

Commentary to Registry's Concept Paper
*Review of the International Criminal Court
Legal Aid System*

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PREFACE

In this commentary, I provide my observations on the Registry’s Concept Paper: *Review of the International Criminal Court Legal Aid System*. This commentary, which may be of use for the consultations seminar on the Legal Aid Scheme (“LAS”) of the International Criminal Court (“ICC”) scheduled for 19 June 2017, is limited to aspects relevant to the Defence at the ICC. It seeks to provide the Registrar with the general, big picture elements that are necessary to consider when redesigning the LAS. It does not attempt to provide a redesigned LAS, nor does it focus on all the minute and technical details of the LAS or proposals addressed in the Registry’s Concept Paper. In preparation of this commentary, I have reviewed the external reports commissioned by Registrar – the International Criminal Justice Consortium (“ICJC”) report and the report by Richard J. Rogers (“Rogers’ report”) – the LASs, Statutes, Rules of Procedure and Evidence (“RPE”), Regulations, Practice Directions, and relevant case law of the ICC and other international(ized) criminal tribunals and courts. I also bring along my professional experience as a criminal defence lawyer as a state and federal public defender in the United States; my experience practicing under the LASs of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), and the ICC; my involvement in legal reform work related to trial advocacy, case preparation and investigation in defending accused before hybrid courts; as well as my Rule of Law and international development experience in formulating the LAS of the Brčko District of Bosnia and Herzegovina. In the overview of this commentary, I provide my general criticism of the current LAS. I then provide the necessary context that the decision makers must appreciate in redesigning the LAS, before commenting on the “Applicable Principles” outlined by the Registry’s Single Policy Document and the recommendations advanced in Rogers’ report.

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I. OVERVIEW

In asking *Why Now*, the Registrar cites the Assembly of States Parties' ("ASP") fifteenth session where it was "stressed" "the need for continuous monitoring of the efficiency of the legal aid system, namely fair trial objectivity, transparency economy continuity and flexibility," and where the Court was requested "to reassess the legal aid system and to present, as appropriate, proposals for adjustments ... for the consideration of the Assembly at the sixteenth session."¹ The Registrar goes onto say that since 2012, when the last review was done, the ICC was able "to identify the strengths and weaknesses" from which lessons learned can now be evaluated. The Registrar noted that Defence and Victims' Counsel have brought to the fore a number of critical matters such as the need for: (a) more administrative efficiency and transparency in legal aid matters; (b) higher remuneration; and (c) additional resources for investigative purposes. Finally, the Registrar wraps up the *Why Now* rhetorical musing by setting out the questions that beg answering: "*whether the Court's legal aid system as a whole meets the requirements of efficiency and effectiveness*" considering "the Court's commitment to *ensuring that it can and should attract external counsel who meet the highest standards of efficiency, competency and integrity.*"²

The LAS promotes neither efficiency nor effectiveness. The remuneration and resource scheme for the Defence, if anything, has been a disincentive in attracting experienced and competent Defence Counsel. Even the most casual observer of the application of the LAS would have reached this conclusion years ago. Here is why. The LAS has been confusing, ill-conceived, and arbitrarily administered since the day the ICC became operational. There is no sense in sugar-coating this fact; assuredly this has been known to the Registry for several years.

It is unfeasible to meet the highest standards in representing an accused before the ICC within the allocated resources. In reality, conscientious Defence Counsel are compelled by their personal commitment to their clients and to the profession in general, their dignity and integrity, and in no small measure, the obligations imposed by the ICC Code of Professional Conduct for Counsel ("ICC Code of Conduct"), to do a fair amount of pro bono work, and in many instances, dig into

¹ Review of the International Criminal Court Legal Aid System, Concept Paper (Draft for Comments) ("Registry's Concept Paper"), p. 2 *citing* Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifteenth session, The Hague, 16-24 November 2016 (ICC-ASP/15/20), vol. I, part III, ICC-ASP/15/Res.5, para. 64 and Annex I, para. 8.

² Registry's Concept Paper, p. 3 (emphasis added).

their own pockets to cover incidental costs.³ And never mind the necessity of having to overly rely on the generosity of the talented pro bono Legal Consultants (currently unfairly termed “Legal Assistants” by the Registry),⁴ who, in many instances, do make a difference in whether the accused will enjoy the fair trial rights guaranteed to them through a robust, competent, and diligent defence.

Why the dreadful nature of the LAS? In part, because of a lack of understanding and experience by those at the ICC who conceptualized the LAS. They neither knew nor appreciated exactly what is entailed in representing a suspect or accused in a mass atrocity case, where the alleged crimes, evidence, and witnesses are thousands of miles away from the seat of the ICC. I say this because in 2007, when I participated in a full day workshop on designing a LAS, it was rather obvious that those hosting the workshop were obsessed with fabricating some rigid formula based on their uninformed imaginings of what the ideal Defence team should be composed of, as if each case requires a uniformed team composition.

The allocated level of fees is also ridiculously low. Obviously, none of those responsible for conceptualizing the LAS had worked in the private sector or as private practitioners, where there are office costs such as rent, utilities, office equipment, secretarial services, employment contributions for office staff, and other costs, such as professional and health insurance, professional dues, continuing education costs, paid vacations for the staff (but not for Counsel), travel costs for time spent traveling to and from The Hague or in the field, etc.

³ Defence Counsel must perform his or her duties “with integrity and diligence, honourably, freely, independently, expeditiously and contentiously.” ICC Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, 2 December 2005 (“ICC Code of Conduct”), Art. 5. Defence Counsel’s ethical duties continue until the representation has ended, regardless of whether the allotted hours or funding have already been consumed. *Id.*, Art. 17(2). The ethical duty of due diligence requires Defence Counsel to do anything and everything permitted by the Statute and RPE to ensure that all fair trial rights are fully accorded to the client, including making legal challenges through written and oral submissions, checking the veracity and accuracy of evidence gathered by the Prosecutor that may be used against the client, objecting to the admissibility of evidence, confronting witnesses, consulting with experts when necessary and relevant, and so on. *See* AMERICAN BAR ASSOCIATION RULES OF PROF’L CONDUCT, Rule 1.3: “A lawyer shall act with reasonable diligence and promptness in representing a client.” *Id.*, Comment to Rule 1.3, para. 1: “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” For more on the ethical duties of Defence Counsel, particularly the duties of zealousness and diligence, *see* Michael G. Karnavas, *Defence Counsel Ethics, the ICC Code of Conduct and Establishing a Bar Association for ICC List Counsel*, 16 INT’L CRIM. L. REV 1048 (2016).

⁴ *See infra* Section IV(I).

And to add salt to the wound, the rates were slashed in 2012 by an average of 25%,⁵ despite the fact the rates were already far below the rates of other international(ized) criminal tribunals and courts,⁶ which were also low and had not been augmented to reflect the increase over the years of the cost of living. Laughingly, the excuse offered is gibberish, bureaucratic double-speak at its most impenetrable and illogical:

- (a) “The difference between the gross salary and the net salary of a staff member employed by the Court is accounted for by the total deductions applicable to Court officials, which are irrelevant and duplicate the regime applicable to independent counsel”;
- (b) “The amount of tax paid by counsel on their remuneration under the legal aid system has moreover proven to be recoverable through the compensation for professional charges scheme”; and
- (c) “The gross fee basis was hence no longer considered to be a relevant or reasonable criterion.”⁷

At the current ICC rate, were Lead Counsel to work only 160 hours per month during trial proceedings – something that is a virtual impossibility when considering the amount of preparation involved, the time spent in the courtroom, the material that must be reviewed, the time it takes to craft a cogent line of questioning, and so on – the hourly rate comes to €51,33. In actuality, the average week of a diligent Lead Counsel while in trial is 60 hours at a minimum, making the hourly rate closer to €34.25. Duty Counsel fare slightly better. When appearing in court, say to represent a witness, for a full day, which, at a minimum, consumes eight working hours, Duty Counsel is handsomely rewarded at a daily rate of €327, or €40.87 per hour. Imagine now what the actual remuneration would be when factoring the un-compensated time consumed in traveling, which can often be a full two days.

The Registrar has noted that the LAS should be sufficiently appropriate to attract good lawyers who would provide high quality representation, presumably meaning: *doing all that is reasonable*

⁵ Decision of the Bureau on Legal Aid, ICC-ASP-2012, 23 March 2012; Registry’s single policy document on the Court’s legal aid system, ICC-ASP/12/3, 4 June 2013 (“Registry’s Single Policy Document”), paras. 77-92; Global Diligence LLP, Assessment of the ICC’s Legal Aid System, 5 January 2017 (“Rogers’ report”), para. 136.

⁶ See Rogers’ report, pp. 18-19, Figures 3 and 4.

⁷ Registry’s Single Policy Document, para. 84.

*and necessary in representing the client and ensuring an efficient and cost-effective defence.*⁸ I could not agree more. But legal services are not cheap. Good lawyers tend to be busy. The private rates for a good, experienced lawyer can range from €300 per hour and upwards to €600 per hour. A good lawyer in the United States bills at \$375 to \$650 per hour. In the United Kingdom, the rates can run from £500 per hour and upwards. Of course, this is not to suggest that the ICC rates need to match the private rates charged by high-end lawyers of one's home jurisdiction. Rather, the rates should be in relevant proximity to what other international(ized) criminal tribunals and courts are offering, subject to a modest increase to reflect any cost-of-living adjustments. For example, Lead Counsel at the ICTY are paid between €81.80 and €111.40 per hour depending on their level of experience.⁹ The hourly rates at the ICTY were to be adjusted yearly based on the movement of the Consumer Price Index used by the International Civil Service Commission.¹⁰

While these rates may be much higher than what is offered in countries where many of the accused hail from, to suggest that the ICC rates should reflect the national rates of developing or under-developed countries is absurd. The ICTY rates did not reflect the tariffs of Serbia, Croatia, Bosnia and Herzegovina, or Kosovo any more than the rates offered by the International Criminal Tribunal for Rwanda ("ICTR") reflected the tariffs of Rwanda. And while there may be an argument to be made that there could be separate rates for international Counsel (Counsel not from the country of origin of the accused) and national Counsel (as is the case with the ECCC),¹¹ since the ICC sits in The Hague, any disparity in remuneration based on the origin of Counsel is unfair, prejudicial, and smacks of neo-colonialism. It is also perniciously presumptuous to assume that Counsel from Europe or the United States or some other developed country are, by virtue of their place of origin, inherently more qualified and thus merit higher rates than Counsel from developing or under-developed countries.

The Registrar is to be commended for taking the initiative in commissioning the expert reports. However, this matter has inexcusably dragged on far too long. While the expert reports were being drafted, the Registrar should have formed a blue-ribbon panel of his own, and could have been

⁸ Registry's Concept Paper, p. 5.

⁹ Revised Annex I to the Directive on the Assignment of Counsel, 1 January 2014, *available at* http://www.icty.org/x/file/Legal%20Library/Defence/Assignment_of_counsel_annex_140101.pdf.

¹⁰ *Id.*, fn. 1.

¹¹ See ECCC Defence Support Section Administrative Regulations, Regulations 2.1, 2.2; ECCC Administrative Support, <https://www.eccc.gov.kh/en/dss/adminsupport>.

holding workshops on the LAS. There was no need to wait to hear from the experts; there are experienced Counsel living and working in The Hague who are familiar with the various LASs applied at the international(ized) criminal tribunals and courts. Time was unnecessarily wasted. In fairness to the Registrar, however, the International Criminal Court Bar Association (“ICCBA”) has been equally lax in tackling this issue. Rather than waiting for the expert reports to present recommendations for an improved LAS on a silver platter, the ICCBA should have, over the past year, drafted a proposed LAS for the Registrar and the ASP to consider.¹²

The reports do not provide any insight that was not known or not readily discernable by gathering and analyzing the various LASs of the international(ized) criminal tribunals and courts. A simple chart, easily made, would have displayed the general schemes and remuneration schedules for comparison purposes. Granted, each tribunal and court has its own peculiarities and therefore, there is not one model that can be claimed to be *the* model. And yes, while the ICC does have unique features that warrant tailoring the LAS to its needs, it is puerile to suggest that one need to have gone around the ICC track, as it were, to appreciate and hypothesize an improved LAS for the ICC to replace the one that has been tried, tested, and failed.

II. CONTEXT THE DECISION MAKERS MUST APPRECIATE

Those drafting any revised LAS must appreciate the context in which the Defence operates in order to make informed decisions as to what is *reasonable and necessary* and to find the “right” level of resources for the Defence.¹³ Such context includes: (a) what it takes to defend a case before the international(ized) criminal tribunals and courts; (b) the general functions of the Defence team; (c) the needs of Defence Counsel in formulating a “core” team; and (d) the needs of Defence Counsel concerning Investigators.

A. What it Takes to Defend a Case Before the International(ized) Criminal Tribunals and Courts

Much too much is made of how different the ICC is from other international(ized) criminal tribunals and courts when it comes to defending an accused.¹⁴ Yes, the Rome Statute is unique,

¹² Michael G. Karnavas, *The ICCBA is born. Huzzah! Now for the steep climb ahead.*, 11 July 2016, <http://michaelgkarnavas.net/blog/2016/07/11/iccba-steep-climb-ahead/>.

¹³ Registrar’s Paper, p. 3.

¹⁴ *See e.g. id.*, p. 6: “If properly implemented, the case complexity system may reduce administrative burdens and encourage efficiency. It may also, however, prove more challenging to apply at the Court whose broad jurisdictional

and in no small measure, unnecessarily overly complicated, providing for disparate approaches to trying cases, depending on the vagaries of the Trial Chamber makeup, and more specifically the predilections of the Presiding Judge.¹⁵ While this may cause additional challenges in defending a case,¹⁶ the simple fact is that all cases before all international(ized) criminal tribunals and courts – save for the ECCC where there are investigating judges and the parties are not permitted to conduct any investigative actions¹⁷ – share common features, requiring Defence Counsel to make more or less the same type of pre-trial and trial efforts as part of their professional responsibility of being duly diligent and zealous in representing their client.¹⁸ All cases require that Defence Counsel

scope entails a very diverse caseload – far more than the ICTY. For these reasons, some may argue that all cases are highly complex.”

¹⁵ Effectively, Article 64 of the Rome Statute and Rule 140 give the Trial Chamber authority to adopt whichever procedure it sees fit. Article 64(3)(a) provides that, upon assignment, the Trial Chamber must “[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.” Article 64(8)(b) permits the Presiding Judge to direct the conduct of the proceedings, giving him or her wide discretion to adopt trial procedures based on his or her legal culture, experiences, and biases. Rule 140(1) provides that if the Presiding Judge does not give directions under Article 64(8), the parties “shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber.” If the parties do not agree, “the Presiding Judge shall issue directions.” Disparity in trial practices based on the Trial Chamber’s predilections can be seen, for example, when comparing the approaches adopted in *Lubanga and Ruto and Sang. Compare Prosecutor v. Lubanga*, ICC-01/04-01/06-1049, Decision Regarding the Practices used to prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, para. 51 (the Pre-Trial and Trial Chambers effectively prohibited witness proofing) with *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-524, Decision on Witness Preparation, 2 January 2013, para. 50 (the Trial Chamber allowed witness proofing by “pre-testimonial meetings ... aimed at clarifying a witness’s evidence.”).

¹⁶ While the ICC procedure does not inevitably lead to unfair trials, its flexible and fragmented nature makes it unforeseeable to the accused. For example, Articles 64(6)(b), 64(6)(d), and 69(3), and Rule 140(2), when read together, provide support for an interpretation that the judges have an obligation to ensure that all evidence that may be obtainable and relevant for the decision – irrespective of what is adduced by the parties – should be considered so the truth can emerge. A dilemma thus arises as to how the judges can exercise their authority in determining the truth without effectively commandeering the Prosecution’s duty to meet its burden of proof. Unequivocally, the Prosecution is in no real need of any help from the judges. From the Defence perspective, it certainly raises issues of lack of fairness and impartiality. And from an equality of arms perspective, the Defence is inherently at a disadvantage regardless of whether the proceedings are conducted in a more adversarial or more inquisitorial fashion.

¹⁷ See ECCC Internal Rules, Rule 55. See also *Case of MEAS Muth*, 003/07-09-2009-ECCC-OCIJ, Decision on MEAS Muth’s Request for the Co-Investigating Judges to Clarify Whether the Defence may Contact Including [REDACTED], D173/2.3, 4 December 2015, paras. 12-13 (holding that the Case 003 defence was prohibited from conducting a site visit with a witness as a guide, questioning a witness about a site, and questioning a witness about his previous statements).

¹⁸ The various codes of conduct of the international(ized) criminal tribunals and courts require Defence Counsel to diligently and zealously represent their clients, i.e. to robustly challenge every investigative action taken by the Prosecutor, to challenge the veracity and accuracy of witness statements, to object to any evidence that may lack relevance, reliability, or authenticity, and to raise every conceivable legal issue of merit. See Michael G. Karnavas, *Defence Counsel Ethics, the ICC Code of Conduct and Establishing a Bar Association for ICC List Counsel*, 16 INT’L CRIM. L. REV 1048 (2016); J. Temminick Tuinstra, *Defending the Defenders. The Role of Defence Counsel in International Criminal Trials*, 8 J. INT’L CRIM. JUST. 463, 472 (2010) (internal citations omitted). See also ICC Code of Conduct, Art. 5; ICTY Code of Professional Conduct for Counsel Appearing before the International Tribunal, IT/125 Rev.3, 22 July 2009, Art. 11; ICTR Code of Professional Conduct for Defence Counsel, Art. 6; Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, STL/CC/2012/03, 14 December 2012, Art. 8(B).

know the statutory provisions and the RPE, possess the requisite skills to competently draft legal submissions, investigate, and examine and cross-examine witnesses, and make a record where errors of fact, law, and procedure are properly perfected and preserved for appeal, and so on.¹⁹ There may be more challenges in investigating in certain areas, there may be a need to rely more on local (*in situ*) third parties to assist in locating witnesses, there may be peculiar court-management procedures in dealing with documents that are to be used in the proceedings, but these differences do not necessarily affect the general approach or the general types of resources needed for defending the case. Each case, no matter the tribunal or court, has its own unique challenges, but the core makeup of the Defence team is generally the same. This, in short, should be the point of departure in identifying what additional funds and resources will be needed, depending on the case.

B. The General Functions of the Defence Team

In fashioning a flexible, efficient, and reasonable LAS, it is essential to appreciate what is required of Defence Counsel in meeting their ethical obligations of due diligence throughout the various stages of the proceedings.²⁰

1. Initial Stages of the Proceedings

To start with, by the time Defence Counsel gets into the case, the Prosecution has been at it for months, if not years, learning the historical context of the events, setting up a network *in situ* to assist in gathering evidence and questioning witnesses, researching any extraordinary legal issues, etc. With a much larger budget, the Prosecution is more flexible and better able to obtain resources on a quick basis. Defence Counsel, by contrast, are playing catch-up, with a steep learning curve – even if they have ICC experience and thus presumably know the ICC regime. Unless afforded sufficient time and resources to absorb, organize, analyze, and synthesize the disclosure material and other secondary material for understanding the events and personalities in question, Defence

¹⁹ See ICC Code of Conduct, Art. 7(2)-(3) (requiring Counsel to maintain a high level of competence in the applicable law, to participate in training initiatives required to maintain such competence, and to at all times comply with the Statute, the Rules of Procedure and Evidence, and the Regulations of the Court). Regarding the preservation of errors on appeal see *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, 20 February 2001, paras. 620-23, 628, 642-47 (Defence Counsel’s failure to raise an objection at the time the issue occurred resulted in summary dismissal by the Appeals Chamber); *c.f. Prosecutor v. Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, para. 35 (holding that the Appeals Chamber can step in and correct legal errors even if the arguments advanced by the litigant are unsupported).

²⁰ On the ethical duty of due diligence, see *supra* note 3.

Counsel cannot meaningfully discern how to best proceed in the most efficient and cost-effective manner. The cost, time, and value of this institutional knowledge and familiarization process cannot be underestimated.

Having a strong Defence at the outset of the case is beneficial to the ICC, assisting in “weeding out weak cases at the confirmation stage,” which results in “huge resource savings (resources that might otherwise have been wasted on full trials ending in acquittals).”²¹ Article 66 of the Rome Statute – enshrining the presumption of innocence – assumes that not everyone charged with a crime is guilty. The Prosecution, even with the best of intentions, occasionally will overcharge or mischarge suspects. The purpose of the confirmation stage is to screen cases; i.e. to determine “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”²² Everything done up until the confirmation hearing – conducting investigations, reviewing disclosure material, drafting legal submissions – is essential for setting up the case for trial. In other words, the efforts transcend the confirmation period. Depending on the factual complexity of the case, Defence Counsel may determine that more investigation is necessary, or conversely, if the case is not as factually complex, he or she can focus resources on other aspects of the case.

It must be underscored that this phase is labor intensive and requires Defence Counsel to be *in situ* for much of the time. To sufficiently familiarize him or herself with the case and situation on the ground, Defence Counsel cannot sit in The Hague or his or her national jurisdictions and simply delegate these tasks to assistants. Depending on the team selected, the assistants may not have the necessary experience on the particular type of case and have a steep learning curve. And if sufficient resources are not provided at this stage, Defence Counsel may have to rely on third parties to assist in tracking down witnesses, gathering evidence, etc. Left unsupervised and to their own devices, these third parties, which often come at the suggestion of the client or his or her family members and friends/associates, wittingly or unwittingly, may engage in conduct that amounts to witness and evidence tampering under Article 70 of the Rome Statute. Ultimately Defence Counsel is responsible for the conduct of all team members.²³ For this reason, not only

²¹ Rogers’ report, para. 11.

²² Rome Statute, Art. 61(7).

²³ ICC Code of Conduct, Art. 32: “Counsel shall be liable for misconduct ... by his or her assistants or staff when he or she (a) Orders or approves the conduct involved; or (b) Knows or has information suggesting that violations may be committed and takes no reasonable remedial action.”

should this sort of assistance be used with caution, but sufficient resources should be provided to Defence Counsel to employ experienced staff to oversee, monitor, control, and work with these third parties. In every case, third parties will be needed to some degree.

In sum, flexibility at this stage is needed to determine Defence Counsel's staffing and investigative needs. It is unrealistic to expect Defence Counsel to be omniscient. This matter is of consequence that must be appreciated.

2. Trial Phase

During the trial proceedings, Defence Counsel are under an even greater threat of either providing ineffective legal assistance or falling afoul with the practice directives of the Trial Chamber, or as mentioned, with Article 70. How so? Well, take for example the issue of proofing witnesses to give evidence (*witness preparation* is the more exact term). Normally, the start of the familiarization process by the Victims and Witnesses Unit serves as the cut-off date for party contact with the witness.²⁴ The starting point of the familiarization process is when the witness arrives in the Netherlands, or if testifying by video-link, when the witness arrives to the location of testimony.²⁵

In order to have an efficient, effective, and focused examination, Defence Counsel need to prepare the witness: (a) familiarizing the witness with what happens in court – the witness's function, his or her basic rights such as the right not to answer questions if they are self-incriminating, the role of the parties and judges, and maybe even a walk through the courtroom; and (b) going over the witness's testimony, including any documents that are likely to be shown to the witness from which questions may be asked, and giving the witness an opportunity to refresh his or her memory of statements that he or she may have given in the past.

If the witness is testifying by video-link, Defence Counsel will need someone to be *in situ* to meet with the witness and go over the necessary documents before the cut-off date for meeting with witnesses. During trial, it is unlikely that the Defence team will be able to spare any qualified team

²⁴ See e.g., *Prosecutor v. Kenyatta*, ICC-01/09-02/11-260-Anx, Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony, 22 August 2011, para. 27. See also *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1299, Decision on Victim and Witnesses Unit Request to modify the witness familiarisation process, 25 September 2015, para. 5.

²⁵ *Prosecutor v. Kenyatta*, ICC-01/09-02/11-260-Anx, Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony, 22 August 2011, para. 28.

members. With the trial proceedings being organic and dynamic, it requires all-hands on deck. Defence Counsel, or whoever does the questioning, do not just show up in court. The preparation process is time consuming, not just for the team member conducting the questioning, but for the Case Manager and others who need to pitch in to ensure that all practice directives, disclosure obligations, and e-court protocols are met, including, among other tasks: organizing and assessing disclosure material, challenging the continued imposition of redactions, transmitting the evidence the Defence collects for processing, and undertaking metadata entry.²⁶ All of this consumes significant time and resources. And, while one witness is testifying, preparation is required for the witness(es) to follow. If the composition of the team is inadequate or the size too small, Defence Counsel runs the ethical risks associated with using *in situ* unqualified pro bono help or third parties who may or may not be associated with the Defence team.

Setting aside the soundness of having a cut-off date (capricious and nonsensical in my opinion), the Prosecution is unlikely to have any resource-difficulties in meeting the witnesses *in situ* and preparing them to give evidence. The same cannot be said for the Defence reliant on the LAS.

Further, written submissions are often required to be made in the midst of taking evidence. Relying on the Office of Public Counsel for the Defence (“OPCD”) to do research or draft submissions should not be seen as a solution. The OPCD may be a resource center and a depository of institutional knowledge, but it should not be relied upon as a substitute for the Defence doing its own research and drafting. Outsourcing the work required of the Defence can be ethically dangerous,²⁷ and should not be countenanced by the Registrar. Further, the reality is that conscientious Defence Counsel would be forced to spend more time framing the issue, providing the factual context and details, confirming the research, and proofing the outsourced product than would be required to just do it him or herself. However, this presupposes that the LAS is sufficiently bountiful to allow the Defence to have a robust and qualified team to carry out investigative tasks, research, and draft submissions (necessary for perfecting errors for appellate review), prepare for the examination of witnesses, etc. Realistically, however, the LAS is often far

²⁶ See Karim A. Khan & Anand A. Shah, *Defensive Practices: Representing Clients Before the International Criminal Court*, 76 L. & CONTEMP. PROBLEMS 191, 200-14 (2014) (noting the significant burdens of disclosure and e-court related issues).

²⁷ This concerns quality control – not the quality of those working for the OPCD – but Counsel’s ability to monitor what he or she is putting his or her signature to. Defence Counsel cannot order or manage OPCD staff, or simply vouch for the quality of the OPCD’s work.

too anemic, thus making it difficult for the Defence not to overly rely on the OPCD, abdicating their responsibilities toward the client and risking professional misconduct.

3. Appeal Phase

The appeal phase is paper-heavy and litigation intensive. In drafting the notices of appeal and the appeal brief, the Defence must identify and substantiate legal, factual, and procedural errors in the trial judgment and/or sentencing decision.²⁸ The burden is on the Defence to present its appellate arguments “clearly, logically and exhaustively,” or face summary dismissal by the Appeals Chamber.²⁹ The Defence cannot merely repeat arguments advanced during trial or make blanket statements without any references to the trial record.³⁰

To substantiate legal errors, the Defence must show how the Trial Chamber misinterpreted the applicable law and how its decision would have been substantially different had it not been for the error.³¹ This requires extensive legal research. To substantiate factual errors, the Defence must identify specific factual findings, explain why the Trial Chamber’s findings were unreasonable, and show how the decision would have been different had it not been for the error.³² It must concretely show that the Trial Chamber misinterpreted facts, took into account irrelevant facts, or failed to take into account relevant facts.³³ This requires a thorough review of the transcripts and evidence in the record. To substantiate procedural errors, the Defence must show that the Pre-Trial or Trial Chamber violated a mandatory procedural provision as a result of a factual or legal error or abuse of discretion, and that the violation materially affected the impugned decision.³⁴ This requires a thorough review of the submissions and written decisions made during the pre-trial and trial phases, the sources cited in those materials, and additional legal and factual research. And of course, the time and effort to do all this is greatly magnified if Defence Counsel on appeal did not represent the accused during trial.

²⁸ See Rome Statute, Art. 81(b).

²⁹ *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 16.

³⁰ *Id.*; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1321-Red, Judgment on the appeal of Mr Thomas Lubanga Dyllo against his conviction, 1 December 2014 (“Lubanga Appeal Judgment”), para. 30.

³¹ Lubanga Appeal Judgment, para. 32; *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-271, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, 27 February 2015 (“Ngudjolo Appeal Judgment”), para. 22 (internal citation omitted).

³² Ngudjolo Appeal Judgment, para. 22 (internal citation omitted).

³³ Lubanga Appeal Judgment, para. 32.

³⁴ Ngudjolo Appeal Judgment, para. 21 (internal citation omitted).

The Defence must also prepare for the Prosecution's response to the Defence appeal brief as well as any appeals by the Prosecution against the judgment or sentencing decision. This means thoroughly breaking down the Prosecution's submissions, analyzing all cited material, and performing legal and factual research to develop responses and/or replies.

After any appeal submissions are filed, the Defence must thoroughly check the text and all footnotes for errors, and if necessary, prepare corrigenda to the submissions or annexes. Oftentimes, the Defence must also draft other appeal related submissions such as requests for extension of time and expansion of word count, or other submissions as issues arise.

Thus, significant resources must be focused on legal and factual research and submission drafting. Depending on the needs of the case, it may not be necessary to have Co-Counsel for the appeal proceedings, but rather to double up on Legal Consultants to perform the research and draft the appeal submissions. Defence Counsel should be given discretion to determine the composition of the team depending on the needs of the case.

C. The Needs of Defence Counsel in Formulating a "Core" Team

From my observations and having consulted with Defence Counsel who have represented accused before the ICC, it appears that, when the accused is not indigent and relying on the LAS, the Defence team is properly staffed, and to some extent, is likely to be more effective because the resources allocated for investigative purposes are proportionate to those of the Prosecution. In other words, where there is equality or qualitative superiority of arms in favor of the accused, there is a greater likelihood that the pre-trial and resultant trial proceedings will be fairer. Conversely, when the accused is under the LAS, there is far too much reliance on pro bono assistance from interns who may have academic credentials but lack any meaningful practical experience. Put differently, the current LAS, almost by intention, is designed to ensure not only that there is no equality of arms, but to also expose Defence Counsel to ethical mischief or mishaps by having to rely on unqualified, inexperienced, uncontrolled, short-term staff. It thus placing Defence Counsel in jeopardy of being investigated and charged with Article 70 offenses.

There are certain tasks, such as in court representation and the questioning of witnesses, that must only be left to highly qualified lawyers. At the risk of sounding arrogant or condescending, the ICC is not a finishing school for novice lawyers to learn trial advocacy skills. The highest standards

of representation are required given the level of charges; only highly qualified, competent, and skillful lawyers should represent the accused before the ICC. However, if the funding is insufficient, the Defence are left with no choice but to overly rely on inexperienced young lawyers, making it difficult to maintain high standards. This places enormous pressure on Defence Counsel as they are responsible for the work of their subordinates.³⁵ And just how fair is it to the accused?

For any case, irrespective of its size, the core Defence team should include the following team members: Lead Counsel, Co-Counsel, Legal Consultant, Case Manager, and Investigator. This is the absolute minimum, especially at the very early pre-confirmation stages. This core team makeup may not necessarily be sufficient depending on the size, complexity, and/or special characteristics of the case. For instance, as with the appeal team, it may be more useful not to have a Co-Counsel, but rather have an additional Legal Consultant who could also double up in assisting in the investigation process – such as taking statements from potential witnesses. It may be more useful to frontload as much of the resources on investigations in order to actively put on a significant challenge at the confirmation hearing. Some cases may require significant legal submissions to be made at the early stages or throughout, especially if novel legal issues are involved. More than one Case Manager may be required due to the amount of work involved in preparing for the proceedings and meeting the strict deadlines for certain activities, such as meeting disclosure obligations and complying with the e-court protocols.³⁶

Defence Counsel must also ensure that those hired in various positions are sufficiently qualified to perform the tasks for which they are hired. For example, Legal Consultants are not necessarily qualified to conduct investigations. They may have superb academic credentials or experience in international or domestic law, but that is of little practical use, especially if they come from jurisdiction where the Defence does not conduct investigations. By assigning them as investigators, Defence Counsel can run into ethical problems.

In short, considering the confirmation of charges process adopted by the ICC, a sound argument can be made that at a minimum a Defence team should be composed of or be provided with the requested funds for the core members of a Defence team. Since one size does not fit all, it should be left to Defence Counsel to decide the needs and composition of the Defence team throughout

³⁵ ICC Code of Conduct, Art. 32.

³⁶ See Karim A. Khan & Anand A. Shah, *supra* note 26.

the proceedings. And as the case progresses from the pre-confirmation stages to trial, it should be understood that additional resources and personnel will be needed.

D. The Needs of Defence Counsel Concerning Investigators

Any experienced Defence Counsel will attest that while legal submissions are essential in challenging the substantive and procedural contours and thus beneficial in limiting the legal exposure of an accused, what really matters most are the facts; challenging the facts alleged by the Prosecution and advancing additional facts, which, when considered, provide alternative plausible conclusions. In other words, what is most essential, perhaps even more than advancing legal challenges, is conducting an effective (and ethical) investigation. This can only be done if from the outset, there are sufficient financial means allocated to secure investigative resources.

Setting a discrete monetary value on an investigation budget, as is currently the practice at the ICC,³⁷ is counterproductive. The number can never be other than “an arbitrary figure” and “oftentimes inadequate,” meaning that Defence Counsel must spend considerable time negotiating with the Counsel Support Section (“CSS”) on what additional resources are reasonable and necessary.³⁸ Not every case demands the same investigative needs, and such needs are not often readily apparent from the outset of the case.

Only after reviewing the disclosure material and becoming familiar with the case can Defence Counsel determine his or her investigative needs. For instance, as I have alluded to earlier, during the confirmation stage, it may be prudent to frontload the investigation: verifying the information that is set out in the disclosure material, checking the accuracy of witness statements, and verifying the client’s versions of the events. In other cases, Defence Counsel may need to focus on motion practice rather than investigations. In those cases, rather than having an Investigator, Defence Counsel may require two Legal Consultants to research and draft submissions. To suggest a one-size-fits-all approach – restricting Defence Counsel to a limited team during the initial stages – is absurd. Defence Counsel need a team that is flexible.

³⁷ Registry’s Single Policy Document, para. 46: “The Court’s legal aid system provides each defence team with an investigation budget in the amount of €73,006 to be used for the entirety of the case.”

³⁸ Rogers’ report, para. 72.

While the Registry's Concept Paper suggests that a local resource person may be assigned to teams to assist with the local knowledge and language for the investigative process,³⁹ it is unclear who assigns this resource person and to whom the resource person reports; i.e. is the resource person an employee of the ICC or Defence Counsel? It must be stressed that Defence Counsel should be solely responsible for defining the team composition and that anyone used in the field for the purpose of investigation should be under the direction and control of Lead Counsel. Defence Counsel are ultimately responsible for actions of Investigators acting on Defence Counsel's instructions. Their conduct, if unprofessional or unethical, directly implicates Defence Counsel.⁴⁰ Maintaining Defence Counsel as the captain of the ship for all purposes also avoids the danger of any needless conflicts. Before hiring an Investigator, his or her background, professional qualifications, and experience must be diligently checked, as an integral part of Defence Counsel's due diligence obligations.

Another factor to consider is that witnesses may be located in remote areas. It may be better to have the witness meet Defence Counsel at a more convenient location as opposed to having Defence Counsel or staff meet the witness in his or her location. There are certain costs – money lost for time off work, travel expenses, overnight stay, child care, etc. – that should not be borne by the witness. Should Defence Counsel attempt to cover the costs of the witness, they could run into serious trouble, including being accused of tampering with and/or bribing witnesses. There must be a mechanism in place that is flexible, efficient, and transparent for costs associated with witnesses who meet with Defence Counsel for investigative purposes.

While Regulations 79 to 91 of the Regulations of the Registry provide for certain witness expenses, they only cover the expenses of witnesses who come to testify before the ICC or at-risk witnesses who need to travel for protection purposes. They do not cover witnesses who need to meet with Defence Counsel for investigative purposes. The system implemented to deal with witness related expenses must be sufficiently expeditious so that decisions can be made on the spot. The system cannot be so cumbersome that it takes weeks to get a decision.

In sum, it is against this contextual backdrop that the current LAS should be reviewed and revised. The LAS should be fair, flexible, and feasible, and with a philosophy of the oversight function

³⁹ Registry's Concept Paper, pp. 12-13.

⁴⁰ ICC Code of Conduct, Art. 32.

shifting from bean-counting to criminal defense. It should be streamlined to avoid unnecessary bureaucratic paperwork and delays, while maintaining the requisite checks and balances to ensure transparency and accountability. There is no need to re-invent the wheel, though a modicum of open-mindedness is essential; LASs from other international(ized) criminal tribunals and courts are worth cherry picking from and adding to and/or amending the current LAS.

III. COMMENT ON THE “APPLICABLE PRINCIPLES” SET OUT IN THE REGISTRY’S SINGLE POLICY DOCUMENT

The LAS under the Registry’s Single Policy Document is guided by five core principles: *equality of arms*, *objectivity*, *transparency*, *continuity and flexibility*, and *economy*.⁴¹ Sound as these principles seem, it is beyond cavil that the ICC has fallen short in meeting these criteria.

A. Equality of Arms

Most notably, because of the preposterously low remuneration fees and paltry funds allocated for essential and non-delegable functions in representing an accused, the LAS has been seriously flawed in ensuring equality of arms.⁴² The Defence should have some semblance of equal arms with the Prosecution when it comes to investigating the case, filing all relevant and necessary submissions, securing all relevant and necessary witnesses, including expert witnesses, and in trying the case with a qualified and adequate staff that is properly remunerated. Pro bono Legal Consultants are a welcomed resource, but they should not be factored into the equality of arms equation. This is added and valuable assistance, but it is not, nor should it be, considered a substitute for paid staff. Under the best of circumstances, quality, tenure, and availability are always areas of uncertainty and inconsistency. Depending on the complexity and magnitude of the case, Lead Counsel should be entitled to assemble a team that meets his or her needs; the human and financial resources allocated must comparatively match the Prosecution’s in light of each side’s respective functions and responsibilities.

It should be noted that making comparisons between the funds allocated to the Prosecution versus those allocated to the Defence is not terribly helpful in determining what is fair and reasonable for Defence teams under the LAS. Defence Counsel are inherently at a disadvantage *vis-à-vis* the

⁴¹ Registry’s Single Policy Document, para. 9; Registrar’s Paper, p. 4.

⁴² “[E]quality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.” *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, paras. 48, 50 (discussing principles laid down by the European Court of Human Rights and by the Human Rights Committee).

Prosecution; the Prosecution is given greater resources and access to witnesses and evidence given their functions and responsibilities.⁴³ It is understandable that the Prosecution's budget would dwarf the Defence budget. Also, no assessment of the Prosecution's "arms" is really possible on a case by case basis, because the nature of a Prosecutor's Office is the accumulation of knowledge, cross-pollination, synergies, and support systems, which make the calculus much more complex than simply toting up the personnel officially assigned to a case.

For me, the equality of arms equation is rather simple:

- (a) *What is an equitable payment scheme for Defence Counsel and their staff?*
- (b) *What resources are necessary for a Defence team to fully prepare the case during the various stages of the proceedings?*
- (c) *What is a fair daily rate and fee scheme for Duty Counsel?*

B. Objectivity

As for objectivity, every case has subjective requirements since no two cases are identical. Every case requires that certain standards be met. The resources allocated should be based on objective criteria. However, some cases may require more resources or different types of resources than others. The question remains: how to apply the objective criteria on a case-by-case basis so that the resources allocated are subjectively tailored to the needs of the case.

C. Transparency

Transparency to ensure budgetary oversight is essential, but it need not be so cumbersome that it creates an inordinate amount of administrative paperwork. For instance, at the ICTY, a lump sum system was adopted with 20% of the fees being withheld until the end of various phases of the proceedings.⁴⁴ Detailed timesheets and other data were required after the fact, making the end of stage reports hundreds of pages, taking weeks to prepare, often requiring supplemental data, revisions, further clarifications and justifications and, so on. At the same time, work that was

⁴³ For instance, the Prosecution is required to examine "all communications and situations that come to its attention based on the statutory criteria and the information available." ICC Office of the Prosecutor, Report on Preliminary Examination Activities, 14 November 2016, para. 1 *citing* ICC Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013. The ICC Prosecution claims that since 2015, it has received 477 communications under Article 15 of the Rome Statute.

⁴⁴ See ICTY Defence Counsel – Trial Legal Aid Policy, 1 November 2009.

necessary and reasonable, such as making submissions for provisional release while the judges were deliberating the evidence, or hours traveling to and waiting at the detention facility (only to find that the facility was locked down or some other spanner was in the works), would not be compensated on the theory that this is work expected of Defence Counsel and already compensated. So, while the lump sum system made sense, and in some respects, was user-friendly, having to also provide complex, after-the-fact end of phase reports with detailed timesheets for all members of the Defence team was completely inconsistent with a lump sum strategy, and invariably turned into an administrative quagmire.

D. Continuity and Flexibility

Does “continuity” refer to the LAS or to maintaining, as much as possible, a static team throughout the proceedings? It is unclear, though if the latter, I concur. As for flexibility, any LAS must provide for reasonable flexibility for all the reasons already noted. Every case has its own characteristics and challenges, which, due to circumstances, will not always be readily apparent from the outset of the case. Suffice it to say, when it becomes necessary to adopt flexible measures, it is incumbent on Defence Counsel to identify the reasons for the flexibility sought. This can easily be accomplished through a written memorandum followed up by in-person consultation with the CSS. Having a particular person in the CSS dedicated to the cases would be useful. Thus, the counterpart in the CSS would be familiar with the general facts and circumstances of the case, and by tracking the progress of the case, would be able to better appreciate the nuances of requests for added flexibility, i.e., specific additional resources. In preparing the memorandum, Defence Counsel would have done his or her due diligence, thus being able to identify with some specificity, the needs and costs associated with the flexibility sought.

E. Economy

Lastly, on the issue of economy, all reasonable and necessary work associated with defending a case should be covered by the LAS. The issue that is often in dispute turns on what is reasonable and necessary. And that is in no small measure a subjective matter. Some Defence Counsel put a premium on challenging all legal and procedural issues to the fullest extent available under the Statute and RPE. Some of these legal or procedural challenges may be seen by some as unnecessary, marginally relevant, or unpromising, and thus may choose not to make these challenges, opting instead to focus their time and resources on gathering evidence, summarizing

the relevant disclosure material for CaseMap or some other aspects of the case. It all depends on the theory of the case selected, the adopted strategy, the legal tradition of Defence Counsel, the priorities set, and rationalization of resources, etc. Thus, in determining the economics and cost-efficiency of defending the case, requiring a general action plan from Defence Counsel should satisfy the CSS in making a reasonable assessment. And since the proceedings from pre-trial through trial are fluid, requiring periodic updates and notification of changes in circumstances should further assist in determining the economic soundness for allocating funds above and beyond the minimum amount set by the LAS.

IV. COMMENTS ON THE EXPERT RECOMMENDATIONS

The Registrar has commissioned two expert reports to assess the ICC's LAS. The first report, done by the ICJC,⁴⁵ is not worth commenting on. The ICJC consulted with few key stake holders in preparing the report, provided a limited analysis with only "assessments" rather than recommendations, and failed to provide clear answers to key questions, such as whether the remuneration paid to assigned Defence Counsel and Defence team members is adequate.⁴⁶ The second report, done by Richard J. Rogers is more detailed and provides for some solid observations. Rogers conducted extensive interviews with Defence Counsel practicing before the ICC and other international(ized) criminal tribunals and courts and a comparative study of the various LASs. While such comparisons can be useful for context, they are to be used with caution: no tribunal or court functions the same. Looking at the raw figures and translating them into percentages can be striking, but also misleading. To what extent statistical comparisons to other international(ized) criminal tribunals and courts are useful to the debate as to what is a fair and reasonable LAS for Defence teams representing indigent accused at the ICC is debatable.⁴⁷

Commenting on some of Rogers' recommendations as outlined in the Registry's Concept Paper, I will offer some general recommendations, though in principle I find Rogers' recommendations to

⁴⁵ ICJC, A Report on the Assessment of the Functioning of the International Criminal Court's Legal Aid System, 27 October 2015.

⁴⁶ *Id.*, para. 52. The ICJC noted that the experts requested the ICC Registry to provide historical information regarding payments made to Defence teams to enable them to better evaluate the adequacy of remuneration. The Registry did not provide the information within the limited time available. The ICJC thus did not provide any assessment of the adequacy of remuneration to Defence Counsel and their staff, only noting the conflicting views between Defence Counsel and the Registry as to the adequacy of pay.

⁴⁷ See Rogers' report, pp. 15-20.

be a sound starting point.⁴⁸ I will also provide some observations and recommendations on an additional matter not addressed in Rogers' report or the Registry's Concept Paper – the use of the term “Legal Assistant”.

A. Remuneration

1. Fee Levels

Rogers recommends:

- The fee levels for defence team members should be recalculated with the aim of achieving a level that is reasonably equivalent to the salary package of their counterparts in the prosecution. Proper account should be taken of staff benefits, professional costs, and income tax;
- The fee levels should be within the range established at the other tribunals;
- The fee levels should be augmented to reflect the results of this calculation (subject to a tax-free agreement being reached).⁴⁹

Observations and recommendations:

I agree with Rogers only in part. For Lead Counsel and Co-Counsel, the fee levels should be roughly equivalent to what is provided to Defence Counsel practicing before other international(ized) criminal tribunals and courts, rather than to the ICC Prosecutors. This is due to the different functions and responsibilities of Defence Counsel and Prosecutors. Prosecutors are officers of the court and cannot seek employment outside the court. Defence Counsel, by contrast, are independent and free to maintain private practices and engage in other projects. The fees allocated to Legal Consultants and Case Managers, on the other hand, should attempt to achieve a level roughly equivalent to the salary packages of their counterparts in the Prosecution and Chambers.

Concerning the fees of Lead and Co-Counsel, adopting a flexible and modified *case complexity* LAS like the ICTY model is most advisable, and would certainly meet the Single Policy Document's five core principles. The criteria for case complexity set out pages five and six of the

⁴⁸ Michael G. Karnavas, *The ICC Registrar-Commissioned Reports Assessing the Legal Aid System: reasonable doubt at a reasonable price, realizing equality of arms, resource rationalization, and more*, 19 January 2017, <http://michaelgkarnavas.net/blog/2017/01/19/assessing-icc-legal-aid/>.

⁴⁹ Rogers' report, p. 60.

Registry's Concept Paper are sound, reasonable, and relevant. To these criteria, especially at the pre-trial and trial stages, I would add as a factor the location where the alleged crimes were committed. There are additional challenges when the locations of the alleged crimes are in remote areas that are not readily accessible or too dangerous to wander about in searching for evidence and witnesses. The infrastructure can make it difficult and time-consuming to visit and the legal culture and lack of rule of law may inhibit or frustrate effective and efficient investigative efforts.

I recommend that:

- **Pre-Trial:** A lump sum should be provided for based on the complexity of the case;
- **Trial:** A lump sum should be provided to be divided as deemed fit by Lead Counsel. Alternatively, a maximum of 180 hours per month (45 hours per week) should be provided to Lead Counsel and Co-Counsel during trial. The fee should be based on years of experience. For example, Lead Counsel with 10 to 15 years of experience could be compensated at a rate of €110 an hour; Lead Counsel with 16 to 20 years could be compensated at a rate of €115 per hour; and Lead Counsel with 20 or more years could be compensated at a rate of €120 per hour. Co-Counsel, irrespective of years of experience (Regulation 67(1) of the Regulations of the Court requires a minimum of eight years to hold the position) could be compensated at rate of €90 per hour.
- **Appeal:** A combination of lump sum and additional hours should be provided based on the complexity of the case and any peculiar needs that may require additional time and resources. Such may be the case where the errors alleged are primarily errors of fact, thus requiring an inordinate amount of time going over the trial record to ensure that the errors are sufficiently presented to avoid summary dismissal for failure to meet the requisite standards of review.

Legal Consultant fees should be flexible, reflecting the fact that responsibilities and experience vary among consultants. Legal Consultants should be entitled to advance to higher pay levels as their duties and experience increase. The requirements for advancing to the different levels should be transparent and clearly explained to all Legal Consultants from the date of hiring. The Case Manager fee should likewise be revised to include different pay levels to reflect different levels of

experience and responsibility. This would allow Legal Consultants and Case Managers to advance in their careers and assist in retaining team members for the duration of the case.⁵⁰

Another factor to consider is that Legal Consultants and Case Managers often hold their positions on a Defence team for several years and are treated as staff members, but do not receive benefits accorded to other ICC staff who perform similar functions in other sections of the Court, such as the right to tax exemption on salaries received, paid annual leave, sick leave, and participation in a pension/retirement fund.⁵¹ This disparate treatment constitutes discrimination.⁵² The Committee on Economic, Social and Cultural Rights commenting upon the definition of equal remuneration, has stated that “[w]orkers should not only receive equal remuneration when they perform the same or similar jobs, but their remuneration should be equal even when their work is completely different but nonetheless of equal value when assessed by objective criteria. The requirement goes beyond only wages or pay to include other payments or benefits paid directly or indirectly to workers.”⁵³

Legal Consultants’ and Case Managers’ contracts should include, at a minimum, the following provisions and benefits:

- A length of 12 months;
- 2.5 days of paid leave per month;
- Provision for maternity/paternity leave;
- Provision for social security/health care;

⁵⁰ These matters concerning the salary and benefits packages offered to Legal Consultants and Case Managers, including the lack of paid leave, maternity leave, social security/healthcare, and tax exemptions, etc. were also raised at the ECCC.

⁵¹ For staff members of the ICC, salaries and benefits are determined within the framework of the United Nations Common System (P-1 through P-5). See ICC Conditions of employment for staff in the Professional category, <https://www.icc-cpi.int/jobs/Pages/conditions-of-employment-PC.aspx>.

⁵² The International Labour Organization (“ILO”) Convention concerning Discrimination in Respect of Employment and Occupation provides that “distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation” constitutes discrimination. ILO, C111 – Convention concerning Discrimination in Respect of Employment and Occupation, entered into force on 15 June 1960, Art. 1(1)(b), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111. This definition covers the “terms and conditions of employment.” *Id.*, Article 1(1) (3).

⁵³ General Comment No. 23 (2016) on the Right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social, and Cultural Rights), para. 11.

- Provision for tax exemptions;
- Provision for a contribution to a pension fund/retirement fund;
- A statement that the location of the work to be performed is to be agreed upon between the Defence Counsel and the team member; and
- A statement that the work is performed in the interest of the accused and under the sole responsibility of the Defence Counsel.

2. Professional Uplift

Rogers recommends:

- Defence team members conducting the same role should automatically receive the same uplift for the costs of being a self-employed lawyer. This uplift should be factored into the hourly and monthly fee rates. Since no separate calculation would be required, the CSS would no longer require proof of actual professional expenses.⁵⁴

Observations and recommendations:

I disagree with Rogers. While the professional uplift would increase the basic fee for Defence Counsel and Defence team members, the use of the professional uplift at the ECCC has not been equitable. Some highly experienced Defence Counsel, depending on where they are from and their domestic office costs, end up getting paid far less than Defence Counsel with less experience. While the salaries of Defence Counsel and their staff should be reflective of the cost of living in The Hague, the professional uplift model should not be embraced by the LAS.

3. Minimum Fee Levels

Rogers recommends:

- The CSS should introduce minimum fees for case managers and legal assistants according to their years of experience. Lead counsel should retain the flexibility to hire team members with less experience – and therefore less cost than the “standard” rate – so long as they respect the minimum fee levels and remain within the overall budget;

⁵⁴ Rogers’ report, p. 60.

- With regard to investigators and resource persons hired locally for field missions, lead counsel should be required to pay a “fair and reasonable” fee rate that represents the best prevailing conditions found locally.⁵⁵

Observations and recommendations:

I agree with Rogers. One of the weaknesses of the ICTY LAS was that legal staff was not sufficiently protected by a minimum salary threshold. In his analysis, Rogers appropriately shows the pay disparity between the ICC Defence staff and the Defence staff of other international(ized) criminal tribunals and courts.⁵⁶ Notably, the salaries for Defence staff at the ICC who live and work in The Hague – one of the most expensive cities in Europe – are strikingly lower than those working at the ECCC in Phnom Penh, where the cost of living is much lower.

4. Taxation Agreement

Rogers recommends:

- To minimise [*sic*] the burden on donor funds, the ICC Registry should attempt to reach an agreement with the host state to exempt independent lawyers and consultants from paying tax on ICC income. (Such an agreement would minimize, or even eliminate, the need to raise fee levels).⁵⁷

Observations and recommendations:

I agree with Rogers. However, whether the Registrar will be able to negotiate such an agreement is unclear.

B. Legal Services Contract

Rogers recommends:

- The CSS should introduce a legal services contract to be signed by each lawyer and legal assistant who is assigned to represent defendants under the LAS;
- The CSS should provide standardised official payment slips to each defence team member detailing the amount paid per month.⁵⁸

⁵⁵ *Id.*, p. 61.

⁵⁶ *Id.*, p. 18, Figure 4. *See also id.*, paras. 157-61.

⁵⁷ *Id.*, p. 61.

⁵⁸ *Id.*, p. 73.

Observations and recommendations

I agree with Rogers. A notable deficiency is that ICC Defence team members are not provided with contracts or any labor guarantees. Given the nature of the work performed by Defence team members, at a minimum, one-year renewable contracts (subject to the case being dismissed or otherwise terminated), should be considered like other staff members of the ICC. The provision of month-to-month or phase-to-phase contracts results in professional instability and a lack of job security, in addition to raising other concrete obstacles. For example, securing adequate housing accommodation can be difficult when the appointment letter states that the expiry date is in one month. The existing lack of contracts are also an obstacle to team stability, as there is a strong incentive to leave such uncertain circumstances if presented with a more stable option, even if wages and other elements are otherwise the same.

C. System for Monitoring Fee Claims

Rogers recommends:

- ***Hourly timesheets***: This would be applied during periods where greater monitoring is required. This includes much of the pre-trial phase (up to the confirmation of charges or three months before trial) and periods of reduced activity (such as lengthy postponements of trial or between closing arguments and judgement). Maximum hourly ceilings would be introduced according to the stage, taking into account the complexity of the case. Team members would be paid for actual hours worked.
- ***Fixed monthly fees***: This would be applied during periods where minimal monitoring is required. This includes the latest stages of pre-trial and throughout trial until closing arguments. Action plans and detailed timesheets would be dispensed with. Team members would be paid a fixed monthly fee. Exceptions would apply in periods of reduced activity or where team members are absent for significant periods.
- ***Lump sum per stage***: This would be applied during stages where the work requirement is relatively predictable, irrespective of duration. This includes the appeal and reparations stages. Action plans and detailed timesheets would be dispensed with; a team composition plan would be required. The lump sum would be assessed according to the complexity of the case.⁵⁹

⁵⁹ *Id.*, pp. 13-14.

Observations and recommendations:

I mostly agree with Rogers, though I would caution against accepting his proposals without carefully considering some matters which are insufficiently nuanced.

The information to be provided in the timesheets should be kept to a minimum and should not require the exact time when certain work was done. Timesheets cannot be so cumbersome that they effectively require the entire Defence team to constantly have to fill out billing sheets, detailing the exact pages read, when and for what purpose, etc. As noted above,⁶⁰ the ICTY's practice of requiring after-the-fact end of phase reports with detailed timesheets was an administrative nightmare, requiring hundreds of pages of burdensome, unnecessary work.

Experience has also shown that oftentimes, hours are cut for whimsical reasons, especially when those cutting the hours are not privy to what was done or cannot grasp the essence as to why the Defence team is doing something. This is why the preferred approach is to present an action plan 10 days before the end of the month that essentially sets out what is expected to be done, recognizing that a certain amount of flexibility is essential due to the dynamic nature of events during the pre-trial stage. I would also require a short bullet-point memorandum setting out the anticipated work. The ECCC has simple user-friendly form for the monthly action plan that can be adjusted and adopted for the ICC LAS.

Rogers, not unreasonably, suggests in the section of hourly timesheets that “[m]aximum hourly ceilings would be introduced according to the stage, taking into account the complexity of the case. *Team members would be paid for actual hours worked.*”⁶¹ On appearance, this seems sound and equitable. However – and here is where reality kicks in – periods when the work is less intense are balanced by the periods when much longer hours are demanded and which are uncompensated. Under an actual hours scheme with a cap, the net pay would be less, or there would be a strong impetus for make-up work during the less intense periods. For instance, in the last 30 days before filing the appeal brief, it is not unrealistic to be clocking 70 to 80 hours a week. A conscientious and detailed-oriented Defence team is not looking at the clock to see that the hours worked do not exceed what is allocated; it just goes on full steam ahead to get the job done. Many of these hours go unaccounted. Also, after the brief is filed, there may be a need to spend considerable hours

⁶⁰ See *supra* Section III(C).

⁶¹ Rogers' report, p. 13 (emphasis added).

preparing a corrigendum. Even if no hours remain for this stage, it would be ineffective assistance and a violation of the ICC Code of Conduct,⁶² to forgo correcting the filings on account of having consumed all allocated hours (and more) in drafting the filings.

D. Additional Means

Rogers recommends:

- Replace the current [Full Time Equivalence (“FTE”)] system for assessing additional means by one that relies on the overall complexity of the case;
- With the assistance of ICCBA, the CSS should develop transparent criteria for ranking cases according to complexity;
- The maximum level of additional resources required at each stage, if any, should be pre-determined according to the complexity and provided upon justification;
- Decisions rejecting requests should be properly motivated.⁶³

Observations and recommendations:

I agree with Rogers. The FTE system should be replaced by the case complexity model applied at the ICTY, where additional resources can be made available upon a showing that such resources are *reasonable and necessary*. The responsibility should fall on Defence Counsel to make such a request to identify the needs, and provide the explanation and justification as to why such resources are necessary. This should be done in writing, with as much detail as possible. It should also be possible on an expeditious basis to provide for a face to face meeting to explain what is needed. It would also help to have someone in the CSS specifically assigned to a particular case to determine additional means and other administrative issues that are specific to the case.⁶⁴

E. System of Assigning Counsel

Rogers recommends:

- The CSS should introduce a system whereby indigent defendants are provided with a reduced list of lawyers who meet a set of criteria provided by the

⁶² See *supra* note 3.

⁶³ Rogers’ report, p. 41.

⁶⁴ See *supra* Section III(D).

defendant. This system should apply to other persons requiring representation through the LAS, such as certain witnesses.⁶⁵

Observations and recommendations:

I agree with Rogers, though it is unclear who gets to decide who *should be* included or excluded from the reduced list. No objective criteria have been developed. To ensure that the process does not become more opaque, ethical considerations should also be considered to prevent improper poaching of potential clients; i.e. preventing Defence Counsel from visiting someone in custody without actually having been invited by the potential client.

F. Team Composition

Rogers recommends:

- At the time of initial appearance, in addition to the current core team (lead counsel, legal assistant, case manager) the LAS should permit the assignment of an associate counsel with a reduced ceiling of billable hours (for example, 25-40 hours maximum per month);
- After the closing arguments until judgment, the LAS should permit the team to claim a significantly reduced number of hours to complete necessary tasks. For example, lead counsel and associate counsel could be allocated up to 25 hours per month between them, whilst the legal assistant and case manager could share up to 75 hours;
- The lump sum allocation for the appeal should take into the need for an associate counsel, at least on a part time basis;
- Additional resources beyond the above should fall under the discretionary budget of ‘additional means’ and ‘investigation and expert budget.’⁶⁶

Observations and recommendations:

I disagree with Rogers. A one-size-fits-all approach is not appropriate; flexibility is necessary. As addressed above,⁶⁷ it is difficult to assess from the outset how many hours or what sort of staff is needed. For example, the initial stages can be very dynamic, requiring significant resources,⁶⁸

⁶⁵ Rogers’ report, pp. 71-72.

⁶⁶ *Id.*, pp. 30-31.

⁶⁷ See *supra* Section II(B)-(C).

⁶⁸ See *supra* Section II(B)(1).

while later periods may call for a restructuring of the Defence team (doubling up on Legal Consultants for submissions during the appeals phase).⁶⁹

G. Investigative Budget

Rogers recommends:

- The CSS should create a new ‘investigation and expert budget’ to cover expenses related to the substances of the case – primarily field investigation, experts, and translation;
- Other professionals and personal expenses of the legal team (such as travel and accommodation unrelated to the field investigations) should remain under a reduced “expenses” budget) ...;
- The savings from the reduced expenses budget should be moved into the investigation and expert budget;
- A new standard investigation and expert budget should be set according to the assessed complexity of the investigation;
- The investigation and expert budget should be increased to cover the cost of a resource person, hired before the confirmation until the end of trial, on a part time basis (at local fee rates);
- Counsel should be encouraged to plan how best to utilize the investigation and expert budget and should be offered flexibility in terms of priorities and fee levels for field staff;
- The current system for augmenting the investigation budget using objective criteria should be developed further to take into account the likely complexities of the defence investigation.⁷⁰

Observations and recommendations:

I disagree with Rogers. As I have noted,⁷¹ I do not think putting a monetary value on investigative services is wise. Rather, a system should be implemented based on billable hours. Presumably, the Investigator is going to work 40 hours per week, and can be put on monthly salary at a rate comparable to a Legal Consultant. For example, Defence Counsel could be allocated 1,000 billable hours which could be used for a variety of purposes, one of which could be for investigative

⁶⁹ See *supra* Section II(B)(3).

⁷⁰ Rogers’ report, pp. 36-37.

⁷¹ See *supra* Section II(D).

purposes. Hours should be transferrable, so that if they are not used up for investigations, they can be used for other purposes, such as drafting submissions.

Because of the nature of the case, Defence Counsel will need to have a primary Investigator, most likely someone who is closely associated with Defence Counsel and based in The Hague and/or in the field. This person could provide assistance in locating witnesses and gather evidence. It must be underscored that Defence Counsel is ethically responsible for the conduct of all team members, including Investigators.⁷²

H. Article 70 Proceedings

Rogers recommends:

- Limiting the team composition—in many cases, a counsel and a field investigator should be sufficient during the pre-trial phase, depending on the allotment of hours. At trial, a single counsel should be sufficient[;]
- Allocating fewer hours for the monthly ceiling during the pre-trial stage;
- Allocating a significantly reduced lump sum for the appeal phase.⁷³

Observations and recommendations:

I disagree with Rogers. While Article 70 cases are generally, but not necessarily, less complex, resources should not be reduced so as to inhibit Defence Counsel from adequately defending the accused with the highest standards. Defence Counsel should not be reduced to only having an Investigator during the pre-trial proceedings and acting alone during the trial proceedings. During the pre-trial, significant discovery material is produced, requiring the assistance of a Case Manager. Legal submissions must also be drafted, which requires a Legal Consultant. Although the trials are much shorter, Defence Counsel must still present evidence and examine several witnesses. On appeal, there is significant work to be done in analyzing and articulating all of the legal, factual, and procedural errors in the trial judgment and sentencing decision. The nature of the charges should not be used as a reason to significantly reduce the Defence staff to the point where Defence Counsel can no longer diligently represent the accused.

⁷² See *supra* Sections II(B)(1) and II(D).

⁷³ Rogers' report, para. 265.

I. Additional Matter of Relevance

As an additional matter of relevance not addressed in Rogers' report or the Registry's Concept Paper, is the use of the term "Legal Assistant." The term should be replaced by the term "Legal Consultant" or "Legal Officer." The term "Legal Assistant" is not used in the Rome Statute, RPE, or Regulations of the Court or Registry, but is a term used by the Registry. The term is demeaning to the work and level of experience required. In the domestic context, the term "Legal Assistant" connotes an administrative position filled by non-lawyer staff, usually someone with an Associate's or Bachelor's degree. By contrast, to be included on the List of Assistants of Counsel, candidates must have "either five years of relevant experience in criminal proceedings or specific competence in international criminal law and procedure."⁷⁴ ICC Prosecution counterparts with similar qualifications are called "Assistant Trial Lawyer" (two years of experience),⁷⁵ or "Associate Trial Lawyer" (four years of experience, or two with a Master's degree).⁷⁶

The current terminology used by the Registry prevents qualified candidates from applying to the List of Assistants to Counsel. It also inhibits those already working as Legal Assistants/Consultants from obtaining employment after appointment at the ICC, as other employers are likely to see the position as an administrative non-lawyer position.

V. CONCLUSION

The LAS has been undoubtedly deficient since the ICC came into existence. The remuneration and resource scheme for the Defence makes it virtually impossible to uphold the highest standards of legal representation and has been a disincentive in attracting highly qualified Defence Counsel. The ICC Registrars have known of this fact for some time, but none (until now) have shown interest in addressing the issue. The current Registrar, Mr. Herman von Hebel should be commended. He must now press ahead with genuine effort, consultation and deliberation, and should not let the process to drag out into an analysis-paralysis morass.

It is absolutely critical that those fashioning the new LAS appreciate the functions of the Defence team during the various stages of the proceedings and the context and environment in which the Defence teams labor. There is no other way of ensuring that the LAS "as a whole meets the

⁷⁴ Regulations of the Court, Regulation 124.

⁷⁵ Vacancy, Office of the Prosecutor, Assistant Trial Lawyer (P-1), <https://unjobs.org/vacancies/1378846848499>.

⁷⁶ Vacancy, Office of the Prosecutor, Associate Trial Lawyer (P-2), <https://unjobs.org/vacancies/1366253658373>.

requirements of efficiency and effectiveness,” and that it “attract[s] external counsel who meet the highest standards of efficiency, competency and integrity.”⁷⁷ Any revised LAS must be fair, flexible, and feasible. While there must be certain checks and balances to ensure transparency and accountability, unnecessary bureaucratic paperwork and delays should be avoided. As I have noted, there is no need to re-invent the wheel.

My firm suggestion is that the ICC use the lump sum/case complexity model applied at the ICTY as a point of departure, adding modifications where necessary to fashion a LAS best suited for the ICC.



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⁷⁷ Registry’s Concept Paper, p. 3.