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First report of the Bureau on legal aid

Note by the Secretariat

At its first meeting on 17 January 2012, the Bureau of the Assembly of States Parties (“the Assembly”) decided to assign the issue of legal aid to The Hague Working Group, pursuant to the mandate set out by the Assembly at its tenth session, in resolution ICC-ASP/10/Res.4. Mr. Irvin Høyland (Norway) was appointed Coordinator for legal aid on 3 February 2012, via a Hague Working Group silence procedure.

A series of informal consultations were held involving the Court, States Parties, other States, and non-governmental organizations and relevant organizations to consider a review of the Court’s legal aid system as mandated by the Assembly in resolution ICC-ASP/10/Res.4, section J, paragraphs 1 to 3. The Hague Working Group held six informal consultations on legal aid, respectively on 22 February, 1, 7, 9, 16 and 19 March 2012, and one informal meeting on 28 February 2012.

The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court and other stakeholders. At its ninth meeting on 23 March 2012, the Bureau decided to adopt the decision on legal aid annexed to the present report.

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I. Introduction

1. The Hague Working Group focused on the most pressing issue, i.e. the implementation of the elements identified in the “Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011 (the proposal paper)”, submitted by the Registry on 15 February 2012 (French original). It was understood that the comprehensive review of the legal aid system would need further consideration in accordance with paragraph 3 of resolution ICC-ASP/10/Res.4.

2. The following recommendations to the Bureau are based on a) resolution ICC-ASP/10/Res.4 on the Programme budget for 2012, and b) the proposal paper submitted by the Registry on 15 February 2012, after consultations with stakeholders on the basis of a discussion paper dated 7 December 2011.

3. The Registry’s proposals consisted of three main elements. Firstly, reviewing the current remuneration scheme based on the equivalence with certain gross salary levels in the Office of the Prosecutor, to introduce equivalence with net salary levels. The Registry proposed to introduce the new remuneration scheme as of 1 April 2012 for future teams only. Secondly, it was suggested to defer a possible decision on certain aspects of the legal aid system, which would merit further elaboration, including discussions and consultations. Thirdly, it was proposed to take a budget neutral decision on the composition of legal teams.¹

4. The Hague Working Group endorsed the recommendation to defer decisions on certain aspects of the legal aid system and, based on its deliberations, recommended that the issue of composition of legal teams would also merit further elaboration. The Hague Working Group recommended the implementation of the Registry’s proposal for a revised remuneration scheme, but also recommended that it should be phased in for existing legal teams, with due regard for the principle of fairness. However the views were expressed by one delegation that the process envisaged in resolution ICC-ASP/10/Res.4 Section J mandated the Registrar to finalize all ongoing consultations with stakeholders as per Rule 20.3 of the Rules of Procedure and Evidence, and only after such consultations could the Bureau decide on the implementation of the revised legal aid system.

5. The Hague Working Group and its members consulted extensively with a large number of stakeholders. These consultations included written as well as oral submissions, which formed an integral part of the discussions and decision making process. These inputs have made it necessary for the present report to address the following issues: the relationship between economy and the fundamental principle of fairness of proceedings and the description of the consultation process with stakeholders undertaken by the Registry prior to the submission of its proposal paper.

II. Economy and the principle of fair trial

6. The fundamental principles which should govern the provision of legal aid by the Court, and which were already recognized in 2004, are equality of arms, objectivity, transparency, continuity and economy. The Assembly at its tenth session noted the fundamental importance of the legal aid system to ensure the fairness of proceedings, including in particular the rights of the defendants and victims.

7. The Hague Working Group carried out the initial review of the existing legal aid system by factoring in the principles outlined in resolution ICC-ASP10/Res.4. While fairness of proceedings is recognized as the overriding principle, The Hague Working Group agreed that looking for cost saving measures was legitimate, provided that the measures do not damage the right to a fair trial and the rights of victims under the Rome Statute.

8. At its tenth session, the Assembly noted that the legal aid system of the Court was one of the main cost drivers for the rapid increase of ca. 180 per cent in the 2012 proposed

¹ The Registry further noted that adequate tracing and recovery of assets of suspects and accused individuals could lead to reduced costs for legal aid.

programme budget compared to the 2011 budget.² The Committee on Budget and Finance (“the Committee”) provided possibilities for potential changes in the legal aid system in annex III to its report on the work of its seventeenth session.³ Furthermore, the Registry presented a preliminary study in the form of a discussion paper, dated 7 December 2011, which contained several scenarios for possible savings.

9. The Assembly requested the Registrar, following consultations, to present a proposal for a review of the legal aid system.⁴ As part of the compromise on the budget, the anticipated savings from implementing a revised legal aid system as from 1 April 2012 was €1.5 million.

10. However, the Assembly noted the fundamental importance of the legal aid system to ensure the fairness of proceedings, including in particular the rights of the defendants and victims. This fundamental basis for the revised legal aid system was explicitly acknowledged by the Registry in the proposal paper. It has also been the firm basis for The Hague Working Group’s approach to the proposals from the Registry and the recommendations to the Bureau.

III. Consultation process

11. At its tenth session, the Assembly requested the Registrar to finalize consultations on the discussion paper on legal aid, as appropriate, with stakeholders in accordance with rule 20.3 of the Rules of Procedure and Evidence and to present a proposal for a review of the legal aid system to the Bureau before 15 February 2012.⁵

12. The Registrar immediately initiated consultations on the paper. It was submitted to all defence counsel and legal representatives of victims involved in cases before the Court, to certain associations representing the legal profession and to internal actors, such as the heads of the Offices of Public Counsel.

13. The consultations initiated by the Registrar, although undertaken in a very short time-frame, generated a considerable amount of input from the legal profession and civil society. In addition to a substantial number of inputs in writing from stakeholders, the Registrar also invited them to a meeting where they engaged in an exchange of views.

14. When preparing the proposals, the Registrar considered, as appropriate, the relevance of the comments received, in order to preserve the fundamental role of the legal aid system, ensure the fairness of the proceedings and uphold the rights of persons found indigent to effective and efficient legal representation. The Registry undertook a more advanced review of the options contained in its discussion paper, considering the significant reservations expressed by counsel working on the various cases before the Court and other external actors. The Registry also took into account the current practice and lessons learnt from the use of legal aid in the most advanced cases before the Court, and the judicial decisions on the subject.

15. As a result of the consultations and the subsequent evaluation by the Registry, a number of changes were made to some of the options initially envisaged in the discussion paper. In addition to changes reflected in the proposal paper, the Registrar proposed that some of the issues (multiple representation, travel allowances, as well as remuneration during phases in which activities are considerably reduced) be deferred in order to allow for further discussion, with a view of finding genuine cost-saving measures without affecting the fairness of the trial.

16. Notwithstanding the fact that the consultations resulted in substantial adjustments to the potential savings as contained in the Registry’s discussion paper, including proposals for further consultations and analyses of some aspects of the legal aid system before submission to the Assembly for review at its eleventh session, a number of stakeholders maintained that the consultations were not satisfactory. In addition to pointing to the tight time schedule, they argued against a partial review of the legal aid system. Furthermore,

² *Official Records ... Tenth session ... 2011*, (ICC-ASP/10/20), vol. I, part II, para. 16.

³ *Official Records ... Tenth session ... 2011*, (ICC-ASP/10/20), vol. II, part B 2.

⁴ ICC-ASP/10/Res.4, section J, para. 1.

⁵ *Ibid.*

some stakeholders pointed to the fact that the increased cost of legal aid was caused by a larger number of teams, not by a higher cost per team. They also argued that lower remuneration levels could lead to lower quality of legal representation before the Court.

17. The Hague Working Group invited stakeholders to make presentations on two occasions, one at the initial stage of the discussion, and one before the draft recommendations were agreed. During this process, The Hague Working Group also took note of written comments received from representatives of the legal profession and civil society. These oral and written contributions informed the elaboration of the final recommendations to the Bureau.

IV. Deliberation by The Hague Working Group

18. The Hague Working Group agreed that the compromise reached during the tenth session of the Assembly, as set out in resolution ICC-ASP/10/Res.4 and the report of the Assembly on the 2012 proposed programme budget, contains the following elements of particular importance for the recommendations to the Bureau:

- (a) Savings of (at least) €1.5 million are to be identified in the legal aid budget;
- (b) A decision has been taken to adjust the legal aid system; and
- (c) A decision has been taken to implement the adjustments as of 1 April 2012.

19. The deliberations of The Hague Working Group focused on three main issues. Firstly, the level of savings in the 2012 budget that would result from the Registry's proposal. Secondly, the proposal from the Registry to defer the consideration of certain elements presented in the discussion paper to a later time. Thirdly, the Registry's proposals for a revised remuneration scheme.

A. Savings in the 2012 budget from the Registry's 15 February 2012 proposal paper

20. The Hague Working Group noted that the impact on the 2012 budget had to be assessed based on the following elements:

(a) The Registry proposed to defer to the eleventh session of the Assembly or later, a number of potential savings initially listed in its discussion paper: remuneration in the case of several mandates for legal team members, legal aid travel policy, as well as remuneration during phases in which activities are considerably reduced. The Registry also mentioned that a possible enhanced role of the Office of Public Counsel for Victims may lead to savings, but suggested that this issue be considered at a later stage.

(b) The Registry proposed certain budget neutral revisions in the composition of the legal teams.

(c) The Registry proposed a reform consisting of a more rigorous enforcement of strict control measures for the payment of amounts due for professional charges of counsel. However, the Registry indicated to The Hague Working Group that the main change was administrative in nature. Instead of a sum decided at the beginning of the year based on the information received, and paid in monthly instalments, the Court would reimburse professional charges at the beginning of the next year on the basis of relevant documented expenses. This would enable the Court to partially deal with the existing shortfall in the current legal aid budget. Accordingly, while this measure would cut the legal aid expenses for the 2012 budget with an amount that could reach close to one million euros, these resources would likely be required in the 2013 budget.

(d) The Registry proposed a revised remuneration system, which would significantly reduce the Court's expenses. Yearly savings per team could amount to approximately €105,000. The two main elements of the proposal, as described in details in the proposal paper, are:

- (i) To reduce the fee structure from a gross basis to a net basis; and

(ii) In addition, compensation for certain expenses would be limited to 30 per cent of the new net basis, instead of 40 per cent of the present gross basis.

However, the Registry proposed that the revised system be applied to future cases and situations only. Consequently, savings from this measure would not have any impact on the 2012 budget, but would reduce the need to access the Contingency Fund for the legal aid costs pertaining to the opening of new cases in 2012. In 2013, the possible 2012 savings would materialize as a reduction in the amount needed for replenishing the Contingency Fund.

21. The consultations in The Hague Working Group showed that a large number of delegations were disappointed over the lack of real savings that would result from the Registry's proposals. It was noted that the main element of the proposal resulted in a "one off" deferral of 2012 expenses to the next year, not in real savings. A number of delegations asked for clarification on whether the proposed measure would be in line with the Financial Regulations and Rules and, in particular, with the need under the accrual principle to account for obligations incurred in one fiscal year, although disbursed in the following year. In addition, disappointment was expressed over the fact that the "savings" would be limited to one million euros only, leaving a shortfall of €0.5 million with regard to the real savings expected by the Assembly at its tenth session, on the basis of the Registry's discussion paper. Surprise was also expressed over the fact that the proposed revised remuneration scheme was limited to future cases and situations, despite the fact that resolution ICC-ASP/10/Res.4 envisaged an application of the proposed measures to future and existing cases. It was agreed that the Court should be urged to continue identifying savings as foreseen by the Assembly in resolution ICC-ASP/10/Res.4.

B. Multiple representation

22. One of the areas which were identified in the Registry's discussion paper as deserving further consideration was the level of remuneration applicable in the case in which a given counsel represents more than one accused person or suspect. Following consultations with stakeholders, the Registry concluded that it could not review this complex issue in such a short timeframe and implement a decision as of 1 April 2012. The Registry informed The Hague Working Group that only one counsel represented more than one defendant under the legal aid system. Due to the connection between the cases against Banda and Jerbo, it was agreed that the counsel in question could represent both of them. However, the Registry decided to limit the counsel remuneration under legal aid to 150 per cent of the amount due for representing one defendant.

23. The Hague Working Group took note of the Registry's views, as well as of the limited budgetary impact of such a measure for 2012, and agreed that the issue could be deferred to the eleventh session of the Assembly.

C. Travel policy

24. Another area for discussion identified by the Registry in the discussion paper was travel allowances. It had been suggested that certain adjustments could be explored in the way resources are provided for counsel and their teams especially for the judicial periods in which their presence is required on a continuous basis. However, following consultations, the Registry concluded that it did not have sufficient information for proposing a revision of the travel policy to be decided by the Bureau for implementation as of 1 April 2012. It therefore proposed a deferral to a later date.

25. The Hague Working Group took note of the Registry's views, and agreed that the issue of travel policy, including daily subsistence allowance, could be deferred to the eleventh session of the Assembly.

D. Action by the Offices of Public Counsel

26. Although this issue was not mentioned in the discussion paper, the Registry tackled it in the proposal paper, taking into account the recommendations of the Committee on Budget and Finance at its seventeenth session.

27. The Registry, however, recommended that the issue should not be part of any decision by the Bureau at this point in time. It was recalled that a judiciary-led initiative was ongoing since 2011 to review the respective mandates and functioning of the Offices for Public Counsel for the Defence (OPCD) and for Victims (OPCV). It has consistently been the view of the Registry that a comprehensive review of the legal aid system should be structured on the basis of the outcome of the review of the Offices for Public Counsel.

28. The Hague Working Group took note of the views of the Registry and agreed that the review of the role of the OPCV should not be part of a decision by the Bureau on legal aid, as mandated by the Assembly at its tenth session, but rather deferred to further consultations on the overall review of the legal aid system.

E. Composition of teams

29. The Registry noted that the resources allocated for investigation had in the past been used in a flexible manner, to better address the needs of the teams at various stages of the proceedings. The Registry proposed to formalize this practice by establishing a position of “resource person” in the field. It was made clear that this change would be budget neutral.

30. The Hague Working Group took note of the need for greater flexibility, but decided that the Registry’s proposal on the composition of victims and defence teams, would merit further study as part of the wider issue of a comprehensive review of the legal aid system and victims’ participation.

F. Revised remuneration scheme

31. The Hague Working Group built upon the Registry’s proposal for a revised remuneration scheme. As set out in the conclusions at the tenth session of the Assembly, The Hague Working Group recalled that there were no legal impediments to the implementation of the revised remuneration to existing cases and teams.⁶ Therefore, The Hague Working Group recommended seeking savings through an implementation scheme of the revised remuneration that would also include existing teams. However, in the interest of fairness, The Hague Working Group recommended that the remuneration scheme for all existing teams in the current phase of proceedings should remain unchanged. Those teams whose cases move on to the Appeals Chamber would be subject to a gradual implementation of the revised remuneration system. The revised remuneration system would then apply to those teams whose case progresses to the confirmation of charges hearing or the hearing of the trial. Any new teams or changes thereof would, as of 1 April 2012, be subject to the immediate implementation of the revised remuneration system. Some delegations noted the complexity of the proposal. However, the Registry confirmed that it was possible to implement it. The details of the proposed implementation of the new remuneration scheme are explained in appendix I to the Decision of the Bureau on legal aid (in annex).

⁶ *Official Records ... Tenth session ... 2011*, (ICC-ASP/10/20), vol. I, part II, para. 20.

Annex

Decision of the Bureau on legal aid

The Bureau,

1. *Takes note* of the Registry's proposal, entitled "Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011", dated 15 February 2012 (the proposal paper).
2. *Decides* that the Registry's proposal on the composition of legal teams, both with regard to victims' teams and defence teams, would merit further study as part of the wider issue of a comprehensive review of the legal aid system and victims' participation.
3. *Decides* that the implementation scheme for the revised remuneration for team members, as set out in the proposal paper is adopted in accordance with appendix I, with regard both to victims teams and defence teams.
4. *Requests* the Court to continue the elaboration of the legal aid system including the following aspects identified in (the proposal paper) and to present a report to the Committee of Budget and Finance at least 30 days in advance of its nineteenth session in September 2012 and in accordance with the Financial Regulations and Rules with a view of having proposals reviewed by the Assembly at its eleventh session:
 - (a) Remuneration in the case of several mandates for legal team members;
 - (b) Legal aid travel policy; and
 - (c) Remuneration during phases in which activities are considerably reduced.
5. *Requests* the Court to present proposals for an enhanced role of the Office of Public Counsel for Victims (OPCV) as part of the review of the legal aid system to be adopted at the eleventh session of the Assembly of States Parties and with the same procedure as under paragraph 4.
6. *Urges* the Court to continue identifying savings as foreseen by the Assembly in resolution ICC-ASP/10/Res.4.

Appendix I

Implementation of the revised system of remuneration for legal teams

A. Explanatory introduction

1. The system described below sets out how the revised remuneration of legal teams will be implemented. The remuneration of all existing teams in the current phase of proceedings will remain unchanged. Those teams whose cases move on to the Appeals Chamber will be subject to a gradual implementation of the revised system of remuneration. The revised system of remuneration will apply to those teams whose case progresses to the confirmation of charges hearing or the hearing of the trial. Any new teams or changes thereof will be subject to the immediate implementation of the revised system of remuneration.

B. Implementation principles

2. The implementation scheme for the revised remuneration for team members under the legal aid system, as set out in the Registry's proposal paper dated 15 February 2012 and concerning the *Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011* (hereinafter, "the proposal"), takes into account the following factors:

- (a) The need to ensure effective legal representation and the importance of fair trials;
- (b) The concerns of relevant stakeholders, in particular issues pertaining to fairness which may jeopardise the integrity of judicial proceedings; and
- (c) Conclusions at the tenth session of the Assembly of States Parties, which set out that there were no legal impediments to the implementation of revised remuneration to existing cases and teams.¹

C. Immediate implementation of revised fees

3. As of 1 April 2012, the revised remuneration system (revised remuneration)², shall have immediate effect with respect to the following situations under the legal aid system:

- (a) Teams appointed before the Court after 1 April 2012; and
- (b) Any changes in legal teams during any stage of proceedings, either by means of replacement of individual members or of whole teams, as well as in case of appointment of additional teams.³

D. Deferred implementation of revised fees

4. With respect to teams, which as of 1 April 2012, are allocated to a case where the confirmation of charges hearing, as set out in article 61 (1), has not yet commenced the revised remuneration system will only apply once the confirmation of charges hearing has started. Up until such time the confirmation of charges hearing has commenced, the teams in such a case will be subject to the existing remuneration regime of the Court.⁴

¹ *Official Records...Tenth session ...2011* (ICC-ASP/10/20), vol. II, part B 2, para. 20; Resolution ICC-ASP/10/Res.4, Section J para. 2.

² As set out in the proposal paper submitted by the Registry on 15 February 2012.

³ Any change by an individual member of a team shall not impact the status under which other team members are paid, unless the composition of the whole team changes.

⁴ For the purposes of determining the relevant period of time, the critical factor will be the date the oral stage of the confirmation of charges hearing has commenced.

5. With respect to teams, which as of 1 April 2012, are allocated to a case where the hearing of the trial has not yet commenced the revised fees will only apply once the hearing of the trial has started. Up until such time the hearing of the trial has not commenced, the teams in such a case will be subject to the existing remuneration regime of the Court.⁵

E. Gradual implementation of revised fees

6. With respect to teams, which as of 1 April 2012, are assigned to cases where the trial is ongoing the existing remuneration regime of the Court will apply until such time proceedings before the Trial Chamber have been completed and the case is before the Appeals Chamber. Once proceedings before the Appeals Chamber commence transitional remuneration arrangements, as described below, will apply.

7. The first step requires the estimation of the length of time required for the case in question to be completed before the Appeals Chamber – the responsibility for this shall fall to the Registry, who shall consult with the Presidency and where appropriate the relevant teams. This estimated length of time shall be divided into three (A, B and C) equal segments of duration, each of which will be consecutive in order of time, starting from the day all relevant proceedings before the Trial Chamber have been completed. Each segment will reflect a certain level of remuneration:

(a) The period of time in segment A shall be subject to the existing fees of the Court;

(b) The period of time in segment B shall be subject to fees which are the in-between the revised fees and existing fees of the Court; and

(c) The period of time segment C shall be subject to the revised fees, as set out by the Registry on 15 February 2012.

8. The Registry shall be responsible for the implementation of this gradual payment of remuneration. Variances between the estimated average length of time and the actual duration of the matter will be balanced out at the end of the case, so as to address any excess or reduced payments.⁶

⁵ For the purposes of determining the period of time the critical factor will be the date the oral stage of the trial hearing has commenced.

⁶ Any dispute on the implementation of this system shall be resolved by the Chamber responsible for the relevant proceedings involving each team.

Appendix II

Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011*

A. Introduction

1. Since the first version of the legal aid programme to be paid by the Court was presented in 2004 (ICC-ASP/3/16), the type of legal aid to be provided to suspects, accused persons and victims has been studied in depth by all of the participants in the International Criminal Court system ("ICC"), including the Assembly of States Parties ("The Assembly") and the Committee on Budget and Finance ("CBF").
2. The Registrar decided that there should be periodic reviews of the Court's legal aid system - "an increasingly important cost driver"¹ - and a first series of amendments submitted in 2007 was welcomed by the CBF, which felt that it proposed a "sound structure for the legal aid system".²
3. The CBF had requested a thorough review of the legal aid system after the conclusion of a full cycle of trial proceedings.³ Subsequently, at its seventeenth session, the Committee presented its analysis and proposals to limit the increase in legal aid costs.
4. During informal discussions within The Hague Working Group on the draft programme budget of the ICC for 2012, the Registrar was asked to provide the information available on the state of the review of the legal aid system to be paid by the Court.
5. In response to this urgent request, the Registrar informally submitted a discussion paper ASP10/01P13 (the "Paper"), exploring possible preliminary avenues to optimize the efficient use of resources allocated by States to legal aid to be paid by the Court. The Registrar had indicated that the objective of the Paper was to launch consultations with various partners, including counsel, NGOs and States, following which she would make formal proposals on legal aid.
6. It was in this specific context that the Assembly requested the Registrar to finalize consultations on the Paper with stakeholders, in accordance with rule 20.3 of the Rules of Procedure and Evidence, and to present a proposal for a review of the legal aid system to the Bureau before 15 February 2012⁴.
7. The Assembly also mandated its Bureau to decide on the implementation of the revised legal aid system on a provisional basis, and requested it to do so before 1 March 2012, with a view to enabling it to be applied with effect from 1 April 2012 to cases currently before the Court and to future cases.
8. Finally, the Assembly asked the Court and the Bureau to continue to review the legal aid system, including in its provisional state, and to report on their findings to the Assembly at its eleventh session. It further invited the Court to continue to monitor and assess the performance of the legal aid system in consultation with States Parties and other relevant stakeholders as appropriate, and, if necessary, to propose measures to further enhance the efficiency of the system.
9. In order to implement this resolution the Registrar immediately initiated consultations on the Paper in accordance with the above Rule 20.3.
10. The Paper was thus submitted to all defence counsel and legal representatives of victims involved in the cases before the Court, to certain associations representing the legal

* Received by the Secretariat, in French, on 15 February 2012.

¹ Report of the Committee on Budget and Finance on the work of its sixteenth session (ICC-ASP/10/5), para. 76.

² Report of the Committee on Budget and Finance on the work of its eighth session (ICC-ASP/6/2), para. 80.

³ See for instance the Report of the Committee on Budget and Finance on the work of its fourteenth session (ICC-ASP/9/5), para. 77.

⁴ Resolution ICC-ASP/10/Res.4, adopted by consensus at the 9th plenary meeting, on 21 December 2011.

profession and to internal actors, such as the heads of the Offices of Public Counsel, for their comments in order to fine-tune the solutions it contains.

11. It is noteworthy that this Paper intended to follow the philosophy that has been applied to legal aid from the outset, and which is still relevant today in light of the experience of recent years. In this regard, consideration was given to the fundamental principles which should govern the provision of legal aid by the Court, and which were already recognised in 2004, namely equality of arms, objectivity, transparency, continuity and economy.⁵

12. The initial concept presented in the Paper aimed in particular at limiting the cost of legal aid as much as possible, whilst giving due consideration to the requirements of a fair trial, in which legal aid paid by the Court is a fundamental component for persons appearing before the Court.

13. The consultations initiated by the Registrar, although undertaken in a very short time-frame owing to the calendar established by the Assembly, generated substantive input from the partners contacted.

14. In view of the relevance of some of the comments received, it seemed appropriate that they should be considered in preparing these proposals, in order to preserve the fundamental role of the legal aid system and to ensure the fairness of the proceedings and uphold the rights of persons found indigent to effective and efficient legal representation.

15. Following a more advanced review of possible outcomes to the options discussed and of comments reflecting significant reservations on the part of counsel working on the various cases before the Court and other external actors, and of the lessons learnt from the use of legal aid in the most advanced cases before the Chambers, including the decisions made on the subject, a number of changes were made to some of the options initially envisaged in the Paper, and it was decided to defer the review of some of the topics (multiple representation and travel allowances), which call for further discussion to find genuine cost-saving measures without affecting the fairness of the trial.

16. In that regard, the Registry considers that, in order to respond to the request of the Assembly to the Court to continue to follow up on and assess the functioning of the legal aid system, it is of paramount importance to pursue the dialogue with all the external partners in order to be able to establish a consistently and substantially revised legal aid programme.

17. It should be noted that any aspect of the legal aid system of the Court that has not been addressed in this document remains unchanged, and will thus continue to be governed by the existing applicable texts.⁶ By the same token, if the changes proposed here were in practice to result in lower remunerations for the persons concerned, in particular for team members, this would certainly affect the determination of the indigence threshold of legal aid applicants. That threshold would then need to be proportionally reduced in order to take account of the applicable scales.

18. Moreover, it is appropriate to recall the provisions of regulation 83 (3) and (4) of the Regulations of the Court, which provide where appropriate for the possibility of applying to the Registrar for additional means, which may be granted depending on the nature of the case, and for a review by the Chamber. Under that regulation, legal aid only covers the costs reasonably necessary for an effective and efficient defence, and application may be made to the Chamber for review of decisions of the Registrar concerning the scope of such aid.

19. These proposals mainly address two aspects of the legal aid system, namely the teams' composition and the determination of remuneration, it being understood that consideration of issues such as multiple representation, travel allowances and action by the Offices of Public Counsel will be finalized during the consultation process, with a view to producing proposals for submission to the Assembly for review at its eleventh session.

⁵ Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16), para. 16.

⁶ ICC-ASP/3/16, 17 August 2004; ICC-ASP/5/INF.1, of 31 October 2005 (the original document reference was ICC-ASP/4/CBF.1/8, 15 March 2005); ICC-ASP/6/4, 31 May 2007.

B. Proposals concerning team composition

1. Victims' teams

20. Proposals in this area will address (1) the status of the resource person (2) the investigations budget. Other considerations on common legal representation will also be addressed (3).

(a) The status of the resource person in victims' teams

21. The structure of teams for the legal representation of victims under the legal aid system was defined in the 2007 amendments, which provide for a core team during the trial phase, composed in principle of one counsel and one case manager. During the reparations phase, the core team would consist of one counsel, one legal assistant and one case manager⁷.

22. In the cases currently before the Court, practice has shown that the composition of the teams of legal representatives is subject to variations that are generally justified by objective factors, relating in particular to the number of victims admitted to participate in the proceedings, their geographical dispersal, the need to protect their interests and the imperatives resulting from judicial considerations.

23. Practice has also shown that, notwithstanding that the investigations budget provided for under paragraph 58 of the amendments⁸ is intended for investigations, a considerable share of the funds has been used to enable legal representatives to communicate with victims, who are often dispersed over several localities. This issue was addressed in the report submitted to the Assembly in 2009.⁹

24. In order to respond more appropriately to this situation, it has been considered necessary to review the status of resource persons within victims' teams. It is proposed to add to the core team one field support resource person,¹⁰ who would be paid up to a maximum of 1,800 Euros per month.¹¹

25. Although this resource person is not a substitute for the legal representative, his inclusion in victims' teams will help increase the frequency of communication between the parties concerned, especially in cases in which many different victims represented by one counsel are scattered across several geographical areas. This addition to the team will also contribute to a certain extent to limiting counsel's travel to the field, in particular when the judicial calendar does not give him many opportunities to go on mission. This proposal should in practice relieve the investigations budget, as payments for the resource person will no longer be paid out of those funds.

(b) The investigations budget of victims' teams

26. In view of the financial implications of the above measure, it is proposed to review the investigations budget provided for in paragraph 58 of the amendments, and to provide

⁷ Report on the operation of the Court's legal aid system and proposals for its amendment, ICC-ASP/6/4, para. 55 and 56.

⁸ Ibid.

⁹ Report of the Court on legal aid: Legal and financial aspects of funding victims' legal representation before the Court (ICC-ASP/8/25), para. 12, 63, 65 and 72.

¹⁰ Such flexibility will allow counsel to make appropriate arrangements for use of the global monthly salary for resource persons. As can be seen from the practice of several defence and victims' counsel active before the Court, this amount can be used to appoint more than one resource person within the limits of the available budget. Savings can even be made on this part of the funding (and in particular funds can be redeployed to recruit additional staff) if the resource person is not regularly needed in the team due to circumstances such as, for example, the suspension of proceedings at an advanced stage in the case, or during the Chamber's deliberations.

¹¹ This amount is arrived at by combining several factors that have appeared relevant in light of the practice of various teams. The factors considered were the scale provided for under paragraph 59 of report ICC-ASP/6/4, average remuneration, based on the payments and arrangements applied by all defence and victims' teams that use resource persons, the average of current salaries as determined by the United Nations for the situation countries (http://www.un.org/Depts/OHRM/salaries_allowances/salary.htm) and actual salary discrepancies between the States concerned.

instead an amount of 22,152 Euros to cover the necessary expenses in respect of field activities.

27. The purpose of this proposal is to allow the legal representative himself (or with his colleagues in The Hague and staff *in situ*) not only to conduct investigations in the field, but also to keep the victims informed of the progress of the case, to ask them for instructions, to identify their needs in order to be able to represent them efficiently before the Court, or to respond to specific requests from Chambers which involve travel to the field.

28. Following current practice to date, the legal representative may in many cases make internal arrangements in planning missions, in particular by limiting or increasing the number of days necessary for each mission as well as the number of people participating. The presence of the resource person in the field is clearly an essential factor to consider in such planning and to ensure the efficient use of available resources.

29. The above measures will not reduce in any way the funds allocated to investigations pursuant to the amendments, but provide increased flexibility in the use of available resources within the limits of the budget allocated to the team in question.

30. Should the funds prove insufficient, counsel can always apply to the Registrar for additional means, stating the reasons for his request. If necessary, in considering the requests for additional means, due regard will *inter alia* be given to the requirements of the proceedings, the number of victims in the case, their geographical dispersal and the electronic access available to the teams. In any event, the Registrar will make an appropriate decision, with the assistance of the legal aid commissioners if need be, and always subject to the relevant Chamber's review in accordance with regulation 83 (4) of the Regulations of the Court.

(c) Further considerations

31. The Registry is aware that the appointment of legal representatives in the Court's system is governed by the principle of free choice of counsel, and that the Chambers decide on common legal representation if considered appropriate. In this regard and whenever justified, the Registrar will make every effort, for all cases before the Court, to put forward proposals for the reduction of the number of teams provided for in the budget to one per case. No challenge was raised to this common-sense measure in the comments received, which only addressed a possible reallocation of the amounts saved. On this last point, the Registry considers that the remuneration of the teams of legal representatives must continue to comply with the current legal aid system and defers any other question to the upcoming review of the legal aid system.

32. All the other options, including the appointment of an Office of Public Counsel for Victims would be assessed in consultation with the Chambers and victims concerned in the event of a conflict of interest and any other relevant factor impeding the proper implementation of the above approach. It should be recalled that the option of appointing this Office in place of external counsel is under review, and will be considered more thoroughly in the draft review of the system to be submitted to the Assembly at its eleventh session.

33. The objective pursued in this approach is to ensure in all cases, and in conformity with all the relevant legal provisions, that the victims involved in proceedings before the Court always have effective legal representation, in a manner which adequately meets the demands of sound management of the Court's limited resources. The use of the Contingency Fund to finance additional teams could then be considered.

2. Defence Teams

34. A study of the current composition of defence teams as regards the conduct of investigations during the pre-trial and trial phases reveals two essential facts. First, the professional investigator,¹² whose fees are paid from the investigations budget in

¹² This category is provided in regulation 137 of the Regulations of the Registry.

accordance with the amendments,¹³ has hardly been used by defence counsel working on the various cases. Secondly, counsel have generally favoured the use of resource persons to cover the investigation needs of their teams.

35. Considering this widespread general practice, it is proposed to formalize the status of the resource person within defence teams, with a monthly remuneration of 1,800 Euros maximum,¹⁴ to be drawn from the investigations budget. Given that the quasi-permanent presence of the resource person within the team would guarantee a degree of stability in the conduct of investigations in the field, this proposal could potentially limit demands for legal aid through requests for additional resources under regulation 83 (3) of the Regulations of the Court.

36. This formalization of the status of the resource person is not intended to replace the professional investigator – who is included in the budget for investigations - but it opens up many options for counsel to manage resources optimally whilst ensuring an appropriate defence. These options are increased by the flexibility governing implementation of the legal aid system, which, for example, enables counsel, by making appropriate arrangements if necessary — as is currently the practice among defence teams — to use the available resources to recruit one or more professional investigators, assisted by one or more resource persons. It is also noteworthy that, in general, professional investigators are not systematically needed for investigations on a quasi-permanent basis, and that their remuneration is based not on a regular salary, but rather on the activities carried out by them.

37. Again, the above measures will not result in fewer resources being allocated to investigations under the amendments,¹⁵ but rather they enhance the flexibility with which available resources may be used within the limits of the allocated budget.

C. Proposals on the remuneration of team members

3. Remuneration of team members currently employed under the legal aid system

38. The fees (or remuneration) of the members of defence and victims' teams have been calculated on a gross-rate basis under the amendments to the legal aid system.¹⁶ In addition to fees, team members operating a professional practice, alone or in association with others, while working at the Court receive an additional amount to compensate for professional charges,¹⁷ which is paid on certain conditions and up to a maximum of 40 % of fees.

39. The items covered by such compensation are set out in the Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons.¹⁸ Essentially these are to cover costs related to operating a law practice, the payment of clerks and outside associates where necessary, and bar fees, which may increase in the event of appointment to the Court, as well as contributions to social security, pension and health insurance schemes to which counsel belongs, including international hospitalization coverage for high-risk countries.

40. The payment of such compensation is intended to be limited to the trial phase or to the pre-trial and appeals phase where the constraints imposed by the Court's calendar justify counsel's presence at the seat of the Court for a period exceeding 15 days.¹⁹

41. Compensation is not paid automatically. It is conditional on the production of supporting evidence enabling the Registry to determine the applicable rate of compensation, by using objective criteria such as national statistics where available.

¹³ Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4), para. 47.

¹⁴ The parameters used to determine this amount are set out in footnote 11.

¹⁵ Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4) para. 47.

¹⁶ *Ibid.*, annex VI.

¹⁷ ICC-ASP/5/INF.1, 31 October 2005, para.5 and ICC-ASP/6/4, annex VIII.

¹⁸ ICC-ASP/3/16, 17 August 2004, para. 21 and 22.

¹⁹ Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4), annex VIII, paragraph 5.

Charges eligible for compensation must be directly linked to the work carried out in proceedings before the Court.

42. Rigorous enforcement of strict control measures for the payment of amounts due for professional charges to the relevant members of all teams playing a role in the legal aid system during all phases is likely to generate considerable savings during the year 2012, which could reach close to one million Euros.

43. It is therefore proposed to (a) maintain the current payments system for all team members currently employed under the system of legal aid paid by the Court and (b) to apply the payment proposals hereunder to future cases and situations only.

44. Applying the proposals to the future only is justified in particular by the fact that they amend the initial conditions under which current members of the teams concerned were appointed to act, but also in order to guard against any situation that could have an adverse effect on the expeditious and efficient conduct of current proceedings before the various Chambers.

4. Establishing a net basic salary

45. The level of payment for team members was set in the 2007 amendments, in particular by calculating for each post the gross pensionable remuneration of a staff member of the appropriate grade within the Office of the Prosecutor²⁰ at step V. Taking gross salary as a basis — which was not meant to be a definitive solution — was justified in order to take into account imperatives related to, inter alia, taxation of counsel and/or pension contributions, and was intended to ensure a degree of equivalence between counsel and members of the Office of the Prosecutor, so as to help uphold the principle of equality of arms.

46. However, practice at the Court has shown that the reference to gross remuneration was not justified, and duplicated the compensation of charges as described above. Thus one of the relevant criteria in contributing to equality of arms between counsel for the defence or victims and counsel in the Office of the Prosecutor is not the cost to the Court of their monthly remuneration – in other words, the gross salary - but the final amounts received each month by the persons concerned, namely, the net salary. 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. The amount of tax paid by counsel on their remuneration under the legal aid system has moreover proven to be recoverable through the compensation scheme described above. Hence it is clear that gross salary is no longer a relevant criterion and must be replaced in future situations and cases by reference to net salary only.

47. In view of these parameters, it is proposed to consider that net base salary be set in accordance with the table below, plus a global amount to cover the totality of taxes or similar additional charges payable by the relevant team members. The percentage for professional charges mentioned above would be included in this global amount (see attachment).

<i>Team members</i>	<i>Current remuneration (in euros)</i>	<i>Net base salary proposed (in euros)</i>
Counsel	10,832	8,221
Associate counsel and professional investigator	8,965	6,956
Legal Assistant	6,113	4,889
Case manager	4,872	3,974

²⁰ Ibid., annex VI.

48. It is thus proposed to pay a maximum of 30 %²¹ of the net base salary as compensation for all charges combined (including pension and health insurance contributions) that are directly related to counsel acting in proceedings in Court, or to fees received under the legal aid program. This percentage would then represent a weighting which should ultimately provide counsel at a minimum with the equivalent of the gross salary of the corresponding category within the Office of the Prosecutor.

49. This proposal is intended to apply to counsel, associate counsel, duty and ad hoc counsel, as well as to legal assistants and case managers, but in the proportions determined hereunder.

50. The applicable percentage would only be paid on production of evidence of actual payment of charges, and once the relevant amounts have been determined on the basis of all available objective data, including national statistics. This determination will be proportionate to the amounts received from the Court and will also take particular circumstances into account. Where necessary, the Registrar can seek the advice of the legal aid commissioners.

51. However, in order to limit the impact of an excessive increase in payments, which could arise if the same percentage provided for counsel were to be applied to legal assistants and case managers, it is proposed to limit the rate applicable to these latter to 15% maximum. This reduced percentage reflects in particular the fact that legal assistants and case managers are not subject to the same professional charges and contributions as counsel.

52. By the same token, the compensation regime will not apply to resource persons. This exclusion is explained by the reduction in pay as set out above. It will not apply to the professional investigator either, for two main reasons. First, because their fees are funded out of the budget for investigations. Second, this budget would be considerably reduced if any percentage were to be applied to them.

53. The implementation of these proposals should generate considerable savings for the legal aid budget without affecting the ability of indigent persons to receive the resources reasonably necessary to guarantee their legal representation before the Court. The expected yearly savings per appointed counsel would amount to at least 53,736 Euros, and to at least 42,096 Euros per year in the case of an associate counsel (see attachment).

54. Two important factors will of course have to be taken into account when assessing the effective savings generated in the legal aid budget, namely any decisions by the Registrar under regulation 83 (3) of the Regulations of the Court, and/or by the Chambers pursuant to paragraph 4 of that regulation. However, the Registry will continue stringently to monitor the team's use of the resources provided to them and to examine any request for additional funds, ensuring that the persons concerned continue to benefit from a fair trial in a manner consistent with the efficient management of public funds.

5. Remuneration during phases in which activities are considerably reduced

55. The Court has installed computerized systems for all teams acting in its proceedings that allow their respective members to access their independent network from their place of residence and to exchange exhibits and comments in a fully secure environment. These systems were designed according to various parameters, such as the need to allow counsel to act effectively before the Court without compromising their domestic professional practice.

56. Moreover, the regular presence of counsel and associate counsel at the seat of the Court is not always justified, in particular during certain phases in which activities are considerably reduced or proceedings are suspended. The Registry is of the opinion that these periods are not necessarily phases in which a presence is required at the seat of the Court. However, such presence could be necessary in certain circumstances, in particular where the requirements of the proceedings necessitate it (if a hearing is scheduled for instance) or for reasons related to meetings between counsel and client.

²¹ This amount is proportionate to the maximum compensation percentage applied to the gross salary (40%). Counsel's net salary is used as a reference in determining this percentage.

57. Consequently, it is proposed to reconsider the payment of a fixed salary during phases in which activities are considerably reduced, and in such phases to apply an hourly payment regime (according to tasks reasonably necessary in the case), up to a ceiling equal to the net base salary, in accordance with the scheme applicable to duty and ad hoc counsel. The above compensation percentage will apply to these phases, and could be reconsidered if any relevant factor so requires.

58. This measure would allow teams to continue to pursue any task related to the case, whilst ensuring that legal aid only covers activities that are reasonably necessary for an effective and efficient defence.

59. The Registry will submit a draft review of the legal aid system to the Assembly for consideration at its eleventh session and will continue to monitor and assess the legal aid system in light of the lessons learnt from the various proceedings before the Court.

Attachment

Table of payments proposed

<i>Category</i>	<i>Applicable monthly payment</i>	<i>Maximum monthly payment</i>	<i>Net base salary</i>	<i>Payment proposed</i>		
	<i>ICC-ASP/6/4</i>	<i>ICC-ASP/6/4</i>		<i>Maximum percentage (%) compensation</i>	<i>Maximum total monthly payment</i>	<i>Anticipated monthly savings by category</i>
Counsel	10,832	15,165	8,221	30	10,687	4 478
Associate counsel	8,965	12,551	6,956	30	9,043	3 508
Legal assistant	6,113	6,113	4,889	15	5,622	490
Case manager	4,872	4,872	3,974	15	4,570	302
Professional investigator	8,965	8,965	6,956	0	6,956	0
Resource person	4,047	4,047	1,800	0	1,800	0*

* This is explained by the fact that the reduction in payments does not generate any real savings, as the corresponding amounts will have to be allocated to the investigations budget so as to ensure flexibility.