

**Eleventh session**

The Hague, 14-22 November 2012

Supplementary report of the Registry on four aspects of the Court's legal aid system*

1. In response to 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 Bureau of the Assembly of States Parties, in its decision and recommendations of 22 March 2012,¹ requested the Court to present a report to the Committee on Budget and Finance, for consideration at its nineteenth session, on the following four matters:

- (a) Remuneration in the case of several mandates for legal team members;
- (b) Legal aid travel policy;
- (c) Remuneration during phases in which activities are considerably reduced;
- (d) The possibility of an enhanced role for the Office of Public Counsel for Victims (OPCV) in cases of common legal representation.

2. Following this request, the Registry proceeded to undertake extensive consultations in accordance with Rule 20(3) of the Rules of Procedure and Evidence to gather the views and observations of the legal profession and other pertinent stakeholders prior to submitting its report. For this purpose, on 20 April a letter from the Registrar of the Court, containing preliminary proposals, was dispatched to both internal and external recipients, including non-governmental organizations, relevant offices at the UN *ad hoc* tribunals, regional and international bar associations, pertinent offices within the Court, including the Offices of Public Counsel, the Victims Participation and Reparations Section, the Counsel Support Section, all defence counsel and legal representatives of victims involved in the cases before the Court, and all lawyers admitted to the Court's List of Counsel.² The letter presented the four issues listed above and invited feedback and suggestions from the targeted group on the draft options set out under each listed heading. The recipients were given until 30 June 2012 to submit their feedback and to make additional suggestions if they wished to do so. In total, the Registry received 15 replies in response to its call for consultation.

3. The feedback and recommendations received were carefully reviewed and scrupulously considered in the drafting and formulation of the Registry's final proposals outlined below. It should be stressed that the pertinent suggestions and observations generated compelled a reconsideration of the initial options presented for purposes of the consultation process.

* Previously issued as CBF/19/6 and Add.1.

¹http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2012-Bureau-9-D-23Mar2012.pdf.

²See Annex I hereto for the full list of recipients.

4. The proposals presented in this report have been guided by cost savings, as well as by the overriding requirements of a fair trial, of which legal aid paid by the Court is a fundamental component for persons appearing before the Court, thus entailing a need for adequate resources to provide an effective and efficient legal representation of suspects, accused persons and victims in proceedings before the Court, in accordance with regulation 83(1) of the Regulations of the Court. The proposals presented apply equally to both defence and victims' legal teams, unless specified otherwise.

5. This report is intended as a supplement to the current texts governing legal aid, and affects the existing legal aid system only in relation to the four items addressed below.

(a) *Remuneration in the case of multiple mandates*

6. In the life of a permanent international judicial institution like the International Criminal Court (ICC), situations can arise where a counsel who is already representing a client in Court proceedings is freely chosen by another client wishing to be represented by the same counsel before the Court. Financial considerations arise when both clients in such a scenario are found by the Registrar to be indigent. Such a scenario has already materialized in practice at the Court: a current example is the joint case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, where both Messrs Banda and Jerbo have freely chosen the same counsel to represent them. The chosen counsel has accepted their choice, and is currently holding two mandates simultaneously (one to represent Mr. Banda and the other to represent Mr. Jerbo). The costs of legal representation of both are assumed under the Court's legal aid scheme in accordance with the decision of the Registrar provisionally declaring both accused indigent.

7. Furthermore, in such cases the question of whether the quality of legal representation is not adversely affected to the detriment of the clients by the fact that counsel has to divide his or her time between two cases also raises important considerations on the merits of simultaneous mandates.

8. Ordinarily, should a *non-indigent* person choose to have a counsel represent him or her, knowing full well that counsel is engaged in another case before the Court, that is a prerogative that rightly belongs to the non-indigent client, who will equally have to face and accept the consequences of that decision. Conversely, the Registry can exercise control over payment of counsel and the appointment of the latter in cases of simultaneous mandates that fall under the Court's legal aid system.

9. The right to freely choose counsel is firmly entrenched in article 67(1)(d) of the Rome Statute and rule 21(2) of the Rules of Procedure and Evidence. The Registry is fully committed to this principle, and its *modus operandi* to date confirms this commitment. However, this right is not absolute.³ Under appropriate circumstances, the right can be circumscribed, when this is not arbitrary, and it is reasonable to do so. This is in accordance with seminal authorities, both international and domestic, as well as with rulings of the Court's Presidency, entrenching this principle in the Court's jurisprudence.⁴ One of the permitted exceptions to the right to freely choose counsel is when the person in need of legal representation is indigent.⁵ Similarly, it should be borne in mind that it is "the Registrar in whom primary responsibility for managing the legal assistance scheme of the Court is vested, including overseeing the scheme of legal assistance by the Court and the

³ See e.g. Khan et al., *Archbold International Criminal Courts: Practice, Procedure & Evidence*, 3rd ed. (Sweet & Maxwell) ("Archbold"), at pages 1568 ff.

⁴ See e.g. Presidency, "Reasons for the 'Decision on the 'Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel'", ICC-Pres.-RoC72-01-8-10, 10 July 2008; Presidency, "Decision on the 'Demande urgente en vertu de la Regle 21-3 du Règlement de procédure et de preuve' and on the 'Urgent Request for the Appointment of a Duty Counsel' filed by Thomas Lubanga Dyilo before the Presidency on 7 May and 10 May, respectively," ICC-01/04-01/06-937, at para. 25.

⁵ See Article 67.1 (d) of the Rome Statute. See also Archbold, at pages 1568 ff. See similarly, *Prosecutor v. Hadžihasanović et al.*, Case no. IT-01-47-PT, (26 March 2002); *Prosecutor v. Blagojević et al.*, Case no. IT-02-60-PT, (9 December 2002); *Prosecutor v. Akayesu*, Case no. ICTR-96-4-A, 1 June 2001, at para. 61-62.; *Prosecutor v. Dusko Knezevic*, Case no. IT-95-4-PT/IT-95-8/1-PT, (6 September 2002); *Jean Kambanda (Appellant) v. the Prosecutor*, Case no. ICTR-97-23-A, 19 October 2000, at paras. 12 ff.

determination of matters relating to qualification, appointment or assignment of counsel.”⁶ In other words, the right to freely choose counsel does not tie the Registry’s hands, for example when simultaneous mandates under the Court’s legal aid system produce inappropriate financial consequences (in that the same counsel is receiving two full monthly lump-sum payments as fees intended for full-time work), while also entailing a risk that clients’ interests may be adversely affected.

10. While the Court may look to the experience and policies of other international criminal jurisdictions for guidance where applicable, it remains a wholly independent institution with its own *sui generis* policies and characteristics. The Registry notes in passing that, while at the UN International Criminal Tribunal for the Former Yugoslavia (UN-ICTY) simultaneous mandates have on occasion been granted,⁷ Article 15 (a) of the *Directive on the Assignment of Defence Counsel* acting before the UN International Criminal Tribunal for Rwanda – which is currently in force – specifically limits the assignment of counsel to no more than “one suspect or accused”.

11. In order to have in place a policy that, in addition to its potential cost savings for the Court’s legal aid system, also ensures effective legal representation and is mindful of the right to freely choose counsel, the Registry proposes that simultaneous mandates be limited to not more than two cases. Capping the number of cases to which counsel can be simultaneously appointed before the Court would, in addition to potential cost savings (detailed in paras. 16-18 below), help ensure that obligations owed to clients are honoured without the distraction and burden of additional cases, and, by diminishing the financial incentives to multiple mandates, discourage lawyers from taking on more cases than can reasonably be handled.

(i) *The Vetting process*

12. As indicated above, and as highlighted by the feedback received, the prospect of the same counsel appearing in more than one case in proceedings before the Court may have negative implications for the quality of legal representation provided. ICC proceedings are, by their very nature, complex, and to navigate through them efficiently and effectively and to best represent the interests of client(s), much energy and full dedication are required of counsel. To guard against a situation where multiple mandates may undermine the quality of the representation, the Registry proposes to adopt and implement a ‘three conflicts’ model in considering a case of simultaneous representation: (i) conflict of interests; (ii) conflicts in scheduling, availability and time commitment of counsel who desires to take on two cases simultaneously in Court proceedings, and (iii) conflicts in payments under the Court’s legal aid system in view of the principles the Registrar is instructed by States Parties to follow in judiciously managing the system. In relation to the first two conflicts, the Registry will conduct a “due diligence” check before authorizing the second mandate, as a safeguard measure to ensure that the additional mandate is in conformity with the relevant texts and will not adversely affect the rights and interests of the clients involved or result in disruptions and delays in the proceedings. As part of this process, the Registry will carry out direct consultations with the relevant clients and obtain the necessary consents, as well as the Chambers seized of the matter, prior to finalization of the appointment. This proposed approach is similar to the practice at the ICTY on the question of simultaneous mandates.⁸ The final decision of the Registrar on whether or not to authorize the appointment may be challenged by way of judicial review before the relevant Chamber, and the question will then be a matter of judicial discretion. The third conflict, which is discussed below, relates to the fair compensation that counsel can expect to receive for services rendered in the second mandate.

⁶ The Presidency, *Prosecutor v. Thomas Lubanga Dyilo*, Case/filing no. ICC-01/04-01/06-937, 29 June 2007, para. 16.

⁷ Article 16 (G) of the *Directive on the Assignment of Defence Counsel* acting before the UN International Criminal Tribunal for the Former Yugoslavia governs how simultaneous mandates are dealt with at the Tribunal. Article 16 (G) stipulates that: “No counsel shall be assigned to more than one suspect or accused at a time, unless: (i) Each accused has received independent legal advice from the Registrar and both have consented in writing, and (ii) The Registrar is satisfied that there is no potential or actual conflict of interest or a scheduling conflict, and that the assignment would not otherwise prejudice the defence of either accused, or the integrity of the proceedings.”

⁸ *Idem*.

(ii) Reasonable remuneration for the second case

13. The current rate of €8,221 paid monthly as legal fees to counsel per case under the Court's new legal aid system is based on the assumption that counsel guarantees a full-time commitment to the case to which he or she has been appointed. This policy has been set primarily with the interests of suspects, accused persons and victims in mind and, secondly, to reasonably justify a lump-sum payment per month to counsel.

14. It should be noted that the Registry, having learned from the experience and challenges faced by the *ad hoc* tribunals, has attempted to integrate the remuneration of external counsel and their team members with that applicable within the Court, and to treat them on a par basis with staff of the Court, as far as feasible within the limits of managing a publicly funded legal aid system. Thus salary amounts for external team members under the Court's legal aid system are set so as to correspond to the net salaries received by Court staff performing equivalent duties, and are automatically fixed at Step 5 within the relevant grade from the commencement of the mandate of the team. It should be noted in this regard that the individual composition of each team — and hence the salary entitlements of its members — is comparable to that of teams in the Office of the Prosecutor, who simultaneously work on several cases in proceedings before the Court.

15. As manager of a publicly funded legal aid system, the Registry considers that paying an additional €8,221 to counsel who represents simultaneously a second indigent client (or set of clients in the case of victims) in proceedings before the Court is not in conformity with the principle of judicious management of the legal aid system as required by the Assembly of States Parties,⁹ in particular where each person in need of legal representation implicated in the main ICC proceedings benefits not from a single counsel, but from a team of lawyers and other relevant professionals who assist in the representation of the case.

16. The Registry appreciates that responsibility for two cases is an exceptional situation, and places additional obligations on counsel. The Registry therefore proposes the following fee arrangement when a counsel who has already been retained by one client in Court proceedings is appointed to represent client(s) in a second case:

Table no.1

	<i>1st Case</i>	<i>2nd Case</i>
Counsel Fees	100% (€8,221 per month)	50% (€4,110.5 per month)

17. This takes the total monthly remuneration counsel will receive under the Court's legal aid system as legal fees for two simultaneous mandates to €12,331.50 per month, representing a monthly saving of €4,110.50 in relation to the full double fee of €16,442.

18. On average, a case before the Court takes approximately five years to go through its full cycle. Thus, if the proposed formula is adopted, the total saving to the Court's legal aid budget over the duration of the two cases will be:

$$60 \times €4,110.50 = €246,630.$$

19. Furthermore, payment of compensation for professional charges will not be justified in the second case if counsel is already receiving such compensation in the first case.

20. In the event that proceedings in one case end prior to those in the second one, then remuneration in the second case will be restored to the full level.

21. The Registry proposes to apply the same proportionate reduction of fees to other team members appointed to two cases simultaneously, resulting in potential additional cost savings for the Court's legal aid system.

22. The Registry recommends that this proposal should take immediate effect for all new instances of simultaneous mandates.

⁹See *Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons* (ICC-ASP/3/16), para. 16.

(b) *Expenses*

(i) *The current system: background*

23. The existing legal aid system provides for a flat-rate monthly allowance of €4,000 to cover the expenses of each legal team. Unused amounts are carried over to the next month(s).

24. This allowance, which is separate from the investigation budget afforded to each legal team, is designed primarily to cover two categories of expenses: miscellaneous and travel. Miscellaneous expenses include office supplies (other than those already provided by the Court), translation costs related to material in a foreign language generated as part of investigations, and costs related to the hiring of an expert consultant who may not be called to testify in Court, as well as other reasonable expenses of the team directly linked to their mandate before the Court.

25. Further, under the current legal aid system, counsel and associate counsel are entitled, subject to certain conditions (e.g. status of the judicial calendar), to receive the applicable daily subsistence allowance (DSA),¹⁰ as set by the United Nations International Civil Service Commission, for the duration of their stay at the seat of the Court, as well as to have the costs of travel to and from The Hague paid out of the €4,000 monthly allowance. In addition to the DSA, counsel and associate counsel are also entitled to terminal expenses, which is a fixed amount paid to travellers under the Court's travel policy to cover the return cost of transportation from the airport/train station to the hotel, apartment or other accommodations. Counsel who travel by private car to the seat of the Court are also entitled to have their mileage reimbursed. Further, on an exceptional basis and subject to pre-authorization by the Registry, other members of the team may also be reimbursed for terminal expenses, as well as for the costs of their *initial* trip to The Hague so as to get settled into the team, provided counsel has specifically authorized the expense(s) against the monthly expenses allotment. Reasonable costs of transportation for legal teams to visit suspects and accused persons at the Detention Unit of the Court are also paid out of the monthly expenses allotment.

26. The €4,000 monthly allotment is not provided directly to legal teams, but rather retained by the Registry as a *trust* for their benefit, to be used when reasonably necessary expenses for an effective and efficient legal representation arise and are pre-approved by the Registry. Once approved, the costs of the expense are then deducted by the Registry from the monthly allotment.

27. DSA and terminal expenses under the Court's travel policy are meant to cover the costs of Court staff when travelling on mission away from the seat of the Court. These missions are temporary and are of short duration by their very nature. Practice has shown that the automatic blanket application of DSA entitlements (and terminal expenses) to counsel and associate counsel – who frequently stay for long periods in The Hague – is contributing to unreasonable costs for the Court's legal aid system. While DSA for each day's stay in The Hague varies slightly from month to month, it remains at approximately €270 per day. For the month of August 2012, the daily rate has been set at €271.73.

28. The application of DSA to counsel and associate counsel is the principal driver of costs against the expenses budget provided under the Court's legal aid system and the main reason for the exhaustion of the monthly €4,000 allotment. Under the existing system, counsel and associate counsel both receive full DSA for each day they are *in situ* in The Hague for matters related to work at the Court. Experience has shown that the existing travel policy applied under the Court's legal aid system encourages an emerging practice where counsel opt for renting suitable accommodations or finding other less costly living arrangements in lieu of staying at hotels. By so doing, they economize on the actual travel

¹⁰ The DSA rates are established on the basis of data supplied by designated agencies for duty stations around the world. The rates are intended to relate to good commercial hotels and restaurants. An additional amount of 15 per cent (of the average hotel and meal cost) is included in the DSA rate to account for "incidental" expenses (tips, laundry, toiletries, etc.).

expenses they incur, and yet benefit from unused amounts from their automatic DSA entitlements as supplementary earnings.

29. By way of an example, if a counsel and associate counsel are required to be present at the seat of the Court to attend 60 days (or two months) in The Hague for a trial, their earnings for that period under the current legal aid system would be as follows:

Table no. 2

	<i>Legal Fees</i>	<i>DSA for 60 Days* (calculated on the basis of DSA rates for the month of August 2012: €271.73 per day)</i>	<i>Deduct approximate actual cost¹¹ for a two- month stay in The Hague (travel, accommodation and meals)</i>	<i>Total¹²</i>
Counsel	€10,832 (x 2)	€16,304	€5,000	€32,968
Associate Counsel	€8,965 (x 2)	€16,304	€5,000	€28,964

(ii) *The Proposed system*

30. The Registry proposes to maintain the monthly expenses allotment system, albeit with a deduction and other changes explained below. Adopting such an approach is more in tune with the real needs of legal teams and the multi-purpose aspect of the expenses budget, which in addition to travel expenses of counsel and associate counsel, also includes, by necessity other important expenses of legal teams.

31. Experience has established that the existing expenses budget and the travel and DSA policy which are applied to external legal teams need to be overhauled for economic efficiency.

32. The Registry proposes to reduce the €4,000 monthly allotment to a maximum per month ceiling of €3,000. While unused funds in one month can be transferred to future months for use, no expenses claimed will be reimbursed if they exceed the monthly ceiling or the accumulated reserves in the expenses budget.

33. This proposed reduction will in itself reduce the annual expenses allotment for each team from €48,000 to €36,000, resulting in a yearly saving of €12,000 per team. Thus, applying the proposed changes to the 17 external legal teams currently actively engaged in Court proceedings and benefiting from its legal aid system, the total annual saving to the Court's legal aid budget in 2013, on this head alone, will be 17 x €12,000, or €204,000.00.

34. The same will apply in future years (exact figure in savings will be subject to changes in the number of legal teams qualifying for legal aid benefits, and in related assumptions in future budget proposals). Further, it is proposed to eliminate the automatic application of DSA and terminal expense payments under the Court's legal aid system. As explained above, the automatic payment of DSA for each day counsel and associate counsel are *in situ* in The Hague primarily accounts for the excessive costs charged against the Court's legal aid system, which are not sufficiently supported by actual costs incurred.

35. In practice, the proposed approach will mean that, while the costs of travel (by air, train, personal vehicle, etc.) of counsel and associate counsel to and from The Hague will continue to be covered by the €3,000 monthly expenses allotment, DSA will no longer be used to calculate the entitlements of counsel and associate counsel for their stay in The Hague. Costs of accommodation and other expenses related to the stay of counsel and associate counsel in The Hague on official business and deemed reasonably necessary by the Registrar will be covered up to the maximum monthly ceiling of €3,000, upon provision of proof that such costs have actually been incurred. As previously mentioned, expenses

¹¹ This approximate deduction is a maximum based on the reasonable cost of living in The Hague and tenancy agreements and other supporting documentation on accommodations provided to the Registry by the relevant team members.

¹² This amount does not include any compensation payable for professional charges.

which exceed this monthly limit or the accumulated reserve will not be covered by the Court's legal aid system, subject to a successful application under Regulation 83(3) of the Regulations of the Court.

36. Additionally, the Registry will continue its existing practice whereby counsel and associate counsel are not reimbursed for the costs of their stay in The Hague if such costs are already assumed by any other judicial institution or entity. While the Registry conducts its own due diligence in this regard, the onus rests on counsel to inform the Registry that they are benefiting from funding from a third source.

37. The solution proposed will potentially produce substantial savings, yet in a manner that is both fair and reasonable, and in tune with the experience of the system in practice and the *actual* needs of legal teams. The monthly lump-sum system will also ensure that legal teams are not prejudiced by, for instance, a one-time lump-sum system (even one which may be supplemented at a later stage) which may not adequately respond to the actual expenses requirements of legal teams or to the length of proceedings in any given case. The proposed scheme, by eliminating automatic DSA and terminal expenses payments will result potentially in substantial savings, while encouraging a more judicious use of expenses allotments under the Court's legal aid system by legal teams. Ridding the system of automatic DSA payments frees the monthly expenses budget to be used for the real and actual expenses of the team reasonably necessary for an effective and efficient legal representation. Under the proposed system, the €3,000 monthly allotment will ensure that legal teams have a source of funding which can be used to cover necessary expenses and incentivizes counsel and associate counsel to manage their travel costs and related expenses within the limits of the monthly ceiling.

38. The Registry recommends that this proposal be brought into force immediately, with the exception of *pending* requests for reimbursement submitted by existing teams, for which the current system will continue to apply. The proposal will not prejudice current (or future) beneficiaries of the Court's legal aid system, as it does *not* disrupt or hamper payment for expenses "reasonably necessary as determined by the Registrar for an effective and efficient legal representation" pursuant to regulation 83(1) of the Regulations of the Court.

(c) *Remuneration: phases in which activities are considerably reduced*

39. There are instances during the 'life' of a case where the workload of the legal teams involved in proceedings before the Court may be significantly reduced. Judicious management of a publicly funded legal aid system cannot reasonably allow members of external legal teams to continue to be remunerated in *full* on a lump-sum basis when the workload of the reduced period of activity cannot (*de facto* or *de jure*) justify this.

40. Non-exhaustive examples of periods where activities are reduced include the period between closing statements rendered at trial and the decision of the Chamber; stay, suspension or other protracted delays in the proceedings; and the waiting period after an appeal against the confirmation of charges by a Pre-Trial Chamber.

41. The Registry recommends that in instances where activity in the proceedings is considerably reduced, the default position ought to be that the payment of lump-sum remuneration of team members under the Court's legal aid system ceases. While the team composition should in the ordinary course be maintained – except where counsel acts alone in conformity with ICC-ASP/6/4, para. 29 – remuneration of each team member in all situations will be on the basis of hours actually worked (as opposed to an automatic lump-sum monthly remuneration) up to the monthly fixed ceiling equal to the payment for each team member under the Court's legal aid system. Payment will be made after a detailed review of time-sheets submitted by each team member for actual work undertaken as required by the demands of the phase in the case at that juncture. In reviewing the time-sheets, the Registry will assess whether sufficient grounds exist for team members to be reasonably engaged in work on the dossier. The Registry may consult with the Chamber and the team members concerned to determine whether the requirements of the case at the time in question justify the work undertaken and billed. Not every team member will necessarily be remunerated during such phases. The onus of demonstrating, to the

satisfaction of the Registrar, the need for the work of each team member will fall on the counsel in charge of the case and on the team member(s) in question.

42. In practice, as soon as a phase in a case arises in the proceedings where activity will be reduced, and after the Registry has conducted the necessary consultations with, *inter alia*, the relevant Chamber or Presidency, the relevant section of the Registry – i.e. the Counsel Support Section – will notify counsel and/or the legal representative who has overall responsibility for the management of the team that payments for the period in question will be stopped by the Registry, and that, in lieu, from that point forward remuneration will be paid on an hourly basis for necessary work undertaken to ensure the effective and efficient legal representation of the client(s). The period of notice will be 30 calendar days, in accordance with the Registry’s current practice regarding a phase of reduced activities in a case, or a change of phase of the proceedings, resulting in a change in the scope of the legal aid applicable. This will enable counsel to take any relevant action, including providing the Registry with further information, or inviting reconsideration of any relevant decision, requesting additional means under regulation 83(3) of the Regulations of the Court or, if appropriate, referring the matter to the relevant Chamber for review under regulation 83(4) of the Regulations of the Court. Moreover, particulars of the possibility of such a change in the remuneration regime will be duly notified to counsel upon their appointment during the initial induction carried out with the relevant services of the Registry, and incorporated in the induction documents provided to counsel upon their appointment.

43. Such an approach will achieve two aims. First, it will ensure that the Court’s legal aid system is managed judiciously, resulting in cost savings for the Court. Second, it avoids a situation where the composition of legal teams is disrupted to the detriment of the client(s), while guaranteeing payment on the basis of objective criteria for necessary work actually and justifiably undertaken — as verified and approved by the Registry — during periods of reduced activity. In effect, the proposed formula enables 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 legal representation as authorized by regulation 83(1) of the Regulations of the Court.

44. Payments for compensation for professional charges for those team members determined by the Registry to be eligible to receive such compensation will be adjusted proportionally to reflect the changes in remuneration during phases of reduced activity.

45. The Registry recommends the immediate implementation of this proposal for any new teams as well as for cases experiencing reduced activity at the time of the proposal’s adoption, and for existing teams when the case progresses to a new phase of the proceedings.

(d) *The possibility of an enhanced role for the Office of Public Counsel for Victims (OPCV)*

46. The Registrar recalls the basic principle, as enshrined in rule 90 (1) of the Rules of Procedure and Evidence, that victims, in the ordinary course, are free to choose their legal representatives. As regards the role of the OPCV, the Registry would begin by reiterating its position set out in the “Report of the Court on legal aid: Legal and financial aspects of funding victims’ legal representation before the Court”:¹³ namely that the question of whether the Office should have an enhanced role in the representation of victims in proceedings before the Court is first and foremost a judicial determination, in particular as it relates to common legal representation as mandated by the relevant legal texts of the Court.

47. The Registry further points out that, for the OPCV to be given a privileged and/or exclusive role in the representation of victims in proceedings before the Court, amendments to this effect would be required to the Regulations of the Court. Given the current legal

¹³ Report of the Court on Legal Aid: Legal and Financial aspects for funding victims’ legal representation before the Court, ICC-ASP/8/25, 5 October 2009, paras 31 – 32. See also Updated Report of the Court on legal aid: Legal and Financial Aspects of funding victims’ legal representation before the Court, the comparison between internal and external counsel, ICC-ASP/9/9, 30 July 2010.

regime governing the appointment of legal representatives for victims, for the Registry to take a definite stance on this issue in the context of its revision of the legal aid scheme would be *ultra vires* the powers of the Registrar and inconsistent with the express provisions of the Court's legal texts, which have placed the issue of appointing OPCV to represent victims where appropriate squarely within the ambit of the judges' exclusive powers.

48. The role of the Registry in cases where the Chamber is contemplating the appointment of common legal representatives is merely to assist the relevant Chamber, guided by the interests of the victims in need of legal representation through the provision of relevant information on a case-by-case basis so as to enable the Chamber to make an informed appointment. The Registry consults the victims prior to any recommendation to the Chamber on common legal representation. Other sections of the Registry are also consulted, and often local legal and other organizations in the area where the victims are located. Any recommendation on common legal representation is based on facts, after careful assessment of all legal and factual parameters of the case and of the information available to the Registry. However, in the absence of explicit provisions in the Regulations of the Court, any provision of an enhanced role for the OPCV as legal representatives in Court proceedings is a matter for the Court's judges and not for the Registry. The latter's margin of action is limited, at best, to recommending the appointment of the OPCV in suitable cases for the judges' consideration.

49. The Registry notes that the Assembly's interest in an enhanced role for the OPCV¹⁴ has been guided primarily by cost-saving considerations. While the Registry is not in principle opposed to an enhanced role for the OPCV in the representation of victims, it would emphasize that a policy shift towards augmenting the role of the Office as the privileged or exclusive legal representative of victims represents a significant departure from the system originally conceived for the representation of victims in Court proceedings. It involves a series of considerations and consequences which need to be carefully studied, and should therefore not be based merely on cost-saving incentives, in particular when the notion that exclusive legal representation of victims by the OPCV will be less costly is, at this juncture, more an assumption than a proven fact, and requires further careful study and scrutiny to verify whether significant cost savings can be achieved through a privileged or exclusive role of the OPCV. As the Court's Trial Chamber I "establishing the principles and procedures to be applied to reparations",¹⁵ indicates, the question of victims' rights and participation in the Court's proceedings, and by extension, their legal representation, is still evolving. The Registry will continue to closely monitor this continuing and developing process so as to gather all the necessary objective criteria to better inform about the best course of action, and to provide in due course a more realistic calculation on cost saving projections and other consequences arising from an enhanced role of the OPCV.

50. The legal profession and civil society have expressed their clear opposition to an overly enhanced or exclusive role of the OPCV in the representation of victims in Court proceedings. Reasons invoked to justify this objection include the following:

(a) Excluding external counsel is inconsistent with the current legal framework governing victims' legal representation; victims have a right to freely choose counsel (rule 90(1) of the Rules of Procedure and Evidence); even in the case of common legal representation, the views of victims must be taken into account (regulation 79(2) of the Regulations of the Court), and victims can challenge the choice of common legal representative appointed by the Court (rule 90(4) of the Rules);

(b) The power of the judges under regulation 80(2) of the Regulations of the Court to appoint the OPCV on a case by case basis as deemed appropriate will be usurped if they are obliged to appoint the Office in every case;¹⁶

¹⁴See footnote 1 above.

¹⁵ ICC-01/04-01/06-2904, dated 7 August 2012.

¹⁶ See e.g. Decision of Trial Chamber III in *The Prosecutor vs. Jean-Pierre Bemba* case: "[W]hile Regulation 80(2) of the Regulations of the Court mentions that the Chamber has the possibility to appoint counsel of the OPCV, such appointment is to be considered on an exceptional basis when the particular circumstances of an individual victim so require and, in any event, not as a rule for appointing, for instance, as common legal representative for

(c) Excluding or limiting the role of external lawyers in the legal representation of victims is neither conducive to the goals of the Rome Statute and to achieving universality, nor to promoting the principle of complementarity;

(d) Granting representation to the OPCV exclusively as of right will result in cost consequences, as the Office will have to recruit additional staff in The Hague and in the field to manage the legal representation of all victims involved in Court proceedings. The Office will also require additional facilities to ensure confidentiality and sufficient separation among the various cases handled by the Office. The resultant increase in costs could well be significant;

(e) Exclusive representation by the OPCV will give rise to conflict of interests, which will have to be managed by the Office, potentially giving rise to additional costs.

51. The OPCV's response to the Registry's call for consultation seems to indicate that the Office is in agreement with the notion that it should not shoulder the *exclusive* representation of victims in Court proceedings. In defending a mixed system, it expressed the view that the:

[...] synergies arising from the collaboration of in-house and external representation would be substantial, not only in terms of cost-savings, but also to more effectively address and serve the needs of victims. The Office considers, indeed, as it has stated on several occasions, that combination of in-house and external lawyers is the optimal model.

52. The Office has provided an estimate of the additional resources required for it to be able to represent all victims in *current* proceedings pending before the Court. These are as follows:

One	P-4	(€134,100)
Two	P-3	(€110,900 x2 = €229,900)
One	P-1	(€91,800)
One	P-1	(€91,800)
Total		€547, 600

53. The Office envisages that these additional staff costs will not increase in the future if there are no more than six active cases before the Court at any one time. Moreover, in addition to added staff costs, the Office foresees that 26 missions would be required to the field (in the different situation countries in Africa), to be conducted by one, or in some cases two, staff of the Office, inter alia for the purposes of meeting with victim-clients and conducting the necessary investigatory work. The projected estimate of costs for field presence as presented by the Office are as follows:

26 missions (€3,500 per person) = €182, 000.*

*This estimate is based on an average cost for a mission for one person for one week to African countries (including Travel and DSA) of €3,500.

54. The Registry has carefully reviewed all the feedback received on the question of an enhanced (or exclusive) role of the OPCV, including the comprehensive contribution submitted by the Office itself. Based on the assessment and consultations carried out to date, and after taking into account relevant objective parameters (i.e. conflicts of interest, views expressed by victims, cost drivers, etc.), the Registry recommends that the system ought to be maintained as a two-tier system as currently established, where both OPCV and external lawyers and other relevant team members (or professionals) can be engaged in the representation of victims in Court proceedings. A carefully engineered formula, combining both these in-house and external components, could result both in cost-savings and in optimal legal representation for victims before the Court. Thus a case-by-case approach could be adopted, so that, for example, a senior legal staff member of the OPCV who meets

an important number of victims in a case. The Chamber underlines that, in any event, it is for the Chamber to appoint counsel from the OPCV as legal representative of victims pursuant to Regulation 80(2) of the Regulations of the Court [...]" (ICC-01/05-01/08-1005, paras. 28 and 29).

the criteria for admission to the Court's List of Counsel could be appointed to head the legal representation of a group of victims, yet build his or her team with external lawyers and other suitable professionals (e.g. field assistants from the situation country) (Option 1). The converse can also be conceived, where an external counsel is appointed to head the legal representation of victims, yet builds his core team from members of the OPCV (if available and willing to act in the designated capacity) (Option 2). Each option would generate cost savings, in so far as the remuneration of one or more members of the legal team ensuring the legal representation of a group of victims would be absorbed by the existing budget of the OPCV as opposed to constituting a charge against the Court's legal aid budget.

55. Option 1, involving assistance to the Court from external counsel or support staff, has already been implemented. Thus at any time, on the basis of objective parameters, a Chamber may order the Registry or the OPCV to appoint external support field staff to facilitate the communication of the views and preoccupations of victims and assist a counsel to fully represent the views and concerns of victims before the Chamber and the Court. One such instance is in the case of *The Prosecutor v. Gbagbo*, where the Chamber appointed OPCV to represent victims, and ordered the appointment of field staff paid under the legal aid system in order to facilitate the work of counsel. Factors to be taken into account in this regard may include the available resources in OPCV, and the need to adjust the composition of teams where the progress of the case justifies this (for instance where additional victims are admitted to participate in the case and assigned to the Court-appointed legal representative). Any such decision to appoint an external counsel or support staff will be based on the objective criteria of the particular case, which might include the views and concerns of the victims regarding their legal representation, familiarity/connection with the situation country, the location and number of victims, and the nature of the harm suffered by the victims, who might require a specialist to protect their dignity. Furthermore, if the Chamber has appointed the OPCV as a common legal representative, it will be for OPCV to appoint any additional staff or assistance.

56. Option 2, where an external counsel is appointed to lead the representation of a group of victims, and is supplemented by relevant OPCV staff, will generate the following benefits:

- (a) Assurance that external counsel, in particular those who hail from situation countries, represent victims in Court proceedings;
- (b) Legal representatives will be able to benefit from the OPCV's institutional knowledge, experience and expertise in relation to practice before the Court;
- (c) Trained staff will be available to support teams at any moment, without the need to recruit and train staff for new teams. This could be particularly valuable at times where a legal representative of victims is appointed only shortly prior to a hearing;
- (d) A single OPCV staff member may be able to support more than one team at a time, particularly during less active stages of the proceedings, thus allowing for greater flexibility;
- (e) Such an arrangement would do away with the need to rely on the legal aid scheme to finance two positions within a legal team, and would leave only the positions of principal counsel and field support to be financed by legal aid, subject to the applicable rules and regulations. Based on figures for the current legal aid regime, this arrangement would save up to:
 - (i) €4,889 per month in fees for a legal assistant;
 - (ii) €3,974 per month in fees for a case manager.

57. The Registry emphasizes that, within the current legal framework, there is enough flexibility and opportunity to encourage greater OPCV involvement in a mixed system as described above. Thus both Option 1 and Option 2 would be viable choices, depending on the circumstances of each particular case. In proposing candidates for appointment as legal representatives, the Registry would recommend OPCV on a case-by-case basis with a view to cost saving and where it deemed that this would be in the interests of victims and the proper administration of justice in any given case.

58. The Registry further notes that the amendments to the Regulations of the Court recently adopted have made a number of changes to regulation 81, which governs the mandate of the OPCV. Significant amongst these changes are wording which can be interpreted to be expansive as it concerns the mandate and capabilities of the Office. For instance, while the previous wording of regulation 81(3) stipulated that the Office “may include a counsel who meets the criteria set out in rule 22 and regulation 67,” the new provision states that the Office “shall include at least one counsel” who meets the same requirements. In effect, this new amendment legally empowers the Office to recruit additional senior lawyers who meet the criteria of admission to the List of Counsel on a needs-basis, in turn enabling it to take on additional cases.¹⁷

59. In fact, the new changes to the Regulations of the Court as it concerns the mandate of the OPCV do not restrict, but rather facilitate a more robust involvement and participation of the Office when it comes to the representation of victims in proceedings before the Court.

60. In conclusion, the Registry would again emphasize that the opportunity for more regular recourse to the OPCV for direct involvement in the representation of victims in Court proceedings already exists within the current legal framework. The Registry will not hesitate to recommend the appointment of the OPCV or its individual staff members when the facts in any given case so justify, having regard both to the interests of victims and to cost-saving considerations.

(e) A continuous and comprehensive review of the Court’s legal aid system

61. Ever since the first Court activities which necessitated payment from the Court’s legal aid system, the Registry has been carefully monitoring the system’s performance, on the one hand to ensure that it is judiciously managed from a responsible fiscal spending perspective, and on the other, to ensure that the funds furnished under the system to legal teams are sufficient and reasonable for an effective and efficient legal representation. The multiple consultations and changes introduced to the Court’s legal aid system since the beginning of the Court’s activities demonstrate that the Registry has taken a pro-active economically conscious stance, while at the same time remaining mindful of the need to see to it that sufficient funds are in place so as to ensure that the right of indigent suspects and accused persons to a fair trial are not undermined by lack of adequate resources, and that indigent victims likewise have the requisite resources to effectively exercise their right to participate in the proceedings.

62. The Registry has from the outset stated that the Court’s legal aid scheme is not set in stone and is a living system, which is constantly monitored, scrutinized and moulded or perfected, to reflect the experience gained from the application of the system in practice. Some of the lessons learned to date have resulted in changes to the system that have resulted in an increase in funding where practice had shown that additional resources were warranted (e.g. the investigation budget). Others, including the latest round of proposed changes – again, based on the lessons learnt from practice – have attempted to rid the legal aid system of certain aspects which have been shown in practice to be unsuitable from an economic efficiency perspective. The Registry is pleased that these pending issues are being addressed in the latest round of proposals to the Court’s legal aid system in 2012.

63. The Registry’s efforts in practice clearly illustrate that it has at all times sought to provide legal teams with the resources reasonably necessary for an effective and efficient legal representation on the basis of actual needs and objective criteria, in conformity with the applicable legal and policy texts governing the Court’s legal aid system. The Registry has been equally firm in objecting to requests by legal teams for additional resources it deemed to be unreasonable when the facts at hand did not objectively warrant the granting of supplementary resources. The countless public filings of the Registrar in response to

¹⁷ Regulation 81.5 of the Regulations of the Court stipulates that “[t]he Office of Public Counsel for victims shall ensure that counsel with at least ten years’ experience is appointed when the Office is required to act as a legal representative.”

applications for judicial review of her decisions in such cases are concrete proof and testament to the Registry's economically conscious stance.¹⁸

64. To be sure, the Court's legal aid system is, and will continue to be, monitored and scrutinized in light of new experiences gained in practice, and when warranted additional changes will be introduced to the system. Based on the extensive experience and the constant monitoring of the legal aid system since the Court's first judicial activities, it can be safely stated that at this juncture, with this latest set of proposed changes, all the major items that required correction, in particular from a cost-savings perspective, have been identified and remedied (the exception being a comprehensive review of how best to manage the costs of legal representation of indigent victims in Court proceedings). The Registry believes that its efforts over the best part of a decade have amounted to a comprehensive review of the legal aid system, and generated significant changes, which have made the Court's legal aid scheme more economically conscious and efficient, while remaining responsive to the real needs of its end-users.

65. The Registry will continue to monitor and assess the legal aid system in light of the lessons learnt from the various proceedings before the Court, and will endeavour to identify additional areas in need of improvement, and where savings may be had, in accordance with the wishes of the Assembly as expressed in resolution ICC-ASP/10/Res.4.

66. The Registry has plans, for the near future, to consolidate into a single document all of the various Assembly documents relating to the Court's legal aid system, as well as relevant internal policy guidelines.

¹⁸ Samples of such public filings (excluding confidential observations) for the period between May 2011 to June 2012 alone include, *inter alia*: 'Registrar's Observations on the "Urgent Request by the Victims' Representative pursuant to regulation 83(4) of the Regulations" dated 1 June 2012' (ICC-01/09-01/11-424); —'The Registrar's Observations on the "Notification regarding the Legal Representation of Participating Victims in these Appeals Proceedings" dated 19 March 2012' (ICC-01/09-02/11-412);— 'Observations of the Registrar on the "Corrigendum to Request for the Review of the Scope of Legal Assistance" dated 4 April 2011' (ICC-01/04-01/10-102);— 'Observations du Greffier relatives aux requêtes ICC-01/04-01/07-3304-Conf-Exp du 5 juin 2012 et ICC-01/04-01/07-3305 du 8 juin 2012 déposées respectivement par les conseils de M. Mathieu Ngudjolo Chui et M. Germain Katanga' (ICC-01/04-01/07-3306); —'Observations du Greffier sur' la « Requête de la Défense stu' le champ de l'aide judiciaire » déposée par Maître Emmanuel Altit le 13 janvier 2012' (ICC-02/11-01/11-28-Red) ; —'Registrar's Submissions under Regulation 24bis of the Regulations of the Court in relation to Trial Chamber I's Decision ICC-01/04-01/06-2800' (ICC-01/04-01/06-2812); —'Observations of the Registrar pursuant to Regulation 24 bis of the Regulations of the Court on the "Requête de la Défense sollicitant le réexamen de la décision du Greffe du 22 juillet 2011 relative à l'aide judiciaire accordée à M. Thomas Lubanga" dated 19 August 2011' (ICC-01/04-01/06-2793); —'Observations in accordance with the "Order on the submission of Observations by the Registrar on the "Application of the Victims's Representative pursuant to Article 83 of the Regulations dated 27 March 2012 (ICC-01/09-01/11-408); — "Observations du Greffier relatives a la "Demande d'examen d'une décision du Greffier relative a une demande de mission du représentant légal (Norme 83 du Règlement de la Cour)" datée du 6 avril 2012 et la Demande complémentaire ICC-01/04-01/07/3269, du 13 avril 2012 (ICC-01/04-01-07-3270).

Annex I

List of Persons, Offices and Organisations Consulted

1. Association Des Avocats de la Défense – UN-International Criminal Tribunal for Rwanda (ADAD-ICTR)
2. Association of Defence Counsel practicing before the International Criminal Tribunal for the former Yugoslavia (ADC-ICTY)
3. Arab Lawyers Union
4. Amnesty International
5. Avocats sans Frontières (ASF) –Belgique
6. Avocats sans Frontières (ASF) – France
7. Coalition for the International Criminal Court (CICC)
8. Conseil de Barreaux de l’Union européenne (CCBE)
9. European Criminal Bar Association (ECBA)
10. Fédération des Barreaux d’Europe (FBE)
11. International Federation for Human Rights (FIDH)
12. Human Rights First
13. Inter-American Bar Association
14. International Association of Young Lawyers
15. International Bar Association (IBA)
16. International Commission of Jurists
17. International Criminal Bar (ICB)
18. International Criminal Defence Attorneys Association (ICDAA)
19. International Federation of Women Lawyers (FIDA)
20. International Federation of Women in Legal Careers (FIFCJ)
21. The Law Association for Asia and the Pacific (LAWASIA)
22. Pan African Lawyers Union (PALU)
23. Redress International (REDRESS)
24. Union Internationale des Avocats (UIA)
25. Unión Iberoamericana de Colegios y Asociaciones de Abogados (UIBA)
26. Women’s Initiatives for Gender Justice
27. Human Rights Watch (HRW)
28. Defence Office, Special Tribunal for Lebanon (DO-STL)
29. Victims Participation Unit, Special Tribunal for Lebanon (VPU-STL)
30. Defence Counsel & Detention Management Section, UN-International Criminal Tribunal for Rwanda (DCDMS-ICTR)
31. Office of Legal Aid and Detention Matters, UN-International Criminal Tribunal for the Former Yugoslavia (OLAD-ICTY)
32. Office of Public Counsel for Defence, ICC (OPCD-ICC)
33. Office of Public Counsel for Victims, ICC (OPCV-ICC)
34. Victims Participation and Reparations Section, ICC (VPRS-ICC)
35. Counsel Support Section, ICC (CSS-ICC)
36. All 428 counsel - as of the 20th of April 2012 - admitted to the Court’s List of Counsel
37. All counsel currently intervening in cases before the Court.

Annex II

Financial implications of the review of the legal aid system of the Court

1. As a result of the comprehensive review of the legal aid system undertaken by the Registry during the course this year, initial overall reductions to the legal aid 2013 budget have been identified amounting to approximately €1.5 million. The first part of the review, which was approved by the Bureau on 23 March 2012, produced reductions amounting to approximately €0.4 million. These reductions have already been integrated into the proposed 2013 legal aid budget as reflected in the 2013 proposed programme budget. In addition, and as requested by the Bureau, the Registry has submitted a supplementary report further proposing measures on four aspects of the Court's legal aid system. If adopted by the Assembly at its upcoming session, the Court has estimated that such measures could result in further reductions in the legal aid budget for 2013 of approximately €1.1 million. It should be noted that while further savings could result in the future from the application of the proposed measures, at this stage the Court is not in a position to quantify them.

2. The tables below illustrate the financial implications of the 2012 review of the legal aid system undertaken by the Registry.

Table 1. Financial implications in the 2013 proposed legal aid budget of the modifications to the legal aid system as approved by the Bureau on 23 March 2012.

	<i>Legal aid budget for 2013 based on ICC-ASP/6/4</i>	<i>Reductions resulting from the modifications approved by the Bureau</i>	<i>Proposed 2013 legal aid budget</i>
Defence	3,313,198.00	190,159.50	3,117,450.50
Victims	4,242,848.00	232,776.00	4,010,072.00
Total	7,556,046.00	422,935.50	7,127,522.50

Table 2. Estimated additional financial implications of the "Supplementary report of the Registry on four aspects of the Court's legal aid system"

	<i>Proposed 2013 legal aid budget</i>	<i>Reduction of monthly expenses rate</i>	<i>Elimination of DSA*</i>	<i>Multiple mandates</i>	<i>Phases of reduced activities</i>	<i>OPCV role</i>	<i>2013 legal aid budget after reductions</i>
Defence	3,117,450.50	69,000.00	440,000.00	n/a	n/a	n/a	2,608,450.50
Victims	4,010,072.00	102,000.00	460,000.00	n/a	n/a	n/a	3,448,072.00
Total	7,127,522.50	171,000.00	900,000.00				6,056,522.50

* Approximate estimated savings based on an average of 6 months of DSA in The Hague for entitled counsels and associate counsels at the foreseen judicial phases during 2013.