



Seventeenth session

The Hague, 5-12 December 2018

Report on the progress of the development of proposals for adjustments to the legal aid remuneration system as of 2019**Executive Summary*

1. In compliance with the request of the Assembly of States Parties at its sixteenth session, the International Criminal Court submits its proposals for adjustments to the legal aid remuneration system. The Court intends for the proposals to form the basis of a facilitated consultation process between States Parties and the Court throughout 2018, following advice from the Committee at its thirtieth session, with a view to adopting a new system, as appropriate, for implementation in 2019.
2. The Court's new legal aid policy would largely codify existing practice and introduce adjustments on the basis of the Court's experience to date. The Court expects that it will be possible to implement any proposed adjustments in 2019 within the envelope of the legal aid budget approved for 2018.
3. Proposed modifications to the existing legal aid system are based on two core goals. The first is to ensure that the Court upholds its obligation to ensure fair trial rights for suspects and accused, as well as effective victim participation. The Court therefore proposes a number of measures aimed at improving resource allocation for legal teams receiving legal aid, including through an increase in fees and team resources. These increases would be partly offset by other modifications in the system, for example by moving from the current lump-sum payment system to an hourly payment system for phases of the proceedings in which team members are not all expected to work full-time.
4. The second goal is to improve the overall administration of legal aid either by reducing unnecessary bureaucracy or by implementing more rigorous financial controls to ensure payment only for services actually delivered. Proposed changes to administration aim at ensuring that available funds are directed as much as possible towards the substantive work of the legal teams rather than to the administration of the legal aid system.
5. Should the proposed legal aid system be approved by the Assembly for implementation in 2019, the Court proposes carefully monitoring the system's implementation and providing a detailed report thereon to the Assembly at its eighteenth session, following receipt of which the States may then continue to assess the implications of the new system.

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I. Introduction

1. At its fifteenth session, the Assembly of States Parties (“the Assembly”) acknowledged “the Court’s efforts to continue implementing the legal aid remuneration policy” but stressed “the need for continuous monitoring of the efficiency of the legal aid system to uphold and strengthen the principles of the legal aid system, namely fair trial, objectivity, transparency, economy, continuity and flexibility”.¹ The Assembly requested the International Criminal Court (“the Court”) “to reassess the functioning of the legal aid system and to present, as appropriate, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly at its sixteenth session”.²

2. At its twenty-eighth session, the Committee on Budget and Finance (“the Committee”) requested the Court to keep the Assembly and the Committee informed of ongoing consultations on the Court’s legal aid system, including “the outcome of the discussion”, the resulting proposal(s) and the process forward”.³ A report on the consultation process was submitted to the Committee in advance of its twenty-ninth session.⁴

3. At its twenty-ninth session, the Committee recommended that the Court’s proposed new system be “more respectful” of the budgetary limits approved by the Assembly.⁵ “Without pre-empting the discussion, the Committee recommended that the Court make every effort to present a reform that aims at limiting the administrative burden without compromising accountability and that can be achieved within existing resources.”

4. At its sixteenth session, the Assembly acknowledged “the Court’s efforts to continue implementing the legal aid remuneration policy” and stressed “the need for continuous monitoring of the efficiency of the legal aid system to uphold and strengthen the principles of the legal aid system, namely fair trial, objectivity, transparency, economy, continuity and flexibility”. The Assembly took note of the information provided by the Registrar and the recommendations of the Committee. The Assembly requested that the Court be “mindful of the recommendation of the Committee [...] that the Court make every effort to present reform that can be achieved within existing resources” and further requested “the Court to continue its review of the functioning of the legal aid system and to present, in early 2018, as appropriate, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly, through the Committee.”⁶

5. Mindful of the Assembly resolution and the Committee’s recommendations, the Court has carefully assessed the Court’s legal aid system.

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifteenth session, The Hague, 16-24 November 2016* (ICC-ASP/15/20), vol. I, part III, ICC-ASP/15/Res.5, section K, para. 64.

² *Official records ... Fifteenth session ... 2016* (ICC-ASP/15/20), vol. I, part III, ICC-ASP/15/Res.5, Annex I, para. 8.

³ ICC-ASP/16/5, para. 129.

⁴ *Updated report of the Court on the progress of the development of proposals for adjustments to the legal aid remuneration system as of 2019, Sixteenth session, New York, 4-14 December 2017* (ICC-ASP/16/32).

⁵ ICC-ASP/16/15, para. 11.

⁶ ICC-ASP/16/Res.6, Annex 1, para. 8. *See also*, ICC-ASP/14/5, para. 101 and ICC-ASP/15/5, para. 99 in which the Committee requested the Court to submit the outcome of the reassessment of the Court’s legal aid policy within the timeframe established by the Assembly.

II. Background

6. In September 2004, at the Assembly's third session, the Court presented an update on the process of developing a legal aid scheme for the Court "whose main objective [was] to ensure the quality of the defence while taking due account of the budgetary restraints of the Court".⁷ In 2007, the Court reported to the Assembly on the operation of the Court's legal aid system and made a number of proposals for amendment. The system that was adopted contained some of the principal components of the Court's current legal aid policy: a core legal team, an investigations budget, compensation for professional charges and payment procedures.⁸

7. In December 2011, the Assembly requested the Court to present a proposal for a review of the legal aid system before 15 February 2012 and invited the Court to propose measures to further enhance the efficiency of the system.⁹ In the same resolution, the Assembly mandated the Bureau to decide on the implementation of the revised legal aid system before 1 March 2012 with a view to its implementation as of 1 April 2012 in cases already before the Court as well as in future cases.

8. Following the Decision of the Bureau on Legal Aid in 2012, remuneration for counsel was reduced by almost 25 per cent.¹⁰ Reductions were justified on the ground that payment based on gross salary equivalents in the Office of the Prosecutor (OTP) was being duplicated by granting compensation for professional charges. Thus, payment was adjusted on the basis of net salary equivalents of counterparts in the OTP. The system was also modified to ensure that only professional charges¹¹ actually incurred would be reimbursed upon verification, rather than the uplift for professional charges being provided automatically. Before 2012, the professional charges uplift was a maximum of 40 per cent for counsel and associate counsel and 20 per cent for trial lawyers and case managers. From 2012, this was reduced to a maximum of 30 per cent and 15 per cent, respectively.¹²

9. In response to concerns raised by counsel, civil society and bar associations that changes made to the Court's legal aid system in 2012 were made progressively without an opportunity for a meaningful comprehensive consultation on their overall impact, the Assembly requested the Court in November 2013 to undertake a comprehensive assessment of the 2012 legal aid system and to engage independent experts to reassess its functioning. Specifically, the Assembly requested that the Court provide a report within 120 days following the first judicial cycle, i.e. upon conclusion of the reparations phase in *Lubanga*.¹³

10. Following the Appeals Chamber's judgment on reparations in *Lubanga* in March 2015, the Registrar accepted a proposal from the International Criminal Justice Consortium (ICJC) to assess the functioning of the Court's legal aid system on a *pro bono* basis. The ICJC's assessment was completed on 27 October 2015. The ICJC reported to the Court that it would submit only its assessment to the Court; recommendations for any proposed changes to the system would be provided upon request, if at all, at a later date.

⁷ *Overview of the efforts of the Registrar in relation to the defence, the legal participation of victims, and the consultation process followed – report pursuant to paragraph 4 of the focal point on the establishment of the international criminal bar, Third Session, The Hague, 6-10 September 2004*, (ICC-ASP/3/7); see also, *Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons*, ICC-ASP/3/16, of 17 August 2004; annex 2 was updated by document ICC-ASP/4/CBF.1/8, of 15 March 2005 (public version ICC-ASP/5/INF.1, of 31 October 2006).

⁸ Each of these components is discussed in further detail below.

⁹ *Official Records ... Tenth session ... 2011* (ICC-ASP/10/20), Res.4, para. J (1-4).

¹⁰ *First report of the Bureau on legal aid, Eleventh Session, The Hague, 14-22 November 2012* (ICC-ASP/11/2/Add.1).

¹¹ Reimbursements for professional charges are meant to cover expenses directly related to representation, including bar fees, Chambers' fees, office expenses, pension, health care and taxes.

¹² *Registry's single policy document on the Court's legal aid system*, ICC-ASP/12/3, paras. 129-138.

¹³ *Official Records ... Twelfth session ... 2013* (ICC-ASP/12/20), vol. I, part III, ICC-ASP/12/Res.8, Annex I, para. 6.

11. However, in the light of the continued judicial activities in the reparations phase of *Lubanga* in 2015, the Assembly, at its fourteenth session, reiterated its request that the Court report on its assessment of the 2012 legal aid system within 120 days following the first judicial cycle.¹⁴

12. At its fifteenth session in 2016, with reparations activities in *Lubanga* still ongoing, the Assembly requested the Court “to reassess the functioning of the legal aid system and to present, as appropriate, proposals for adjustments to the legal aid remuneration policy for the consideration of the Assembly at its sixteenth session”.¹⁵ Notably, the Assembly’s reformulated request to assess the Court’s legal aid system was no longer tied to the conclusion of the reparations phase in *Lubanga*.

13. Initial research and insight offered by the ICJC in 2015 provided a foundation for the Court’s engagement of a second independent expert (“Expert”) to provide both an assessment of the Court’s legal aid system (“Assessment Report”)¹⁶ and concrete recommendations for its improvement. Importantly, the Assessment Report provided a comparative analysis of the legal aid systems in other international criminal tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the Mechanism for International Criminal Tribunals (MICT), the Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).¹⁷

14. To ensure the widest consultation possible, the Court then contracted the Expert to develop a Concept Paper based on the Assessment Report and to identify the topics on which proposals could be made to adjust the legal aid policy. The Assessment Report and Concept Paper were published on the Court’s website in May 2017. These formed the basis for a broad consultation with counsel, the legal community, civil society organizations and practitioners to give full effect to the Registrar’s obligation under rules 20(3) and 21(1) of the Rules and Procedure and Evidence (RPE). Interested participants were invited to submit written comments to the Court on the Concept Paper by 30 May 2017.

15. On 19 June 2017, the Court held a one-day round-table seminar to discuss the Assessment Report and the issues identified in the Concept Paper. The seminar was attended by, *inter alia*, a member of the Assembly; current and former counsel, associate counsel, trial lawyers and case managers practising before the Court; representatives of the International Criminal Court Bar Association, the International Bar Association, other regional and national bars, and the Coalition for the International Criminal Court; staff from other international criminal tribunals, and staff of the Court including the Registry, OTP, Chambers and the Offices of Public Counsel for the defence and victims. The discussion took place within the wider context of increasing the effectiveness of legal representation, balancing principles of justice and effective use of resources, as well as developing proposals to be presented to the Assembly. A brief summary of the discussion and comments received is set out below.

16. Following the seminar, participants were invited to submit any additional written comments no later than 3 July 2017. In total, the Court received nine written submissions before and after the seminar. A summary of points raised during the seminar and in written comments is provided below for the Committee’s information.

17. In late 2017, on the basis of the Assessment Report and input from the Registry, civil society, counsel, bar associations, and practitioners, the Expert prepared and transmitted to the Registrar two drafts of proposed legal aid policies for the Registrar’s consideration (one for defence and one for victims). Following their receipt, internal consultations on the preliminary drafts were held within the Registry and with the Office of Public Counsel for the Defence (OPCD) and the Office of Public Counsel for Victims

¹⁴ *Official Records ... Fourteenth session ... 2015* (ICC-ASP/14/20), vol. I, part III, ICC-ASP/14/Res.4, Annex I, para. 6(c).

¹⁵ ICC-ASP/15/Res.5, Annex 1, para. 8.

¹⁶ Available on the Court’s website at: <https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>.

¹⁷ To compare the cost of the Court’s legal aid system with other tribunals, the Expert sent a questionnaire to the relevant actors in the Registries and/or Defence Office at the ICTY, MICT, STL, and ECCC. In addition, the Expert distributed a questionnaire to counsel, legal assistants, and case managers who had been, or are engaged in cases at the Court.

(OPCV). These are currently under review within the Registry and additional information is being gathered before they are finalized by the Registrar.

III. Legal basis

18. The Rome Statute of the International Criminal Court (“the Statute”) upholds the right of an accused in a criminal proceeding to choose his or her counsel and to have legal assistance assigned and paid by the Court in circumstances where the accused lacks sufficient means to pay. A fundamental element of fair judicial proceedings is ensuring that a suspect or an accused who lacks the means to pay for legal assistance in his or her defence may be provided with legal aid. Under article 55(2)(c) of the Statute, persons to be questioned by the Prosecutor or by national authorities under Part 9 of the Statute are also entitled to legal assistance without payment if they do not have sufficient means to pay for it.

19. As acknowledged by the Assembly at its sixteenth session,¹⁸ the Court’s legal aid system is founded on principles fundamental to ensuring that the proper administration of legal aid is properly balanced against fair trial rights during the Court’s proceedings. These principles have been articulated as follows:

(a) Equality of arms: The legal aid system contributes to a balance between the resources of the defence and prosecution.

(b) Objectivity: The legal aid system allocates resources on the basis of the objective requirements of the case.

(c) Transparency: The legal aid system complies with the requirements of budgetary oversight and auditing of public funds without interfering with confidentiality or the autonomy of counsel or defence team members.

(d) Continuity and flexibility: The legal aid system provides for mechanisms that are flexible enough to adapt to situations and avoid paralysis prejudicial to the administration of justice.

(e) Economy: The term “all costs reasonably necessary” within regulation 83(1) of the Regulations of the Court (RoC) is to be interpreted to mean “all costs that are reasonable and necessary”. The legal aid system is to cover only costs that are both reasonable and necessary for effective and efficient legal representation.

20. Under article 43(1) of the Statute and regulation 130 of the Regulations of the Registry (RoR), the Registry has been designated as the organ responsible for the management of the Court’s legal aid scheme. The beneficiaries of the Court’s legal aid system have recourse to a judicial review of the Registrar’s administrative decisions concerning legal aid.

21. Under rule 21(1) of the RPE, the criteria and procedures for assignment of legal assistance to a suspect or accused are to be established in the Regulations of the Registry, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in rule 20(3) of the RPE.

22. Under regulation 83 of the RoC, legal assistance paid by the Court is to cover *all costs reasonably necessary* as determined by the Registrar *for an effective and efficient defence*, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances (DSA).

23. In respect of victims, while the Statute does not expressly provide for legal assistance to be paid by the Court as a matter of right for victims, rule 90(5) of the RPE provides that “a victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.”

¹⁸ ICC-ASP/16/Res.6, para. 75.

24. Under regulation 83(2), the scope of legal assistance paid by the Court regarding victims is to be determined by the Registrar in consultation with the Chamber, where appropriate. Chapter 4, Section 3 of the RoR (regulations 130 to 136) provides additional legal bases and guidance to the Registry on the management of the Court's legal aid system.

IV. Proposal

25. The Court's new legal aid policy would largely codify existing practice and introduce adjustments on the basis of the Court's experience to date. The Court expects that it will be possible to implement any adjustments within the envelope of the legal aid budget approved for 2018.

26. Proposed modifications to the existing legal aid system are based on two core goals. The first is to ensure that the Court upholds its obligation to ensure fair trial rights for suspects and accused, as well as effective victim participation. The Court therefore proposes a number of measures aimed at improving resource allocation for legal teams receiving legal aid, including through an increase in fees and team resources. These increases would be partly offset by other modifications in the system, for example, by moving from the current lump-sum payment system to an hourly payment system for phases of the proceedings in which team members are not all expected to work full-time. The second goal is to improve the overall administration of legal aid either by reducing unnecessary bureaucracy or by implementing more rigorous financial controls to better ensure payment for services actually delivered. Proposed changes to administration aim at ensuring that available funds are directed as much as possible towards the substantive work of the legal teams rather than to the administration of the legal aid system.

27. For the reasons given further below, the Court proposes upward adjustments of fee levels and core team resources. While the proposed policies include a number of important changes (as explained in detail below), some of these changes simply implement existing practice, on the basis of the Court's experience to date. The changes are aimed at ensuring that the Court effectively discharges its obligation to ensure fair trial rights for the suspect or accused. The proposals described herein also uphold the core principle of equity in remuneration as compared with relevant counterparts in the OTP. These adjustments are also meant to ensure a legal aid system which recognizes that meaningful participation of victims is best executed through effective legal representation. They are intended to ensure that the Court's legal aid system allocates resources within a range at least comparable to other international criminal tribunals.

28. While acceptance of the Court's proposal would result in increases in, for example, fee levels and team resources, these increases may be partly offset by other modifications in the system. Thus, the proposals should be viewed from a holistic perspective, with each proposed modification of the system being interdependent on other aspects of the system.

29. As explained further below, in the present proposal, for each phase or stage of the Court's proceedings, adjustments have been made to resource provision and administration to provide the most efficient and effective legal aid allocation possible. Because of the number of variables applied at each phase, it is difficult to provide direct cost comparisons of the current and proposed systems. For example, in the current system, fees are paid on a lump-sum basis regardless of hours worked, but resources over and above the upper limits of the current policy are frequently allocated through requests for additional resources. The proposed system will be dependent on a number of variables based on objective criteria, including: the phase of the case (pre-trial, trial, appeals, reparations, sentencing); the upper limit of billable hours allocated for that phase and the number of hours actually worked; whether additional resources may be requested during that phase; whether the team members reside full-time in The Hague (and therefore receive a lump sum for settling in rather than a monthly payment, such as a DSA for personal expenses); whether team members have submitted a declaration of tax liability for automatic payment of a percentage of professional charges; and/or whether additional resources for the phase of the proceedings are available and have been considered necessary following a determination of complexity. To aid in the comparison, the Court is in the process of developing a legal aid calculator which takes into account each of these variables and can accurately present the

differences between the present and proposed systems. Concurrently, the Court is also exploring possibilities for income tax exemption and general temporary assistance (GTA) contracts for trial assistants, case managers and field assistants similar to the system employed at the Special Tribunal for Lebanon.

30. In order to provide information in relation to the Court's proposals, in each section below, the Court provides: (i) an overview of the current system; (ii) a summary of the Expert's Assessment; (iii) feedback received during the consultation process; and (iv) the Court's proposal thereon.

A. Core team: Defence

31. Under the current system, a "core team" is assigned to work together throughout the proceedings, except in two instances: (i) before the first appearance before the Pre-Trial Chamber and (ii) between the conclusion of the closing statements and the judgment. Associate counsel is provided automatically only from the confirmation of charges until the closing statements.

32. In his Assessment, the Expert observed that even though the standard core team lacks the associate counsel for much of the process, this and other resource needs have been frequently provided through time-consuming requests for additional resources. The Expert concluded that where the assignment of additional team members is justified, it would be more efficient and no more expensive to assign the team members as part of the standard core team.

33. During the consultation seminar following the dissemination of the Assessment Report and Concept Paper, participants concurred with the Expert's assessment that it is necessary to have a full core team – including co/associate counsel – from the suspect's initial appearance through the end of trial. Participants considered this essential at the Court, in particular because of the specificity of the Court's proceedings in respect of the volume of work in the pre-trial phase and during the disclosure process.

34. The Court proposes that the core defence team be assigned for the duration of the proceedings. During phases in which counsel, associate counsel or other members of the team are not expected to be working full-time, they should be paid on an hourly basis for actual hours worked. The proposal therefore reflects a key change from the current system in which the core team is paid a monthly lump sum *regardless of the number of hours worked*.¹⁹ In the proposed system, the Court increases the number of expected "phases" of the judicial process (as illustrated below). This is to make the allocation of resources per phase more precise and to account for the likelihood of judicial activity, on the basis of the Court's experience to date. It also reduces the time-consuming process of requesting additional team resources throughout the proceedings, ensures continuity in the team composition, contributes to the efficient use of team resources by retaining members with knowledge of the case, and reduces judicial burden when decisions on requests for resources are appealed.

¹⁹ The rationale behind the lump sum system was to compensate peaks and valleys during the different phases of the proceedings while maintaining budgetary foreseeability: thus, counsel would be paid the same for phases in which there was less work knowing that in phases such as trial, they would be working longer hours.

Table 1: Phases and defence core team allocation under the current and proposed legal aid policies

<i>Phases in current legal aid policy</i>	<i>Current policy core team allocation</i>	<i>Phases in proposed legal aid policy</i>	<i>Proposed policy core team²⁰ allocation/hourly limits</i>	
Start of the proceedings	Counsel	Initial suspect representation, including initial appearance	Counsel Trial lawyer	Hourly, up to 150 hours per month Hourly, up to 150 hours per month
First appearance	Counsel Legal assistant Case manager	From initial appearance to confirmation decision	Counsel Associate counsel Trial lawyer Case manager	Hourly, up to 150 hours per month Hourly, 150 hours for the phase Hourly, up to 150 hours per month Hourly, up to 150 hours per month
Confirmation of charges proceedings finalized	Counsel Associate counsel Legal assistant Case manager	From confirmation decision to start of trial	Counsel Associate counsel Trial lawyer Case manager	Hourly, up to 150 hours per month Hourly, up to 150 hours per month Hourly, up to 150 hours per month Hourly, up to 150 hours per month
Confirmation to closing statements	Counsel Associate counsel Legal assistant Case manager	Start of trial to closing arguments	Counsel Associate counsel Trial lawyer Case manager	Monthly, 150 hours Monthly, 150 hours Monthly, 150 hours Monthly, 150 hours
Closing statements to trial judgment	Counsel	From closing argument to judgment Sentencing ²¹	Counsel Associate counsel Trial lawyer Case manager Counsel Associate counsel Trial lawyer Case manager	Shared with associate counsel: up to 75 hours per month Hourly, up to 75 hours per month Hourly, up to 75 hours per month 150 hours for the entire phase 150 hours for the entire phase 150 hours for the entire phase 150 hours for the entire phase
Trial judgment to appeals judgment	Counsel Legal assistant Case manager	Appeal, stage 1 (during appellate briefing period) Appeal, stage 2 (following the close of appellate briefing period and while awaiting appeal judgment)	Counsel Associate counsel Trial lawyer Case manager Counsel Associate counsel Trial lawyer Case manager	Hourly, up to 150 hours per month Hourly, up to 150 hours per month Hourly, up to 150 hours per month Hourly, up to 150 hours per month Counsel and associate counsel share 75 hours per month Trial lawyer and case manager share 75 hours per month
		Reparations ²²	Counsel Associate counsel Trial lawyer Case manager	Hourly, 50 hours per month N/A Hourly, 50 hours per month N/A

²⁰ Under the proposed legal aid policy, the title “legal assistant” would be replaced with the title “trial lawyer”, which more accurately reflects the function and title of the role, equivalent to a P-3 trial lawyer in the OTP.

²¹ The proposed policy anticipates that work on sentencing may overlap with work on reparations, depending on the case. The resource allocation here pertains to situations where work on sentencing does not overlap with other phases.

²² The proposed policy anticipates that activities related to the reparations phase may commence following a finding of guilt by a trial chamber. Work on reparations may overlap with work on sentencing or appeals, depending on the case. The resource allocation here pertains to a situation where the work on reparations does not overlap with other phases.

B. Core team: Victims

35. Under the current system, the core team consists of counsel, a case manager and a trial lawyer (currently referred to as a legal assistant).²³ However, the full core team is assigned only as of the reparations phase. During pre-trial proceedings, the external legal representative of victims (ELRV) is alone until the charges are confirmed. During the confirmation hearing and through trial, a case manager is added, and only during the reparations phase is the core team complete. The composition of the core team for victims under the Court's current policy is illustrated below.

36. In his Assessment, the Expert noted that the Court's developing jurisprudence and differing models of victim representation made it difficult to recommend a "one-size-fits-all" approach. The Expert noted, however, that the core team model utilized by the OPCV is illustrative of the basic requirements for providing effective and efficient representation.²⁴ He noted, for example, the need for both an in-Court team following the proceedings and a field-based team providing information to and receiving feedback from the clients.

37. In respect of victims' teams, most participants emphasized during the consultation process that ensuring maximum victim participation in the courtroom requires activities to take place primarily in the field, especially during the pre-trial and post-judgment phases. Participants also noted the heavy workload on victims' teams at the beginning of a case in terms of organizing, meeting with, ascertaining and reporting on their clients' views. Participants pointed out that experience so far has demonstrated that the reparations phase requires greater contribution from victims' teams in terms of the level of resources required.

38. The Court proposes that a core team for the ELRV be assigned for the duration of the proceedings. The core team would be composed of a court team (ELRV and trial lawyer or case manager) and a field team with two field assistants. This represents a change in the rationale for how the role of victims' representatives is seen in the proceedings, with more emphasis on the field and on communication with victims. During certain phases of the proceedings in which it is expected that the team members might not be required to work full-time, fees may be subject to a maximum ceiling of billable hours per month. As with the defence policy, the number of judicial phases for legal aid purposes has been increased to enable a more precise allocation based on the Court's experience to date.

²³ See note 20, *supra*.

²⁴ The Expert reported that, according to the OPCV, a "normal" team composition consists of the following: Pre-Trial: 1 Counsel; 1 Legal Assistant; 1 Case Manager; 1 Field Counsel (on a consultancy contract); Trial: 1 Counsel; 2 Legal Assistants; 1 Case Manager; 1 Field Counsel; Appeal: 1 Counsel; 1 Legal Assistant; 1 Case Manager; 1 Field Counsel; Reparations: 1 Counsel; 2 Legal Assistants; 1 Case Manager; 1 Field Counsel.

Table 2: Comparison of current versus proposed core teams (victims)

<i>Phases in current legal aid policy</i>	<i>Current policy core team allocation</i>	<i>Phases in proposed legal aid policy</i>	<i>Proposed policy core team²⁵ allocation/hourly limits</i>			
Start of the proceedings to start of confirmation hearing	Counsel Case manager	Appointment to confirmation of charges decision	ELRV	Hourly, up to 100 hours per month		
			Trial lawyer or Case manager	Hourly, up to 150 hours per month		
			Field assistant 1	Monthly, 150 hours per month		
			Field assistant 2	Monthly, 150 hours per month		
Start of confirmation hearing to trial	Counsel Case manager	From confirmation decision to start of trial	ELRV	Hourly, up to 100 hours per month		
			Trial lawyer or Case manager	Hourly, 150 hours for the phase		
			Field assistant 1	Monthly, 150 hours per month		
			Field assistant 2	Monthly, 150 hours per month		
Trial to judgment	Counsel Case manager	From start of trial to closing arguments	ELRV	Monthly, 150 hours per month		
			Trial lawyer or Case manager	Monthly, 150 hours per month		
		From closing arguments to judgment	Field assistant 1	Monthly, 150 hours per month		
			Field assistant 2	Monthly, up to 150 hours per month		
		ELRV	Hourly, up to 75 hours per month			
		Trial lawyer or Case manager	Hourly, up to 75 hours per month			
		Field assistant 1	Monthly, 75 hours per month			
		Field assistant 2	Monthly, 75 hours per month			
		Judgment to reparations	Counsel Case manager	Sentencing ²⁶	ELRV	Hourly, up to 75 hours per month
					Trial lawyer or Case manager	Hourly, up to 75 hours per month
Appeal stage 1	Field assistant 1			Monthly, 75 hours per month		
	Field assistant 2			Monthly, 75 hours per month		
Appeal stage 2	ELRV			Hourly, up to 75 hours per month		
	Trial lawyer or Case manager			Hourly, up to 75 hours per month		
Field assistant 1	Monthly, 75 hours per month					
Field assistant 2	Monthly, 75 hours per month					
ELRV	Hourly, up to 50 hours per month					
Trial lawyer or Case manager	Hourly, up to 50 hours per month					
Field assistant 1	Monthly, 75 hours per month					
Field assistant 2	Monthly, 75 hours per month					
Reparations phase	Counsel Legal Assistant Case manager	Reparations proceedings to reparations order	ELRV	Monthly, 150 hours per month		
			Trial lawyer or Case manager	Monthly, 150 hours per month		
			Field assistant 1	Monthly, 150 hours per month		
			Field assistant 2	Monthly, 150 hours per month		
			Field assistant 2	Monthly, 150 hours per month		

²⁵ See note 20, *supra*.

²⁶ The proposed policy anticipates that work on sentencing may overlap with work on reparations, depending on the case. The resource allocation here pertains to situations where work on sentencing does not overlap with other phases.

C. Investigation budget (Defence)

39. Under the current policy, each defence team is provided with a basic investigation budget of €73,006 for the entirety of the case,²⁷ intended to cover 90 days of investigation. The purpose of the investigation budget is to enable an effective defence by identifying potential witnesses or acquiring relevant evidence for an average of 30 OTP witnesses.²⁸ Under the current system, the upper limit of the investigation budget may be increased upon request for additional resources (see below), according to conditions set out in the policy. For example, for each extra witness called by the OTP, the equivalent of half-days can be added to the investigation budget. Travel costs can also be increased on the basis of additional investigation days.

40. In his assessment of the Court's current policy, the Expert observed that the basic investigation budget of €73,006 for the entire case had proven to be an arbitrary figure that was reported by Court staff and counsel alike to be frequently inadequate.

Table 3 Investigation expenditure totals by team²⁹

	<i>Lubanga</i>	<i>Katanga</i>	<i>Ngudjolo</i>	<i>Al Mahdi</i> ³⁰
Total expenditure by case on investigations	€58,003	€176,410	€116,461	€16,732

41. This meant that Court staff and counsel spent considerable time assessing whether additional investigation resources were necessary and reasonable. The Expert recommended a system that both reduced the administrative burden on the Court and ensured that the available funds were directed as much as possible towards the substantive work of defence teams. The Expert recommended redefining the investigation budget. He noted that under the current system the budget includes the defence team's personal expenses, explained further below, but did not include a budget for the team to hire necessary experts. He recommended increasing the budgetary limit for investigations in accordance with a complexity assessment based on objective criteria and on the basis of the Court's experience to date.

42. During the consultation process, there was a general consensus on the need to increase the standard budget ceiling for defence investigations and the need to increase support for defence teams in hiring professional and well-trained investigators.

43. The Court proposes that a core "investigation and expert budget" of €150,000 be made available per team per case. The upper limit more closely reflects the Court's experience in terms of resource allocation for investigations, but reduces administrative burden by making this limit closer to average expenditure. The Court also proposes separating the investigation and expert budget from the team's personal expenses such that only expenses related to the substance of the defence would be included in this budget line. The investigation and expert budget would therefore include investigations in the situation country or third countries, experts, and translation. Personal expenses would be covered under a different and separate budget line (see below). The budget which is held in trust by the Court is managed by counsel. Counsel would be obligated to ensure that costs incurred are both reasonable and necessary by submitting an investigation plan which includes an overview of investigative missions, experts and translations required.³¹ Once the investigation plan is approved by the Registrar, counsel would be permitted to incur the

²⁷ The amount of €73,006 was determined as follows: 1 Professional Investigator, with a cost of €26,895; 1 Assistant Investigator/Resource Person, with a cost of €12,141, €20,970 for the DSA and €13,000 for travel costs.

²⁸ The current budget covers, e.g. the hourly fees of the professional investigator(s) or resource person(s) and travel expenses and DSA for them and the team members (i.e. personal expenses) in connection with the investigation work.

²⁹ Under the current policy, the investigation budget may be increased in response to a successful request for additional means made pursuant to regulation 83(3) of the RoC where justified by relevant factors in the case and in accordance with paragraph 49 of the current legal aid policy. The upper limit of €73,006 was established in ICC-ASP/12/3 and approved by the Assembly at its twelfth session.

³⁰ In the *Al Mahdi* case, there was no trial because the Chamber accepted the accused's guilty plea.

³¹ In the proposed policy, when a proposed task and its projected costs in the investigation plan are approved, counsel may incur the costs to perform that task without further scrutiny, so long as the costs remain within the approved budget for that task. Proof of all such expenditure must be retained by counsel and stored in the legal aid management system.

costs to perform the tasks without individual approval, so long as the costs remain within the approved budget and are covered under the investigation plan. Any funds requested over and above the core budget would be subject to greater scrutiny, must be necessary and reasonable, and approved depending on, in part, how efficiently the defence team has administered its core investigation and expert budget.

D. Field budget (Victims)

44. Under the current policy, each ELRV team receives an investigation budget for its field activities, with an upper limit of €43,752 for the entirety of the case.³² Assignment of a field assistant “paid on an hourly basis up to a maximum of €4,047 per month” is deducted from the team’s investigation budget. The purpose of the investigation budget is to facilitate the team’s communication with the victims and to ensure that counsel can therefore fully represent the views and concerns of the victims to the Court.

45. In his Assessment, the Expert found that in practice, this investigation budget has often proved insufficient. The Expert recommended renaming the budget the “field budget” to more properly reflect its purpose. The upper limit of the field budget would be decided on a case-by-case basis for the ELRV teams per case and per stage to cover the team’s field expenses. In the view of the Expert, the ELRV could then plan with better accuracy the composition of his or her team (including the workload and fees) as well as the field expenses. Allocation of the field budget would be subject to the victims’ representatives’ submission to the Court of a detailed action plan at the start of each stage which outlines the projected work and costs for (i) the headquarters (HQ) team, (ii) the field team, and (iii) field expenses. Establishing an overall budget – as opposed to establishing the resources for victims’ teams piecemeal – would lessen the administrative burden on the Court and victims’ teams, reduce disputes over resources, and add to the efficiency and effectiveness of the representation.

46. During the consultation process, participants supported the idea of establishing a field budget to allow victims’ representatives to adequately plan and organize case strategy in accordance with their available resources. Participants also noted the difficulty in forward planning the victims’ teams’ activities without knowing exactly what was covered by their budget. Participants noted that having a transparent list of what was covered and a clear procedure for expenditure of approved costs would enable better planning and efficiency of the team’s work. They considered that it would reduce the time spent on exchanges with Court staff justifying each expenditure.

47. The Court proposes establishing a field budget for ELRV teams to cover the costs related to its fieldwork, as well as to translations and experts. Because the challenges associated with ensuring adequate participation of victims through fieldwork vary considerably from case to case – depending on the victims’ geographical location and distribution, the political and social context of the case, languages spoken, etc. – the upper limit allocation for a field budget would reflect the needs of the particular case. Finally, the Court proposes designating “standard expenses” for which no pre-approval would be necessary. This would increase the efficiency and administration of the legal aid policy and ensure that team resources are spent on the substance of representation rather than on needless administration.

³² This budget is established on the basis of the equivalent of 60 days’ fees for one professional investigator (corresponding to an OTP P-4 level investigator), 60 days’ DSA and up to €10,000 in travel costs. The investigation budget is held in trust by the Registry for use by legal representatives.

E. Additional resources

48. Under the current policy, additional resources over and above the core team and each budget line may be granted depending on the nature of the case, at any stage in the proceedings.

49. To assess a request for additional team members, a point system called Full Time Equivalent (FTE) is used, such that for each FTE accumulated, the team is entitled to recruit one additional trial lawyer; and for every three FTE, the team is entitled to recruit one additional associate counsel. The system is provided in the Court's existing single policy document, as follows:

“(a) For each count submitted by the Prosecutor: 0.025 FTE (1 FTE = 40 counts);

(b) For each person submitting an application for participation in the proceedings: 0.005 FTE (1 FTE = 200 persons);

(c) For each victim or group of victims whose application for participation in the case is accepted by the Chamber: 0.02 FTE (1 FTE = 50 victims);

(d) For every 3000 pages added to the case file by other participants: 0.1 FTE (1 FTE = 30.000 pages); and

(e) For every 3000 pages submitted by the Prosecutor: 0.1 FTE (1 FTE = 30.000 pages).

70. A team's accumulation of FTE would entitle it to recruit additional staff in accordance with the following scale:

(a) For each FTE: One legal assistant; and

(b) For each 3 FTE: One associate counsel.”

Table 4: Current core teams in the trial phase with additional resources per team 2014-2017

<i>Gbagbo Defence Team</i>	<i>Blé Goudé Defence Team</i>	<i>Ntaganda Defence Team</i>	<i>Ongwen Defence Team</i>
Counsel	Counsel	Counsel	Counsel
Asst. counsel	Asst. counsel	Asst. counsel	Asst. counsel
Legal assistant	Legal assistant	Legal assistant	Legal assistant
Case manager	Case manager	Case manager	Case manager
Add'l resources:	Add'l resources:	Add'l resources:	Add'l resources:
Legal assistant (L2)	Legal assistant (L2)	Asst. counsel	Asst. counsel
Legal assistant (L1)	Legal assistant (L1)	Legal assistant (L2)	Legal assistant
Legal assistant (L1)	Case manager	Legal assistant (L1)	Case manager
		Case manager	

50. Requests for an increase in the team's investigation or field budget are made in writing and discussed with the Registry, which provides its decision also in writing. If a request for either additional team resources or for additional budget is denied by the Registrar, counsel may request a second review by the Registrar. Thereafter, counsel may appeal the decision before the relevant Chamber, which considers the matter and renders a decision in the record of the case.

51. In his assessment of the Court's current policy, the Expert also recommended that the current system for augmenting the investigation budget be developed further to take into account the likely complexities of defence investigations. Moreover, the Expert reported that both Court staff and counsel felt that the FTE system for assessing the need for extra resources was overly complex, time-consuming and difficult to understand. In addition, the FTE system, which relies on quantitative criteria only, does not properly account for the qualitative aspects of a criminal process. The Expert noted, for example,

that one additional Prosecution witness might require an hour, a day, or a week of extra work. The Expert recommended the development of a transparent system to determine the “complexity” of the case once, rather than throughout the trial. In the Expert’s estimation, this would reduce the administrative burden on both Court staff and counsel, provide more transparency in the assignment of resources as levels will be set according to complexity, rather than negotiated individually, and would enable teams to plan their work better as the resource levels per stage will be known well in advance.

52. During the consultation process, there was general consensus with the Expert that a “one-budget-for-all” approach is incompatible with the vast diversity in cases at the Court. However, participants questioned whether the Court’s cases were too diverse to allow for a standard formula to assess a case’s complexity *ab initio*. Some considered that a complexity formula could be employed for the investigations budget or, for example, during specific phases of a case. In particular, participants suggested that there must be provisions in any legal aid system to account for unforeseeable potential increases in workload which could not have been budgeted for in advance. In the light of this, the discussion focused on the need for ensuring flexibility in the legal aid system.

53. The Court proposes discontinuing the FTE system and replacing it with a more efficient and fit-for-purpose assessment for additional resources. In order to ensure the system is flexible enough to adapt to dynamic proceedings and that resources are directed as much as possible towards the substantive work of the teams rather than to administrative requests, the Court proposes that additional resources only be requested at specific phases of the proceedings (based on the Court’s experience to date) and conferred only for the duration of that phase. Under the proposed system, legal teams may be granted additional resources over and above the standard core team according to the complexity level assigned to each phase, under procedures established by the Registrar. In order to make an informed decision, the proposed policy envisages that the Registrar would receive submissions on the complexity of the phase and would be required to consider any submissions from legal counsel. The Registrar may also seek advice from legal aid commissioners, pursuant to regulation 136 of the RoR or engage an external expert to provide an opinion, as required.

54. In respect of legal representation for victims, the Registrar would determine the phase complexity level within one month after the request by the ELRV. The level may be revised (upward or downward) if there has been a material change in circumstances seriously affecting the workload of the ELRV team, including significant disclosure of material by the Prosecution. To ensure that the legal aid system allocates resources on the basis of objective requirements, the phase complexity level would be based on qualitative and quantitative criteria under procedures determined by the Registrar. The additional resources allocated are as follows:

Table 5: Additional resources to the core defence team depending on case complexity

<i>Phase complexity level</i>	<i>Additional resources</i>
1	None
2	One additional trial lawyer level 1
3	One additional trial lawyer level 2
4	Two additional trial lawyers level 2

Table 6: Additional resources to the ELRV core team depending on case complexity

<i>Phase complexity level</i>	<i>Additional resources</i>
1	None
2	<p><i>During all phases:</i></p> <p>One additional trial lawyer level 1 or case manager</p> <p>or</p> <p>Full-time hours for the court team during phases where members are normally limited by hours</p>
3	<p><i>During trial and reparations:</i></p> <p>One additional trial lawyer 3</p> <p><i>All other phases:</i></p> <p>Full-time hours for the court team plus one additional trial lawyer level 1 or case manager</p>

F. Administration of the legal aid system

55. Administratively, the Court's current legal aid system is labour intensive. The teams' budgets for investigations and personal expenses are held in trust by the Registry and each proposed expenditure is submitted to, evaluated, individually itemized and, once approved, deducted by Court staff. To be reimbursed for professional charges, each request for reimbursement, regardless of the amount, requires proof that the expenses were incurred and is submitted to, evaluated, individually itemized and reimbursed by Court staff. Each resource request over and above the core team requires an evaluation under a point system called Full Time Equivalent (FTE), such that for each FTE accumulated, the team is entitled to recruit one additional trial lawyer; and for each three FTE, the team is entitled to recruit one additional associate counsel. Finally, for each decision taken by the Registry in respect of team resources or budget allocation, counsel may request review of the decision by the Registrar, and following that, review of the decision by the Chamber. The decision-making process is laden with both administrative and judicial burden.

56. In his Assessment, the Expert concluded that inefficiencies in administration resulted in resource implications both for the Court and the legal teams, which in his estimation added little to no value in respect of financial monitoring. The Expert noted that the monitoring system is still paper-based, with Registry staff manually inputting figures into a database. The Expert was of the view that, while the Court must be in a position to account for spending on legal aid, and counsel must expect to justify their expenditures and accept financial monitoring by the Registry, this should not mean that Court staff and the legal teams should be burdened by administrative demands that add little or nothing to the financial accountability process. Finally, he observed that, unlike other comparable international tribunals, there are no written legal services contracts between the members of the legal teams and the Court equivalent to those used at other international tribunals detailing the terms of their engagement and their mutual obligations under the legal aid system.

57. During the consultation process, participants largely supported the Expert's recommended measures to reduce the administrative burden of the legal aid system. They criticized the bureaucratic nature of the system and the burdens imposed on seeking remuneration and reimbursement of expenses. Participants supported the idea of adopting different monitoring procedures based on the different phases of the proceedings, i.e. requiring action plans for the pre-trial phase, but not while a legal team is appearing daily in trial. Participants supported the idea of introducing a legal services contract to provide greater certainty on the terms of engagement and to facilitate the ability of counsel and support staff to obtain rental contracts and open bank accounts in the Netherlands.

58. For these reasons, the Court proposes a number of adjustments relating to the administration of the legal aid system. While a number of the proposals would result in a reduction of *unnecessary* bureaucracy (e.g. moving to automatic payments for certain categories of expenses), the new system also introduces enhanced financial controls (e.g.

moving to remuneration based on actual hours worked, rather than a lump sum during certain phases of the case). These include, *inter alia*:

(a) Ensuring that standard allocations of resources for the core team and investigation/field budget are fit-for-purpose at the outset rather than making the provision of necessary resources reliant on time-consuming requests that increase administrative and judicial burden;

(b) Replacing the complicated FTE system with a streamlined system based on an assessment of the complexity of the phase of the case; resources would be allocated according to both a quantitative and qualitative assessment, but would be available only during specific phases and only for the duration of the phase;

(c) Replacing the current paper-based system of administration with an electronic system that would allow each legal team to monitor and submit its own billable hours and monthly time sheets, to track their budget expenditures and remaining funds, and to receive itemized reimbursements and pay statements;

(d) Introducing a standard legal services contract;

(e) As explained below, remunerating some expenses automatically (such as professional charges and personal expenses) or introducing a one-time lump sum.

G. Remuneration

59. The basic principle for determining the appropriate level of fees for defence and victim team members is that counsel, trial lawyers and case managers should be paid at a rate that is, to the extent possible, equivalent to their counterparts in the OTP.³³ Counsel fees should therefore match the salary of a P-5 prosecutor, an associate counsel would match a P-4, a trial lawyer would match a P-3, and a case manager a P-1/P-2. This reflects the need to ensure a fair and effective defence by attracting quality lawyers and preserving the principle of equity with counterparts in the OTP. This also reflects the notion that equivalent remuneration attracts counsel of equivalent experience and skill, thereby improving overall the quality and efficiency of Court proceedings.

60. Determining what is equivalent remuneration to the salary, benefits and entitlements of a P-5, P-4, P-3 or P-1/P-2 is at the heart of the debate about whether the current system of legal aid remuneration is adequate. The compensation package for Court staff is determined in accordance with United Nations (UN) Common System standards by the International Civil Service Commission, with approval by the UN General Assembly. Staff of the UN common system organizations are provided with various benefits (e.g. pension and health insurance contributions) and allowances (rental subsidy, education grant, settling-in grant, etc.) as part of the conditions of service. These benefits and entitlements are designed, in part, to provide a system of parity with the situation of national civil servants, in order to attract staff of diverse geographical backgrounds for employment with an international organization. In other words, the system approved by the UN General Assembly aims to mitigate any advantage to nationals of the host state.

61. The Expert thus reported in his Assessment that despite applying the same principle of equivalence, the fees for external counsel at comparable international tribunals vary significantly from court to court. This is partly because of the various “add-ons” that are applied to augment the basic salary, such as expenses, professional uplift and tax reimbursement. This considerable difference in fees exists despite the fact that (i) the salaries of prosecutors between courts are the same, and (ii) the compensation package for UN staff is decided by the UN General Assembly. The Expert also noted that the fees for external counsel and their teams at the Court are considerably lower than at comparable international tribunals.

³³ Registry’s single policy document on the Court’s legal aid system, ICC-ASP/12/3, para. 79.

62. Under the current policy, external counsel and those assisting them receive remuneration for essentially three categories: (1) fees, (2) reimbursement for professional charges, and (3) reimbursement for personal expenses. Fees are calculated by reference to the salary equivalent of counterparts in the OTP. Reimbursements for professional charges compensate for professional expenses related to representation: e.g. Chambers' rent, law firm contributions, bar council fees, pensions, and tax. Reimbursements for personal expenses, discussed below, compensate for costs of travelling to and from counsel's primary place of business and The Hague.

H. Fees and compensation for professional charges

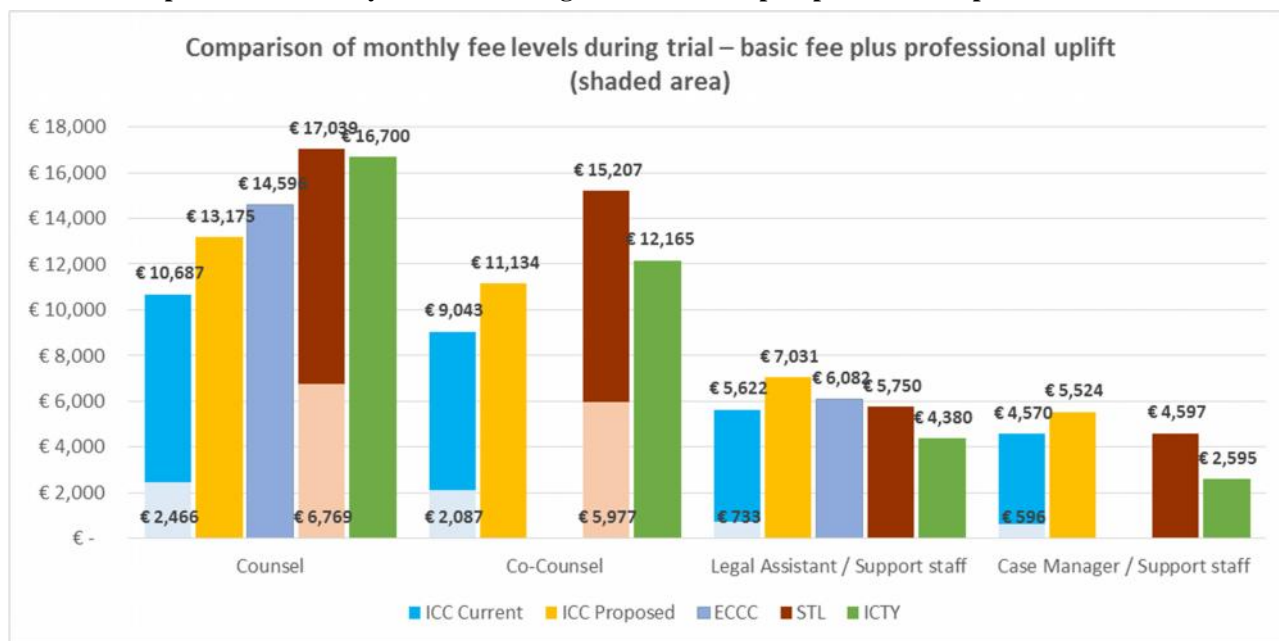
63. Following the Decision of the Bureau on Legal Aid in 2012, remuneration for counsel was reduced by almost 25 per cent. Reductions were justified on the ground that payment based on gross salary equivalents in the OTP was being duplicated by granting compensation for professional charges. Thus, payment was adjusted on the basis of net salary equivalents of counterparts in the OTP. The system was also modified to ensure that only professional charges³⁴ actually incurred would be reimbursed upon verification, rather than the uplift for professional charges being provided automatically. Before 2012, the professional charges reimbursement was a maximum of 40 per cent for counsel and associate counsel and 20 per cent for trial lawyers and case managers. From 2012, this was reduced to a maximum of 30 per cent and 15 per cent, respectively.

64. In his Assessment, the Expert acknowledged that it was difficult to measure the exact financial value of the combined salary, benefits and entitlements of an equivalent OTP staff member. However, the Expert observed that the professional uplift provided, in addition to the basic fee, was insufficient to compensate for (i) staff entitlements and benefits, (ii) the costs of being self-employed, and (iii) income tax. In addition, he observed that the process of calculating reimbursements for professional charges for each external defence and victims' team member was time consuming and could lead to an unfair result.³⁵ In his Assessment, "all independent lawyers must manage their practice and make provision to address the financial insecurity of being self-employed. That cost should be compensated (in part) to create equivalence with the Prosecution salary package. But it is neither sensible nor fair nor efficient to compensate individual lawyers at different rates according to the actual costs incurred." The Expert therefore recommended that fee levels be adjusted with the aim of achieving a level that is reasonably equivalent to the salary package of their counterparts in the Prosecution. He recommended that team members with the same role should automatically receive the same reimbursement for professional charges rather than having the uplift determined on a reimbursable basis, noting both the fairness in doing so and the reduction in administrative burden for the Court. He also recommended that the Court introduce minimum fee levels for case managers and trial lawyers and that the Court try to reach an agreement with the Host State to exempt external lawyers and consultants from paying tax on their Court income.

65. When comparing the Court with the other tribunals, the largest disparity was observed in the fees of counsel and co-counsel, while the fees of other team members are more balanced.

³⁴ Reimbursements for professional charges are meant to cover expenses directly related to representation, including bar fees, Chambers' fees, office expenses, pension, health care and taxes.

³⁵ The unfairness lies in the requirement that the counsel and his/her team provide proof of expenditure in order to receive reimbursement, even if the expenditure later derives a benefit. The Expert explained: "For example, contributions to a pension scheme do not disappear, rather, the money is paid back to the lawyer at a later date; the percentage of fee paid by a French or Dutch lawyer into their law firm, (generally) allows them to share in the end of year profits; the 'rent' paid by barristers to their chambers allows them to use the office and to be 'clerked', etc. Compensating lawyers for expenses that already derive a benefit is unfair on the lawyers who choose not to make those professional investments."

Table 7: Comparison of monthly fee levels during trial – basic fee plus professional uplift³⁶

66. During the consultation process, participants reached a broad consensus in support of the Expert’s findings on the need to adjust fee levels to ensure greater equivalence with counterparts in the OTP and at comparable international courts and tribunals, for the reasons cited by the Expert. Some noted that a greater disparity in equivalence exists in the remuneration of junior staff, i.e. trial lawyers and case managers. Participants considered that the “critical underfunding” of defence and victims’ teams at the Court would be best addressed by adjusting remuneration levels within the range provided by the other international criminal tribunals. In addition, participants formulated a number of proposals specific to the issue of remuneration, i.e. to engage in discussions with the host State for tax-free status for defence and victims’ teams; to move towards a lump-sum system rather than a system dependent on administration and verification; or to remunerate junior members of legal teams with the same entitlements as staff of the Court, in a manner similar to the system at the STL. Of particular concern was the current system for providing compensation for professional charges. Participants suggested establishing a system of payment made automatically and on a monthly basis, instead of upon request and with the provision of supporting documentation, at the end of the year.

67. The Court proposes that the fee levels for counsel, co-counsel, case managers, trial lawyers and field assistants under the 2012 policy be adjusted to ensure equality of arms and greater equivalence with counterparts in the OTP. The proposed remuneration scheme would be based on three components: (i) fees, established by the net base salary plus post adjustment of counterparts in the OTP, (ii) an additional 5 or 10 per cent (case managers/assistants and counsel/co-counsel, respectively) compensation for benefits and entitlements, such as health insurance and pension contributions, and (iii) an additional 15 or 30 per cent (case managers/assistants and counsel/ co-counsel, respectively) compensation for a proportion of professional costs and income tax. These proposals aim to ensure that resources are best directed towards the substantive work of the external legal

³⁶ In the table, the shaded area reflects the professional uplift allocated at the particular court or tribunal. Under the proposal, this would be incorporated into the fees, so no shaded area is apparent. The basic fee for counsel at the ECCC was obtained assuming that the professional uplift had been increased by 40 per cent. Since the ICTY applies a lump sum per stage system (except for appeals), certain assumptions had to be applied to allow for a reasonable comparison. First, the fees for counsel and co-counsel assume that they are paid the equivalent of the highest hourly rate at 150 hours per month. For legal assistants and case managers, it was assumed that their hourly rates are the highest and lowest hourly rate paid to support staff – €29.20 and €17.30, respectively – at 150 hours per month. In practice, lead counsel can decide what fee to pay support staff and, therefore, how much of the lump sum he or she takes as a fee. The basic fees for staff levels P-1 to P-3 of the STL were obtained from the UN Salary Rates, using the net single fee at the highest step. For counsel and co-counsel, the maximum hourly rates were obtained directly from the legal aid policy. The uplift was calculated using a professional uplift of 20 per cent and 40 per cent of tax uplift.

teams rather than administration of the legal aid system, and to ensure the Court will apportion compensation for benefits, entitlements and professional charges automatically, rather than requiring an item-by-item reimbursement.

I. Personal expenses

68. Under the Court's current policy, the teams' personal expenses are reimbursed through an expenses budget that provides a flat fixed-rate monthly allowance to cover the expenses of each legal team. The monthly allotment is €3,000 per team and unused amounts may be carried over to the following months. The Court individually approves each expense and deducts these from the monthly allotment. The expenses budget, which is separate from the investigation budget, is designed to cover two categories of expenses: miscellaneous and travel. Miscellaneous is defined as office supplies, translation costs, experts and other expenses related to the team's mandate before the Court. The budget also covers the transportation and accommodation expenses incurred by counsel and associate counsel (only) in travelling to and from their primary residence/place of business to The Hague in lieu of the DSA and terminal expenses.

69. In his Assessment, the Expert observed that, under the current system, costs related to the substance of the defence are divided between the investigation budget and the expenses budget, but that the latter also covers the personal expenses of counsel. He considered that the legal aid system would benefit from redefining the investigation budget and the expenses budget to create a clean split between: (i) expenses related to the substance of the defence (primarily field investigations, experts, translation), and (ii) expenses related to the purely personal expenses of defence team members (such as travel and accommodation unrelated to field investigations). The separation would prevent counsel from having to make what he deemed the "unfortunate" choice of whether to pay for personal accommodation versus an expert or translation. He also recommended that, like other similar international tribunals, the monthly amount should be added automatically rather than having to be pre-approved or proof being required for every expense.

70. As explained above, the Court proposes redefining the investigation budget (defence), field budget (victims) and personal expenses budget. The Court proposes that the personal expenses budget, which is designed to compensate core team members for case-related personal costs normally covered through the DSA – such as accommodation, food, local transport, visas, and airport costs – be provided on an individual basis, rather than allocated to the team as a whole. However, from the day the core team member relocates (as defined by the Court's Human Resources Section) to The Hague area, the fixed monthly amount will cease and be replaced by a one-off settling-in grant. This reflects a reduction in administration, plus potential savings from eliminating the monthly allocation.

J. Article 70 cases

71. Under the current legal aid system, there is no specific policy in place in respect of cases relating to offences under article 70 of the Statute (offences against the administration of justice).

72. The Expert observed that since there have been few article 70 cases to date and they have the potential to vary considerably in terms of size and complexity, the Court should maintain a flexible approach in respect of resources for legal aid.

73. During the consultation process, it was noted that experience to date in cases arising under article 70 of the Statute has demonstrated that these cases may involve multiple accused or rely on complex evidence, making them potentially as resource intensive as a case arising under article 5 of the Statute. Nevertheless, it was considered that fewer resources could be allocated at the outset for a case arising under article 70.

74. The Court proposes that the legal aid policy specify that the allocation of resources for article 70 cases be decided on a case-by-case basis, in accordance with procedures set out separately in an annex to the legal aid policy. In principle, the cost of legal aid for an

article 70 case should not exceed 50 per cent of the costs for a standard team for a case arising under article 5 of the Statute.

K. Indigence

75. Based on its experience to date, and concurrent with the adoption of any adjustments to the legal aid system, the Court proposes to streamline its process in relation to the assessment of indigence of suspects and accused persons.

76. In respect of indigence, the Court proposes applying a presumption of indigence for victim applicants. In the Court's experience to date, in almost all cases that come before Court, the process of assessing victims' indigence is likely to cost considerably more than could be saved by requiring non-indigent victims to contribute their share to the cost of representation. Under the proposal, if the Registrar has a reasonable basis to believe that a victim is not indigent, the Registrar may request the victim to provide financial information in order to make an indigence assessment, pursuant to regulation 113(2) of the RoR. If the Registrar determines that a victim is not indigent, the victim may be required to contribute to the cost of the legal representation.

V. Proposed steps forward

77. The Court is mindful that a proper assessment of the legal aid system requires the principles of equality of arms, objectivity, transparency, continuity and economy to be met in a balanced and appropriate manner. Following its submission of proposed adjustments, the Court envisages a thorough and facilitated consultation process with States Parties in 2018. The purpose of the consultation is to discuss the Court's proposals with the goal of ensuring that the Court employs the best available methods to increase the effectiveness of legal representation, balance principles of justice and effective use of resources, as well as produce concrete proposals for the Assembly's consideration in 2018. In addition to the consultation process, the Registrar anticipates that the Court will receive additional feedback from civil society, practitioners and bar associations on the proposed draft legal aid policies after their submission to the Assembly.

78. The Court envisages that a facilitated consultation process in 2018 will be informed by any recommendations from the Committee at its thirtieth session on the financial implications of the Court's submitted proposals.

79. The aim is that new legal aid policies resulting from a thorough discussion with all stakeholders will be submitted to the Assembly for adoption, as appropriate, at its seventeenth session with a view to starting implementation, if any, in 2019, in the context of the approved 2019 budget. The Court expects that it will be possible to implement any proposed adjustments in 2019 within the envelope of the legal aid budget approved for 2018.

80. Should the proposed legal aid system be approved by the Assembly for implementation in 2019, the Court proposes carefully monitoring the system's implementation and providing a detailed report thereon to the Assembly at its eighteenth session, following receipt of which the States may then decide whether to maintain the proposed system.
