved to the detriment of those of the Defence.

But more importantly, such a drastic reduction of means, that where already notoriously insufficient, would deprive the assused of his right to an "effective and efficient Defence". [3]

[1] "Discussion Paper on the Review of the ICC Legal Aid System" transmitted on 5 January 2012.
[2] The Office of Prosecutor's budget was increased of more than 10 % for the year 2012.
[3] Article 67-2 and Rule 20. See also: ICC-01/04-01/06-2800, par.44, 53 et 54 et ICC-01/04-01/10-142, par. 11.

To mesure the risks that the implementation of this proposal would represent for the rights of the Defence, it is useful to highlight some particularities of the proceedings before the ICC, and the organisation of the Defence based on the legal aid system.

Defence conducted by independant and experimented counsel who are freely chosen by the accused

Instead of creating a « defence structure » within the jurisdiction, similar to the « public defender » in certain common law systems, composed of counsel, who are part of the institution and paid as civil servants of the Court, it was decided to confide the defence, including under the legal aid system, to independent and specialised lawyer with at least 10 years of professional experience in their respective Bar, who would be freely chosen by the accused.[4]

Counsel would, therefore, be experimented lawyers with an established professional practice in their country of origin, who would accept to dedicate a part of their career to the defence of a specific case before the ICC, and would return to their regular practice at the conclusion of their case. Such a guarantee of professionalism and independence can only be attained if their work at the ICC does not inescapably ruin their firm in the short term.

Defence in proceedings essentially based on the common law system require an exceptional availability and important financial and material means.

Notwithstanding the fact that some some concepts of the roman-germanic system were borrowed, the Court's procedural rules are essentially based on the common law system, in which the Prosecutor investigates and leads the prosecution at trial, whereas the Defence conducts its own investigations, challenges the evidence of the Prosecutor, calls its own witnesses and tenders it's own evidence.

Two major implications follow:

[4] See for ex. Report to the Assembly of States Parties on Options for Ensuring Adequate Defense Counsel for Accused Persons, ICC-ASP/3/16.

First, like the Prosecutor, the Defence has to conduct its investigations in the field, wherever necessary. The charges against the accused are not prepared by a judge who is presumed impartial, but by the Prosecutor himself.[5] In this system, the ability of the Defence to conduct extensive investigation is a *sine qua non* condition for a fair trial. Such investigation forces counsel and their teams to undertake long and costly travels in terms of human, material and financial means, particularly considering that the investigation often takes place in countries distant from The Hague or from the counsel's country of origin.

Second, the oral and adversarial debate over the evidence put forth by the Prosecution and the Defence takes place during the trial phase. Even if the written submissions play an important part in the judicial proceedings, particularly during the pre-trial phase or in relation with procedural matters, the material elements can only be tendered into evidence, save for some exceptions, if they were subject to adversarial debates during a hearing. The same principle applies to witnesses who, in principle, will testify in person before the Court and will be subjected to cross-examination.The trial phase is, therefore, inevitably long and requires an active and permanent presence of counsel at the Court's premises (in the *Lubanga* case, Trial Chamber sat for 220 days of hearing during trial phase, and in the *Katanga & Ngudjolo* case, Defence teams where present for 243 days of hearing).

Defence conducted in exceptionally large scale cases

The charges refer to alleged mass crimes often committed on several territories over long periods of time, involving multiple actors, in the context of large scale conflicts. Furthermore, the charges are of extreme gravity, the scale of the evidence to collect is immense, and the complexity of the questions raised is without any equivalent with those raised in national jurisdictions. The scale of these trials, under these various

[5] It must be underlined that even so the Prosecutor is under obligation to investigate incriminating and exonerating circumstances (Article 54-1-a), practice shows that this obligation is highly neglected by the Prosecutor. See for instance: *Mbarushimana* case, ICC-01/04-01/10-465-Red, par. 51.

aspects, calls for a long and complex investigation and for particularly demanding judicial debates in terms of workload and availability.

Such is the context in which Defence has to operate before the ICC.

The costs generated by these Defence investigation missions are so significant that, in the vast majority of cases, the individual arrested and charged (who's assets will immediately be « frozen ») will not have the personal means to assume his or her own defence. It follows that, in general, Defence can only exist if funded by the Registry under the legal system. This only demonstrates the importance for the institution to render the Defence effective and efficient, without which a fair trial is impossible.

Moreover, the fairness of the trial implies a certain form of balance between the Prosecution and the Defence (the "equality of arms") that is not only formal and procedural, but must also be apparent in the attribution of means to the parties.

The present legal laid system is notoriously insufficient and, for this reason, has already been faced with many crisis situations that impacted negatively on the Court's proceedings. If adopted, the Registrar's proposal for the review of the legal aid system, which is solely motivated by a reduction of costs,[6] would render impossible for the Defence to accomplish its mandate, and would, furthermore, contribute to permanently dissuade experimented and independent counsel to offer their competence and energy to the service of International Criminal Justice.

This document's aim is to demonstrate that this reform proposal wrongfully describes the mandate of the Defence and the means that are necessary, and to propose a realistic analysis of situations, which the Defence is facing, in order to achieve, with concrete proposals, a legal aid system that is truly "effective and efficient".

[6] The review of the legal aid system in order to reduce expenses was strongly suggested by the Committee for budget and finance. For ex. ICC-ASP/10/15, par. 15 and Annex III.

The efficiency of the legal aid system can be examined under four essential aspects: the composition of the Defence teams, the indemnities and remuneration paid to the Defence team members, the investigation budget and the operational budget.

1- Composition of the Defence teams

A description of the composition of the Defence teams and the assignment of their member is necessary.

It is completely artificial to seek to change the composition of a Defence team according to the successive "phases" of the proceedings between the issuance of the warrant of arrest (or the summons to appear) until the end of the trial phase. Even if the nature of the tasks varies under certain circumstances, these tasks remain essentially the same and their scale is comparable. The human resources necessary to face such tasks therefore remains the same.

The Defence must perform the following tasks during all procedural phases concerned and until the end of the debates in the trial phase:

- **Analysis of evidence disclosed by the prosecutor and the participating victims.**

In the *Lubanga* case, for instance, approximately 700 exhibits have been disclosed in the time period between the warrant of arrest and the decision on the confirmation of charges, around 2 500 between the decision on the confirmation of charges and the beginning of the trial, and around 2 900 throughout the trial itself. In the *Mbarushimana* case, the Prosecutor disclosed to the Defence, at the pre-trial phase, in addition to numerous other documents, close to 12 000 intercepted communications and the content of 47 hard drive.[7] In the *Katanga & Ngudjolo* case, approximately 800 exhibits have been disclosed in the time period between the issuance of a warrant of arrest and the decision on the confirmation of charges, about 3 000 between the

[7] Only 30 of the hard drives were made available to the Defence.

decision on the confirmation of charges and the opening of the trial, and about 1 100 during the trial phase. These figures give an indication of the extent of the analysis taskthat must be undertaken at every stage of the proceedings.

– **Investigation**

The investigation by the Defence must be undertaken from counsel's appointment onwards and initially, of course, during the pre-trial phase: the cases *Mbarushimana*[8], *Abu Garda,*[9] *Kosgey*[10] et *Ali*[11] illustrated the importance of the ability of the Defence to efficiently challenge the Prosecutor's case during the confirmation of charges hearings, to prevent, if applicable, the Court to consider further legal actions that do not have realistic chances of resulting in a conviction.

The Defence's investigation must also continue during the trial phase itself. The presentation of new evidence and the testimony of the Prosecution witnesses and victims generate new investigation fields throughout the trial. For instance, in the *Lubanga* case, it was necessary for the Defence to organise and carry out 15 investigative missions in DRC throughout the trial phase[12].

– **Written filings**

The *Lubanga* case statistics reveal the large amount and the essential role of written submissions: the Registry recorded 796 filings between the warrant of arrest and the decision on the confirmation of charges, 848 between the decision on the confirmation of charges and the opening of the trial, and 1190 throughout the trial

[8] Decision on the confirmation of charges, ICC-01/04-01/10-465-Red.
[9] Decision on the confirmation of charges, ICC-02/05-02/09-243-Red.
[10] *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the confirmation of charges, ICC-01/09-01/11-373.
[11] *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta et Mohammed Hussein Ali*, Decision on the confirmation of charges, ICC-01/09-02/11-382-Red.
[12] In total, the counsels and legal assistants of Mr Lubanga's Defence Team carried out 15 missions in Africa, for a total of approximately 130 days for two persons on the field (4 ½ months). These data exclude the missions carried out by the resource person.

itself.[13] In the *Katanga & Ngudjolo* case, a total of 717 filings were recorded by the Registry between the warrant of arrest and the decision on the confirmation of charges, 951 between the decision on the confirmation of charges and the opening of the trial and 1 555 during the trial. Although these filings varied in significance, it is obvious that the proceedings before the ICC, far from being exclusively "oral", confer an important place to "written" debates throughout all the phases of the proceedings.

– **Hearings**

Even before the opening of the trial, on a regular basis hearings are held on various topics pertaining to, for instance, disclosure of evidence, investigations, protection of witnesses, participation of victims, etc. (In the *Lubanga* case, 70 hearings took place before the opening of the trial; in the *Ngudjolo* case, the Chamber held 37 hearings before the opening of the trial).

It goes without saying that from the beginning of the trial, the preparation of hearings and participation in them is substantial and requires the Defence team's prensence at the seat of the Court. This makes it extremely difficult for a team without adequate workforce to carry out further necessary investigative missions to the field.

The attendance at trial hearings constitutes even more strenuous work, since it necessitates meticulous preparation, as the parties are the main actors of witness examination and cross-examination, as well as presentation of documentary evidence. Experience reveals that in this type of cases, it is tremendously difficult for a counsel alone (on the Prosecutor's side as much as on the Defence's side) to prepare and conduct several successive examinations. The simultaneous presence at the Court of both counsels is consequently a necessity.

[13] Including the period pending judgement.

Such are, very briefly presented, the essential tasks of Defence.

The experience of the *Lubanga* case highlighted the failures of the actual legal aid system regarding the workforce that is necessary for an operational Defence team to take on these missions.

First, the present legal aid system, which limits the team to one counsel, one assistant and one case manager during the pre-trial phase up to the opening of the trial, has already led to a major crisis. The first counsel appointed was irresistibly compelled to resign from the end of the pre-trial phase,[14] while the new appointed counsel rightfully subjected her acceptance to an increase of the human and material resources made available to her, and required that the team comprised at least of two counsel, two legal assistants and one case manager (excluding the bearing of cost of an investigator and resource person whose instigate other difficulties, described bellow). This crisis profoundly disrupted and delayed the proceedings for a period of several months, particularly due to the Registry's reluctance in admitting the necessity to provide the Defence with indispensable "additional resources".[15]

Second, the lack of an investigator and of a resource person in the field, who is integrated in a permanent and institutional way into the Defence team (meaning that its cost will not put a strain on the allocated investigation budget), placed the Defence team in a extremely difficult position when organising investigative missions in the course of the trial. This forced the Defence to request from the Chamber the suspension of the proceedings to allow a part of the team to conduct these missions.

The experience of the *Lubanga* case leads to two primary conclusions:

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[14] The lead counsel withdrew from the case on February 20th 2007.

[15] On March 20th 2007, Mr. Thomas Lubanga designated Ms Catherine Mabille as his lead counsel in the proceedings before the International criminal court. On June 21st 2007, Ms Catherine Mabille accepted this designation following a Registrar's decision granting to the Defence team of Mr Lubanga additional resources especially the appointment of a co-counsel, one additional legal assistant and an investigation's budget. See: ICC-01/04-01/06-845, ICC-01/04-01/06-927 et ICC-01/04-01/06-928.

- The Defence team must be fully constituted from the appointment of a counsel by an indigent accused and must remain complete until the end of the trial phase;

- This team, in addition to two counsel, two legal assistants and one case manager, must also include an investigator and a resource person, who will stay at counsel's disposal during the whole period.

It goes without saying that this "modest" composition of a defence team would still be disproportional to the workforce available to the Office of the Prosecutor. The latter does not only benefit from teams of professional investigators, and in Court, of a higher number of prosecutor's representatives, but also benefits from the support of specialised sections in different fields (for instance appeals, participation of victims, follow-up of witnesses in the field, court hearings, technical support). The Office of the Prosecutor can also resort to the service of external consultant on various specific questions, and has at its disposal its own translation and interpretation unit.

The Registrar's proposal, far from taking into consideration the lessons learned, aggravates even more the insufficiencies of the current system.

First, being completely silent on the pre-trial phase, the Registrar is apparently satisfied with the current system governing this period (one counsel, one assistant, one case manager); a system whose serious insufficiencies have been underlined above. The same goes for the trial phase, as the current system[16] only provides for one legal assistant instead of two. However, the experience of the first cases demonstrates the necessity of a second legal assistant, as it has been fully recognised by the Registry.

Second, far from proposing the inclusion of an investigator in the Defence team, the Registry proposes on the contrary to completely suppress this part of the

[16] ICC-ASP/6/4.

investigation budget. The Registry's suggestion to resort, when needed, to the «*the budget for expenses where available, as well as any savings generated by the team* » to remunerate the work of a professional investigator is obviously unsatisfactory. These funds are required for other necessities and, considering the proposed budget restrictions, it is difficult to imagine that any economies could be ever made…

The Registry maintains that defense teams have themselves, somehow, decided not to use a professional investigator. This argument is unfortunate: if defense teams "preferred" to use the services of a "resource person" rather than those of a professional, Registry certified, investigator, it is only because the payment of fees for the latter (based on the amount fixed by the Registry) would have exhausted the investigation budget in three months! This argument is even more unacceptable considering that the section of the Registry responsible for these issues received complaints from counsel on this matter and is perfectly aware that counsels have "renounced" the use of such investigators only because of the financial constraints imposed on them.

The integration of a "resource person" into the team, as envisaged by the Registry, would indeed be an improvement over the current system, but cannot in any way compensate for the lack of a true professional investigator. Whereas, the Office of the Prosecutor has, and rightly so, many professional investigators, who are working in the field, in collaboration with paid local intermediaries, it would be manifestly unfair if the Defence could not have any professional investigator.

Thirdly, the Registry seems to suggest that only the "case manager" should be paid during the period between the end of closing arguments and judgment. This proposal goes directly against Trial Chamber I's decision of 30 August 2011 in *Lubanga*. The Chamber ruled that the fundamental rights of the accused required that the defence team be kept in place unchanged until the end of the trial phase, i.e.

either until acquittal or, in the case of a conviction, pending decisions on sentence and reparations.

As the judges pointed out in this decision, under Rule 150, any decision by the Trial Chamber rendered on (1) guilt, (2) sentence, or (3) reparation may be subject to an appeal within 30 days. However, if the defence team were to be reduced, it would be unfair to the accused to be requested to build a new team and to file an appeal in such a short time.[17]

2 - Compensation and remuneration

Contrary to the approach taken by the Registry, it is important to distinguish between two very different situations: the situation of legal assistants and "case managers" on the one hand and the situation of counsel on the other.

The former are in a similar situation to lawyers and other Court staff: they are based at the seat of the Court, and devote themselves full-time to the case for which they were recruited. Therefore, their remuneration should be assessed by comparison to the salary of a lawyer at the same level within the Office of the Prosecutor, taking into account the total wages and benefits in respect of which the latter can benefit because of his/her status.

The Registry proposes to reduce a legal assistant's monthly salary to € 4,889 and that of a "case manager" to € 3974. However, the current salary of a legal assistant (6113 €/month) is already lower than that of the comparable OTP position, which is considered by the Registry to be the equivalent of a P2. A P2 salary amounts to about €7,400/month taking into account all advantages, such as insurance and pension fund contributions, relocation allowances, and the possibility of maternity leave, etc.[18] The

[17] See ICC-01/04-01/06-2800.

[18] See ICC-ASP/6/4, par. 59 and Annex VI. Footnote 2 in Annex VI states: "These figures have been 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."

Registry's proposal would, thus, reduce the remuneration of the legal assistant to just over half of what is paid to a professional P2 in the OTP.

Additionally, the title of "legal assistant" is inappropriate considering the requirements for this position (a minimum of 5 years experience). The equivalent OTP position is an "Associate Trial Lawyer". The title of a legal assistant's position should change accordingly.

In contrast, counsel, i.e. lawyers with more than ten years of specialist criminal law experience in their domestic jurisdiction, firstly, need a "revenue" (or gross income) which covers certain structural costs associated with their law firm (i.e. staff costs, rent, social security payments, costs for the rent of equipment and furniture, miscellaneous costs, etc.) and, secondly, which generates a "gross profit" that is appropriate to their age and experience. Their situation is incomparable to that of a senior trial lawyer in the OTP at the ICC, who, in addition to receiving the benefits and privileges associated with an international civil servant, receives a fixed salary without having to assume any professional costs.

First, as pointed out by the Registry, it is legitimate that the remuneration of counsel (i.e. their net income) is similar to that of a senior trial lawyer. Counsel should receive the same remuneration as a professional P5 at the OTP, taking into account all the advantages received by the latter (which represents a monthly salary of about € 13 000).

Subsequently, it is appropriate to add to that sum the average monthly fees which counsel pays to his/her domestic bar. This situation varies according to the particular requirements of their domestic judicial system. In France, for example, a lawyer pays an average of € 8,083 per month in fees.[19] These are national averages, which do not

[19] This average is based on statistics provided by the ANAAFA (National Association of Administrative and Fiscal Assistance): the national average annual gross revenues received by a lawyer is € 147 093, a revenue on which 65.95% in expenses are imposed. The result is an annual

take into account variations depending on the location (Paris / province), seniority or expertise. It follows that these numbers provide guidance on minimum amounts.

The data above allows one to estimate the amount of fees paid by a French lawyer with 10 years of experience, who wants to devote himself/herself to the defence of an accused before the ICC, without putting at risk his professional career.

Taking all phases of the proceedings together , if one considers that a defence counsel spends an average of "only" 80% of his/her activity at the ICC, then the total monthly professional charges could be reduced by this amount.

It follows that a lawyer can only reasonably be expected to work full time on the defence of an accused before the ICC if he/she receives a monthly fee similar to his/her counterpart at the OTP, in addition to his/her properly vouched professional charges.

In its draft, the Registry proposes to reduce the monthly fees of lead counsel to € 8,221 and the fees of co-counsel to € 6,956. These amounts either cover only the minimum amount of professional charges to be paid (for the lead counsel), or are well below this minimum (for co-counsel).

The Registry also proposes to "reduce" (but the wording suggests that it proposes to eliminate altogether) the "compensation for professional charges."

In other words, it is as if defence counsel have been asked to act *pro bono* (i.e. for no compensation), or even to contribute financially to the proper functioning of the Court. In contrast, the OTP's senior trial attorneys would receive payments without making any contribution to the efforts to reduce the Court's budget.

Moreover, the Registry suggests reducing fees by a further 25% "during phases of the proceedings which do not require their presence at the seat of the Court."

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charge of € 97 007 or € 8,083 for monthly expenses. Ref. Journal "Master", published by ANAAFA, No. 210, October / November 2011 "Special Issue Statistics 2010".

These proposals, which are obviously unrealistic, are not based on any serious justification.

First, the hypothetical "tax exemption" on the basis of a hypothetical amendment to the Headquarters Agreement and the Agreement on Privileges and Immunities will, unfortunately, not benefit counsel. The fees received by counsel do not qualify as taxable income, but as "gross income" which is part of the total revenue of the law firm concerned, resulting (very hypothetically here!) in a profit which cannot escape taxation.

Second, the Registry intends to justify striking out "compensation for professional charges" by the fact that " as the work of the Court develops, counsel receive from the Court all the assistance necessary to effectively fulfil their tasks in terms of support personnel and facilities, including office space, computer hardware and software, etc.".

This argument reveals a serious misunderstanding of the purpose of this compensation: this compensation is intended to cover the structural costs assumed by the counsel in his home country, as described above, and it was never intended to fund facilities and equipment at the headquarters of the Court, exclusively dedicated to the defence of the accused before the ICC. The provision of an office and computer equipment at the seat of the Court, which was provided for at the opening of the first case, was never envisaged to be covered by the fees and allowances paid to counsel. Moreover, it is clear that the provision of an office and equipment at the Court's headquarters in no way reduces the amount of expenses that counsels continue to bear in their domestic jurisdiction.

Thirdly, the Registry intends to justify the 25% reduction of counsel's fees ("75 per cent of the basic remuneration") during "the non-presential phases of a case" when their presence at the seat of the Court is not required on the grounds that during this period they "can therefore work for other clients." This suggestion ignores the fact

that the phases of the proceedings, during which the intensity of work may slightly diminish, must be balanced against the phases during which, conversely, work is at its peak (investigations on the field, court hearings) and completely engage counsel. One should, therefore, think in terms of a weighted average. Furthermore, this suggestion wrongly equates the phases of the proceedings without hearings, which require the presence of counsel to phases which "do not require their presence at the seat of the Court": it is clear that the bulk of trial preparation can only be done at the seat of the Court, where the material facts of the case are and where assistants and "case managers" are based. Moreover, these “non-presentational” phases are often used to conduct field investigation. This, in fact, is not a reduction in workload, but amounts to a phase of intensive work, during which it is impossible to focus on "other clients".

Regarding remuneration of the resource person, the amount of € 1,000 per month seems clearly insufficient if we want or intend to recruit qualified staff. This assessment is all the more surprising given that the Registry to date (and since 2007) set the same compensation of €4074 (Investigation Assistant GS-OL). More importantly, the amount, which must be fixed at a minimum, must be subject to upward modification depending on the circumstances in which the resource person works. The financial needs of the latter typically vary according to the location, where he/her operates.

3 - Investigation Budget

The Registry proposes to reduce the investigation budget for defence teams to € 35 000, a reduction of more than half the budget previously set at € 73 000. This reduction is incomprehensible in the light of experience gained during the first two cases investigated by the ICC.

In fact, the amount of €73 000 has clearly proven to be insufficient for defence teams, who, during proceedings, have had to ask repeatedly for additional resources to enable them to carry out all necessary investigations.[20]

Thus, with the approval of the competent services of the Registry, the total investigation budget for the defence of Mr. Thomas Lubanga amounted to €214, 797.35. If the €85 000, which approximately corresponds to the total remuneration of the resource person on the ground, and the €18 560, corresponding to the remuneration of the professional investigator,[21] are deducted the total costs of investigation in this case, strictly speaking, amounted to approximately €111 200. At no time did the Registry allege that these funds, which payment it authorized, were used inappropriately. The conduct of the hearings, at which the results of these investigations have been shown and made public, demonstrate the need for the defence to have sufficient resources to carry out such investigations, the *sine qua non* condition for a fair trial and the search for truth.

In light of this experience, it clearly appears that the lump-sum for the investigation budget initially made available to a defence team should not be less than €100 000. This is without prejudice to the possibility of seeking additional resources, as was the case in the first two cases.

4 - Operational Budget

The current system provides for the reimbursement of counsel's and co-counsel's travel expenses during their missions to the headquarters of the Court upon the presentation of receipts. A monthly lump sum of € 4,000 is allocated to defence teams for the reimbursement of travel expenses and a payment of *per diem* at a fixed rate.

[20] For example, in the *Lubanga* case, the defense team has filed four requests for additional resources. It should be noted that these requests add a substantial workload for defense teams, often at critical stages of the procedure.
[21] The remuneration of the investigator was performed for 3 months during the preliminary phase.

Unused funds from the monthly lump-sum of € 4,000 are added to the lump sum of the following month, along with any unused funds from previous months.

The Registry has previously acknowledged that the monthly lump-sum of € 4,000 was clearly insufficient for the needs of a team during the trial phase.[22] Despite that, the Registry is now proposing to significantly reduce the amount allocated for travel expenses to the seat of the Court.

Pursuant to the proposal, lead counsel and co-counsel will be reimbursed via an annual flat rate, which may decrease depending on the duration of the trial, rather than being reimbursed for the full costs of their missions to the headquarters of the Court.

Lead counsel and co-counsel, who agreed to act before the Court, should have the possibility to ensure a minimal presence at their respective law firms in order to maintain their professional practice. This monitoring requires them to travel frequently and regularly between their home country and the seat of the Court, resulting in considerable travel and accommodation expenses. The Registry's proposal is unacceptable, since it will necessarily either lead to counsel having to cover a significant part of the costs themselves or limit their ability to travel to the seat of the Court, to the detriment of the rights of the accused.

Moreover, it does not seem justified that the travel allowances granted to counsel depend on the stage of the proceedings and that the amount awarded to co-counsel is less than the one accorded to counsel.

Finally, it should be noted that no explanation is given as to how the proposed lump sums were arrived at.[23] At the very least, it seems that the proposed compensation does not take into consideration factors, such as the distance between the country of residence of counsel and the seat of the Court, the available means of transport

[22] See e.g. ICC-ASP/6/4, para. 49.
[23] Working paper, para. 40.

between the seat of the Court and place of residence, frequency of travel of counsel and length of stay of counsel at the headquarters of the Court.

5 - Recommendations

This document should not be seen as an exhaustive list of proposals for a reform of the Court's legal aid system put forward by the defence teams. It only suggests avenues of work as part of what should be a thorough study of this issue. The Registry argues that it has already conducted such an "in depth" study of legal aid regarding all players. However, no defence team has been consulted on this matter prior to the notification of the Discussion Paper, which is commented upon in these observations. Furthermore, large organizations, such as the International Criminal Bar, have also been forgotten. To date, it has been impossible to know which participants in the ICC system were consulted by the Registry prior to the drafting of the discussion paper, apart from the Assembly of States Parties and the Committee on Budget and Finance.

The Defence teams, therefore, call for the establishment of a working group comprised of legal professionals, including counsel and other members of defence teams, the OPCD, the Registry, various organizations such the International Criminal Bar, the International Bar Association, the Coalition for the International Criminal Court, and representatives of the judges and the Presidency of the Court, in order to be able to carry out a comprehensive review of the legal aid system based on the experience gained during the first years of the functioning of the Court. Any reform of this system cannot be considered without a thorough examination of its impact on fundamental rights of the accused, and in particular his/her right to a fair trial.

Done at The Hague, January 31, 2012

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