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**Report on the operation of the Court's legal aid system and proposals  
for its amendment\***

**I. Introduction**

1. The Registry submitted the legal aid system proposed by the Court to the Committee on Budget and Finance (“the Committee”) at the latter’s third session in August 2004.<sup>1</sup> The Committee considered issues related to the legal aid system at most of its working meetings, recognizing the importance of guaranteeing appropriate assistance for indigent persons entitled to legal aid paid by the Court, while exercising controls in order to avoid excessive or unnecessary expenditure. The Committee was unable to examine the report at its third session, and requested the Court “to provide additional information at its next session on how the Court intends to determine indigence for the purposes of legal aid”.<sup>2</sup>

2. On 22 February 2005, the Registry submitted the Report on the principles and criteria for the determination of indigence for the purposes of legal aid,<sup>3</sup> which stated the principles applicable to the evaluation of statements of persons declaring themselves to be indigent. At its fourth session, the Committee considered this report and noted that the provision of legal aid was an area of considerable risk for the Court. It submitted a number of recommendations to the Court.<sup>4</sup>

3. The Registry, sharing the Committee’s concern about the need to exercise great prudence in the management of the funds allocated to legal aid, took note of the Committee’s recommendations and reconsidered a number of issues, which will be finalized when the financial investigator starts work. It should be pointed out that the only case in which the principles relating to indigence have yet been applied is that of Mr. Thomas Lubanga Dyilo and a minor victim. In respect of ad hoc<sup>5</sup> counsel, whose task is to represent and protect the general interests of the defence, the absence of a specific recipient of the assistance makes it

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\* Previously issued as ICC-ASP/6/CBF.1/1 and Add.1.

<sup>1</sup> 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).

<sup>2</sup> Report of the Committee on Budget and Finance, 3<sup>rd</sup> session (2-6 August 2004), ICC-ASP/3/18, of 13 August 2004, para. 116.

<sup>3</sup> ICC-ASP/4/CBF.1/2, of 21 February 2005.

<sup>4</sup> Report of the Committee on Budget and Finance on the work of its fourth session, ICC-ASP/4/CBF.1/2, of 22 February 2005, paras. 47 et seq., particularly para. 50.

<sup>5</sup> See para. 7 below.

impossible to evaluate in advance a request for the granting of legal aid paid by the Court. In respect of duty counsel,<sup>6</sup> the Registry plans to conduct investigations of such requests, taking into account the cost and urgency of interventions<sup>7</sup> and the financial implications of investigations.

4. In respect of assessment of the property of the person claiming to be indigent, an issue which the Committee had considered, the Registry proposes amendments, described in annex I below, which take account of the Committee's concerns.

5. The Registry subsequently submitted to the Committee the Report by the Registry on the formal procedure for assessment and oversight of the Court's system of legal assistance,<sup>8</sup> and the Committee took note of the report. Progress has been made in the introduction of the automated, computerized oversight system referred to in paragraph 5, but its integration into enterprise resource planning (ERP) in the SAP system has delayed its full introduction, which is now scheduled for September 2007. Pending the introduction of this automated, computerized oversight system, the Registry monitors the bills submitted by counsel and maintains a table which evaluates the performance of the system in relation to the defence team.

6. Finally, at its seventh session, the Committee expressed the desire to review the operation of the legal aid programme since its earlier consideration of the issue.<sup>9</sup> This report evaluates the operation of the programme and makes suggestions for amendments intended to improve its operation while ensuring that the criteria of equality of arms, objectivity, transparency, continuity and economy are met in a balanced and judicious manner.

## II. Operation of the system of legal aid paid by the Court

7. The Registry has operated the system of legal aid paid by the Court<sup>10</sup> (the "existing system") to date as follows:

- assignment by the Chamber of counsel to represent the general interests of the defence pursuant to article 56, paragraph 2 (d), ("ad hoc counsel")
- assistance provided pursuant to article 55, paragraph 2 (under which no trial has yet taken place) when (a) persons have been questioned by the Prosecutor ("duty counsel") and (b) in the case of a person referred to the Court, Mr. Thomas Lubanga Dyilo, and
- representation of a victim, pursuant to article 68, paragraph 3, for the confirmation of charges hearing in the case *The Prosecutor v. Thomas Lubanga Dyilo*.<sup>11</sup>

### Ad hoc counsel

8. The relevant Chambers, or the Registrar acting on the Chambers' instructions, have appointed four ad hoc counsel, two in respect of the situation in the Democratic Republic of

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<sup>6</sup> See para. 7 below.

<sup>7</sup> An average payment of € 848.87 was assumed for each appointment, since some duty counsel were obliged to intervene a number of times during the same appointment.

<sup>8</sup> ICC-ASP/4/CBF.2/3, of 30 August 2005.

<sup>9</sup> Report of the Committee on Budget and Finance on the work of its seventh session, ICC-ASP/5/23, para. 130.

<sup>10</sup> ICC-ASP/3/16, updated by ICC-ASP/5/INF.1.

<sup>11</sup> Case ICC-01/04-01/06.

Congo, one for the case of *The Prosecutor v. Kony et al.* in respect of the situation in Uganda, and one in respect of the situation in Darfur.

9. Ad hoc counsel have been paid under the legal aid system at the same rates as duty counsels.<sup>12</sup>

### **Assistance pursuant to article 55, paragraph 2**

#### *Duty counsel*

10. The Registry appointed four duty counsel in 2005 and 12 duty counsel in 2006 to provide appropriate assistance to persons questioned by the Prosecutor who wished to exercise their right to assistance from a counsel. Experience has shown that requests for assistance are unpredictable and occur sporadically, and appropriate provision has been made in the administrative mechanism relating to this assistance.

11. As for the financial aspect,<sup>13</sup> the Registry has paid travel costs (transport + daily subsistence allowance) and counsel's fees, in accordance with the table below:

#### **FEES PAYABLE TO A DUTY OR AD HOC COUNSEL**

- €100 per hour \*, with an upper limit of
- €700 per day, with an upper limit of
- €8 864 per month

+ compensation for professional charges on a case-by-case basis, with an upper limit of 40%

\* The hourly rate applies when the counsel works in his/her place of residence: when he/she is on mission away from the country of residence, the daily rate applies.

#### *Assistance to Mr. Thomas Lubanga Dyilo*

12. As soon as Mr. Lubanga was transferred to the Detention Centre, the Registry presented him with a list of duty counsel who had confirmed their availability to assist Mr. Lubanga in his first appearance before the Chamber; after that first appearance, and after consulting the full list of counsel authorized to appear before the Court, Mr. Lubanga appointed Mr. Jean Flamme (a Belgian lawyer) as his counsel.

13. Mr. Flamme appointed a legal assistant (grade G-5), in accordance with the Court's legal aid system, a case manager and a resource person for investigations, as authorized by the Registrar in a letter dated 31 August 2006. Following the Court's decision of 22 September 2006,<sup>14</sup> a further legal assistant (P-2) was added to the defence team. Mr. Flamme also received considerable assistance from the Office of Public Counsel for the Defence and from a number of interns working *pro bono* or as part of the Court's internship programme.<sup>15</sup>

### **Legal representation of victim a/0105/06**

14. Following the decision of Pre-Trial Chamber I to grant victim status in the case *The Prosecutor v. Thomas Lubanga Dyilo* to Applicant a/0105/06, the victim applied to the Registry for legal aid. The Registrar decided provisionally to grant the request of this victim,

<sup>12</sup> See para. 11 below.

<sup>13</sup> See the detailed costing table for each appointment of a duty counsel, annex II below.

<sup>14</sup> ICC-01/04-01/06-460.

<sup>15</sup> The payments made in connection with legal assistance given to Mr. Lubanga and paid by the Court are listed in annex III.

a completely indigent minor, and to assume the costs of intervention by one counsel, Ms Carine Bapita, in the confirmation of charges hearing.

### **III. Evaluation of the implementation of the existing system of legal aid paid by the Court**

15. After just over two years of operation, some 20 counsel have been appointed in various capacities under the existing system. It has now become necessary for the Registry to conduct a critical appraisal of the existing system.

16. This appraisal covers both the assistance provided for duty and ad hoc counsel and that provided for counsel appearing in a case to assist a person requesting legal aid paid by the Court.

17. In respect of ad hoc and duty counsel, experience has shown that the existing system has not posed any particular problems to date and could continue as it is, except for the need to review the automatic payment of compensation for professional charges.

18. In respect of interventions by counsel appearing in substantive matters on behalf of persons requesting legal aid paid by the Court, experience has shown that the existing system, as it has operated in actual proceedings before the Court, and especially in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, has revealed a need for the Court to respond to the influence of certain factors on the capacity of the person appearing before the Court and his/her defence team to conduct the defence appropriately. Three of these factors should be particularly emphasized, namely short time limits in proceedings, intervention by victims in the proceedings and the Court's electronic system for the disclosure of materials.

#### **Time limits in proceedings**

19. The time limits for interlocutory appeals<sup>16</sup> and the filing of responses are short. In principle, the time limit for an appeal is five days for filing the notice of appeal and 21 days for filing the brief in support of the appeal. The time limit for responding to a document filed by a participant is 21 days and the time limit for replies is 10 days.<sup>17</sup> The time limit for filing observations<sup>18</sup> on applications for participation by victims has generally been 15 days, except for those relating to the participation of Applicants VPRS 1 to VPRS 6, which were set at 10 days.<sup>19</sup> It should be noted that these short time limits for appeals are not confined to proceedings before the Court: they are also a characteristic of all national legal systems. Moreover, they apply equally to all the participants in the proceedings.

#### **Intervention by victims in the proceedings**

20. In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, there were 74 requests to participate in the proceedings, and the defence was required to comment on those applications within 10-15 days. The time required to prepare these observations is an additional burden on the defence, which also has to observe time limits imposed in relation to other issues.

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<sup>16</sup> See the combined provisions of Rules 154 and 155 of the Rules of Procedure and Evidence and Regulation 64 of the Regulations of the Court.

<sup>17</sup> See Regulation 34 of the Regulations of the Court.

<sup>18</sup> Decisions authorizing the submission of observations on applications for participation by victims in a case have generally stipulated a time limit of 15 days. See documents ICC-01/04-01/06-107 of 18 May 2006, ICC-01/04-01/06-270 of 4 August 2006 and ICC-01/04-01/06-494 of 29 September 2006.

<sup>19</sup> See document ICC-01/04-01-06-58 of 28 March 2006.

### **The electronic system for disclosure of materials between participants**

21. Because the “eCourt” system introduced by the Court was new to counsel, it seems to have caused them a number of practical problems at first, although the Court has introduced a system giving access to the necessary applications in order to facilitate counsel’s work in the “eCourt” environment. Nevertheless, this electronic system not only requires special training for members of the teams in certain applications or software packages, but also calls for qualified staff within the teams who will transmit and manage all the case documents exchanged by participants in the proceedings.

22. The impact of all these factors may be reduced in future, since procedures, and especially the electronic disclosure system, will have been perfected in the course of this case, the first to come before the Court.

23. It should be emphasized that the experience acquired to date is mainly confined to the pre-trial phase of a single case brought before the Court, and to three situations. Clearly, it will be possible to draw more specific conclusions when the Court has considered one or more cases from the investigation phase to the final decision on appeal. These conclusions may, in due course, lead to a revision of the existing system and, if necessary, changes to some provisions of the Rules of Procedure and Evidence, the Regulations of the Court and/or the Regulations of the Registry.

### **IV. Proposed amendments to the existing system**

24. In the short term, the question has arisen whether specific and limited amendments should be made to the existing system, without implying any change to the regulatory framework and taking due account of the principles of equality of arms, objectivity, transparency, flexibility and economy.

25. The amendments proposed are intended to resolve the difficulties described above. During the pre-trial stage in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, it became clear that the needs of the teams may change as the proceedings continue. In order to guarantee an appropriate response to such changes, and with a view to adopting objective criteria which will avoid arbitrary judgments by any party, it is proposed that the following elements of the existing system should be adapted: the composition of teams, the budget for investigations, statements by expert witnesses, determination of the salary of each member of counsel teams, compensation for professional charges and payment procedures.

26. In identifying the proposed amendments, the Registry took into account the contribution of counsel who submitted comments on the operation of the existing system, particularly counsel in the case of *The Prosecutor v. Thomas Lubanga Dyilo*; the documents prepared for various purposes by lawyers’ associations, including the International Bar Association and the International Criminal Bar; the experience of the ad hoc tribunals and the lessons learned from the missions undertaken by Registry staff to London and Madrid to exchange experiences with the institutions responsible for the management of legal aid programmes.

27. The Registry distributed an initial working paper to a number of partners both internal and external to the Court, and held a meeting to discuss the proposals. This one-day meeting

took place at the Court's headquarters on 23 February 2007, and all the participants' ideas were taken into consideration, wherever possible, in the preparation of this report.<sup>20</sup>

28. This report may be amended in the light of the final consultation with counsel, which is scheduled to take place on 28 and 29 March 2007. The issue of compensation for professional charges will be dealt with in an addendum to this report, which will be submitted to the Committee in the very near future.\*

### **Amendments applicable solely to the defence**

#### *Composition of teams*

29. No change is planned to the times when the counsel will act alone, as provided for in the existing system.

*Times when counsel will act alone (see annex IV: phases 1 and 4 of the proceedings):*

- Assistance provided for a person undergoing questioning by the Prosecutor's Office (duty counsel)
- Ad hoc counsel representing the general interests of the defence
- The period between the closing arguments and the judgment.

It should be made clear that counsel may receive assistance from the Office of Public Counsel for the Defence at these times.

Likewise, legal aid paid by the Court does not, in principle, cover proceedings brought before national jurisdictions on the basis of article 59 of the Statute to seek a ruling on arrest proceedings in the custodial State before the person concerned is surrendered to the Court.

30. The description of the teams laid down in the existing system is to be simplified. Instead of describing the composition of the team in detail at every stage of the proceedings, it is proposed that a core team should be appointed, which would operate throughout the proceedings, with the exception of the two periods when counsel acts alone. This core team would be supplemented by additional resources during the trial phase.

31. The inclusion of a legal assistant in the core team during the pre-trial phase would further simplify the composition of the teams, and would also respond to some of the needs which have become apparent in practice.

32. This core team would be supplemented during the proceedings by additional resources, some automatically provided and some varying in accordance with certain parameters which may influence counsel's workload.

*a) Core team (see annex IV: phases 2, 3 and 5 of the proceedings)*

- 1 counsel (remuneration corresponding to the salary of a trial lawyer in the Office of the Prosecutor, P-5)

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<sup>20</sup> The list of associations and units of the Court which received the document, the participants in the meeting and the written contributions received are contained in annex VII. The full record of the meeting will be available very soon. An additional consultation will take place during the annual seminar organized by the Registry for the counsel on the list. This seminar will be held on 28 and 29 March 2007, and its conclusions may lead to minor changes in this report.

\* See annex VIII.

- 1 legal assistant (remuneration corresponding to the salary of an associate legal officer in the Office of the Prosecutor, P-2; provided in the existing system only in the trial and appeal phases)
- 1 case manager (remuneration corresponding to the salary of a case manager in the Office of the Prosecutor, P-1; “assistant” in the existing system)

*b) Additional resources automatically provided during the trial phase (see annex IV: phase 3 of the proceedings)*

- 1 associate counsel (remuneration corresponding to the salary of an associate trial lawyer in the Office of the Prosecutor, P-4; “legal adviser” in the existing system), who would begin work as soon as a definite decision had been taken relating to the confirmation of charges. This would allow the associate counsel sufficient time to become acquainted with the case before the trial begins.

33. It is intended that counsel will have the choice of using the resources allocated for the recruitment of an associate counsel to recruit instead a legal assistant plus an assistant paid at a level equivalent to a general-service staff member (G-5), or two assistants paid at a level equivalent to P-1. Although these options would not incur any additional financial burden, the current system (recruitment of an associate counsel) seems the most appropriate, in view of the need to guarantee the quality of the representation accorded to the person receiving legal aid and to guarantee continuity of representation, particularly in the case of the withdrawal or temporary unavailability of counsel during the proceedings.

*c) Variable additional resources (see annex IV: phases 1, 2, 3 and 5 of the proceedings and annex V)*

34. In view of the impossibility of predicting exactly which needs the team will need to meet in the course of the proceedings relating to a case, particularly in respect of interventions by victims, it is recommended that a formula should be established which will allow the additional resources allocated to the teams to be varied to match the sometimes considerable fluctuations which may occur during a case.

35. Without excluding other parameters which might justify the allocation of additional resources, the Registry has estimated and quantified a number of parameters in order to arrive at equivalences which would allow counsel to recruit additional assistants, who would be paid from the Court Contingency Fund. The unit adopted here is the “full time equivalent” (FTE), corresponding to the amount of work performed by a team member working full-time:

- (i) For each count submitted by the Prosecutor: 0.025 FTE (1 FTE = 40 counts)
- (ii) For each person submitting an application for participation in the proceedings: 0.005 FTE (1 FTE = 200 persons)
- (iii) 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)
- (iv) For every 3000 pages added to the case file by other participants: 0.1 FTE (1 FTE = 30 000 pages)
- (v) For each 3000 pages submitted by the Prosecutor: 0.1 FTE (1 FTE = 30 000 pages)

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

- For each FTE: 1 legal assistant
- For each 3 FTE: 1 associate counsel

37. Counsel would be able to distribute the accumulated FTE as he/she chose in order to make up the team.

38. The choice of the FTE as the work unit for the flexible recruitment of additional members of staff into a team is consistent with the general approach adopted in the Court Capacity Model.<sup>21</sup> It gives the system the flexibility required to meet needs which arise in the course of the proceedings, while guaranteeing the necessary objectivity.

39. However, an excessive increase in the size of a team owing to an accumulation of FTE might make the financial burden disproportionate to the real needs, which could create problems of team management and overburden the financial resources of the Court. It is therefore planned to set a limit on the variable additional resources which could be allocated, in view of the limited resources assigned to the legal aid programme paid by the Court.

40. Moreover, the principle of variability of additional resources according to the above parameters presupposes that these resources will be reconsidered when the parameters are reduced or cease to have an impact on the defence's workload at a particular stage of the proceedings.

41. For instance, in the case of the "Count" parameter, if a warrant of arrest incorporating a number of charges which had justified a certain FTE was amended during the proceedings by an amount equivalent to one or more FTE, the variable additional resource(s) allocated to that case would be reduced.

42. In the same way, in the case of the parameter "Person submitting an application for participation in the proceedings", the variable resources allocated under that parameter would be reconsidered as soon as the Chamber had issued its decision on applications for participation.

43. The variable additional resources allocated under the other parameters could continue until the closing arguments before the Trial Chamber.

44. Variable additional resources would not be granted automatically. They would have to be specifically requested by counsel, who would have to justify the need for them, if necessary before an FTE had actually been accumulated for one of the parameters, in order to guarantee effective representation for the client.

45. The Registry is aware of the existence of other parameters, such as the nature of the charges and the form of responsibility of the person against whom proceedings are directed, which might substantially affect the work of the teams. However, at present it does not have enough relatively reliable evidence deriving from the operation of cases to allow an objective quantification of the impact of these parameters on the defence's work and their expression in terms of variable resources which might reasonably be required for an effective and efficient defence. If necessary, counsel could submit a request pursuant to regulation 83, paragraph 3, of the Regulations of the Court, and the Registrar would take an appropriate decision, with the assistance of the legal aid commissioners if necessary and always under the supervision of the Chamber, pursuant to regulation 83, paragraph 4.

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<sup>21</sup> ICC-ASP/5/10.

*Budget for investigations*

46. In view of the need for the defence to undertake investigations to prepare for the confirmation of charges hearing, it seems appropriate to review the budget allocated to these activities in the existing system and to include the remuneration of the resource person provided for in regulation 139 of the Regulations of the Registry. In view of the tasks which this resource person might have to undertake and of the fact that the resource person is not a replacement for the professional investigator, it was considered that the applicable remuneration should be that of an assistant investigator (G-5) in the Office of the Prosecutor.

47. The budget of the existing system (€70 138) is equivalent to 90 days' fees for one investigator (€21 552, corresponding to the remuneration of an investigator in the Office of the Prosecutor, P-4), the remuneration of one resource person for the same period (€14 616, corresponding to the remuneration of an assistant investigator in the Office of the Prosecutor, G-5), the daily subsistence allowance for the same period (€20 970) and €13 000 for travel costs. This budget is considered to be a core budget covering the day-to-day needs of the defence, including identifying potential witnesses and reaching a decision regarding their testimony, or acquiring relevant evidence for an average of 30 prosecution witnesses.

48. The sum allocated for fees and daily subsistence allowance in this core budget would be increased, particularly in the following cases and under the following conditions:

- For each supplementary witness called by another participant: 0.5 day of investigations;

Travel costs would be increased at the following rate:

- For every 10 days of additional investigations: one national/regional trip;
- For every 30 days of additional investigations: one intercontinental trip.

Unlike the variable additional resources allocated for extra team members, no upper limit would be imposed on the parameter governing additional days of investigation. As indicated above in the context of human resources,<sup>22</sup> other factors might have a substantial influence on the teams' investigation work. The Registry is fully aware of this fact, but at present it does not have enough relatively reliable evidence deriving from the operation of cases to allow an objective quantification of the impact of these parameters on the defence's work and their expression in terms of variable resources which might reasonably be required for an effective and efficient defence.<sup>23</sup> Counsel in need of additional resources could always submit a request to that effect under regulation 83, paragraph 3, of the Regulations of the Court.

*Missions by team members (other than investigators or resource persons, or missions undertaken by other members of the team for the purposes of the investigation)*

49. The Registry has carefully studied the possibility of increasing the budget allocated for team expenses. It has been maintained that, during the trial phase, the level of travel expenses and daily subsistence allowance currently authorized will be insufficient to meet the teams' needs.

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<sup>22</sup> See para. 43 above.

<sup>23</sup> As suggested by a number of counsels' associations which submitted written contributions to the consultation on 23 February 2007.

50. Nevertheless, since computerized systems have been installed which allow these team members to access their independent network from home and to exchange documents and comments with complete security, it does not seem necessary to provide for this increase.

#### *Expert witnesses*

51. As soon as an expert has been approved to give testimony by the Chamber, the payment of his/her fees and expenses is assumed by the budget allocated for that purpose by the Victims and Witnesses Unit.

#### **Amendments applicable solely to victims**

52. To date, the Registrar has taken only one decision granting legal aid.<sup>24</sup> Experience gained from the situation of the Democratic Republic of Congo and the case *The Prosecutor v. Thomas Lubanga Dyilo* has shown that the participation of victims in the pre-trial phase, while permissible, is subject to procedural limitations.<sup>25</sup> The decisions about participation procedures taken by the Chambers of the Court in future will affect the resources which will need to be provided for the teams of legal representatives of victims and the requirements of investigation before and during the reparations phase.

53. Moreover, at any time the Chamber or the Registrar may deliver ad hoc decisions relating to the legal representation of victims, depending on the circumstances of the case. The legal aid system should, therefore, be in a position to respond effectively to these needs.

54. It should also be noted that legal aid for victims paid by the Court will take the form of common legal representation.

55. Consequently, owing to the absence both of established and confirmed jurisprudence on the procedures for participation by victims applying for legal aid paid by the Court and of sufficiently reliable parameters relating to this, it seems most appropriate to refrain, for the time being, from establishing a legal aid system specifically for victims in the pre-trial phase. For the trial phase, it is proposed in principle that legal aid paid by the Court should cover a core team, which will be reduced or increased at the Registrar's discretion in the light of the actual participation procedures decided by the Chambers and other relevant factors. This core team will consist of:

- 1 counsel (P-5)
- 1 case manager ("assistant" in the existing system, P-1)

56. For the reparations phase, it is proposed that legal aid paid by the Court should cover a core team, which may be supplemented by additional resources at the Registrar's discretion and subject to the oversight of the Chamber. This core team will consist of:

- 1 counsel (P-5)
- 1 legal assistant (P-2)
- 1 case manager ("assistant" in the existing system, P-1)

57. The possibility of providing additional resources for the legal representation team could be considered in the following cases, among others: when the number of victims in the

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<sup>24</sup> Decision of the Registry dated 3 November 2006, ICC-01/04-01/06-650.

<sup>25</sup> Decisions of the Pre-Trial Chamber I of 17 January 2006 (ICC-01/04-101), 22 September 2006 (ICC-01/04-01/06-4620) and 20 October 2006 (ICC-01/04-01/06-601).

group exceeds 50; when the reparation proceedings imply the need to request protective measures, pursuant to article 93, paragraph 1, of the Rome Statute; when the Chamber has decided that it will determine the extent of any damage.

#### *Budget for investigations*

58. The existing system makes no provision for a budget for investigations. However, it seems necessary to consider the allocation of a budget under this heading, particularly for all the issues arising in respect of reparations. It is proposed that a budget for investigations of €43 752 euros should be allocated for the whole case, including the reparations phase. This budget is equivalent to 60 days' fees for one investigator (€17 912, corresponding to the remuneration of an investigator in the Office of the Prosecutor, P-4), the daily subsistence allowance for the same period (€15 840) and €10 000 for travel costs.

#### **Amendments applicable to both the defence and victims**

##### *Determination of amounts to be paid*

59. The remuneration of all team members is determined using the remuneration of a staff member of the appropriate grade, at step V. The table of remuneration corresponding to each category of team member is contained in annex VI.

##### *Payment procedures*

60. The practice adopted in principle by the Registry, namely to pay 60% of the fees of each team member after submission of the statement of hours worked, and the remaining 40% at the end of each phase or every six months, has been strongly opposed by Mr. Lubanga's defence counsel.

61. This practice is not used at the International Criminal Tribunal for Rwanda (ICTR) and it is different from the one used at the International Criminal Tribunal for the former Yugoslavia (ICTY), where team members were paid 80% of their remuneration at the end of each month. However, this possibility was also opposed by counsel, who called for similar treatment to that given to members of the Office of the Prosecutor, who are paid their remuneration in full every month.

62. Although this is a simplistic argument, it appears that, since the current percentage paid is the lowest of all the international criminal jurisdictions, there are grounds for amending the practice.

63. It is therefore proposed that the percentage laid down in the existing system should be reconsidered. In future, 75% of fees would be paid on receipt of the statement of hours worked, and the remaining percentage at the end of every phase or every six months, after a review of the implementation of the plan of action initially approved by the Registry.

64. Payment of the total sum due would make it very difficult or even impossible for the Registry to exercise oversight over the use of the funds paid to the legal teams, to ensure the reimbursement of sums paid to members in error or to ensure the return of the case file if counsel withdraws from the case.

65. However, this payment procedure would apply only to counsel and associate counsel. The other team members will be paid their remuneration in full on receipt of the corresponding statement of hours worked. Moreover, in the period from the effective start date of the trial, as fixed by the Trial Chamber, to the closing arguments, this procedure will not apply, and all team members will be paid their remuneration in full.

66. In all cases, the existing system provides for intervention by legal aid commissioners, whose participation will provide an appropriate guarantee of oversight over the need for, and the reasonableness and effectiveness of, activities undertaken by counsel which are financed from a publicly funded programme.

## Annex I

### Amendment to the principles governing the determination of indigence

#### 1) Basis for the assessment of living expenses

When assessing the needs of persons dependent on the applicant, the Registry will base its calculations on the following sources, in order of priority:

- a) Official statistics relating to living expenses in the State of residence of each dependant;
- b) Official statistics published by the International Civil Service Commission;
- c) Other statistics relating to living expenses in the dependants' place of residence;
- d) The rate of daily subsistence allowance set by the International Civil Service Commission for stays lasting more than one month.

#### 2) Exclusion of certain assets

- *Residence belonging to the applicant*: the estimated rental value would be deducted from the estimated needs of the dependants living there; if the rent was higher than the needs of those persons, the difference would be treated as a disposable asset of the applicant;
- *Residence belonging to a dependant*: the estimated rental value would be deducted from the estimated needs of the person in question (and, if necessary, those of other dependants living with the latter) up to the estimated value of those needs;<sup>1</sup>
- *Furnishings*: the Registry considers that the approach described in the reference document will achieve the proposed aim;
- *Vehicles*: no vehicle which, in the opinion of the Registry, was of a lavish or ostentatious nature could be excluded.

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<sup>1</sup> The Registry considers that, unless ownership of the property in which a dependant resides has been fraudulently transferred to that dependant, it cannot be considered to be part of the assets of the applicant.

## Annex II

### Cost of each appointment of a duty counsel or ad hoc counsel up to 1 March 2007

Reference number of appointment	Cost
01/05	2 918.51
02/05	7 700.00
03/05	2 616.00
01/06	6 080.00
02/06	5 255.83
03/06	2 550.00
04/06	12 434.68
05/06	7 168.62
06/06	4 204.22
07/06	10 321.66
08/06	5 210.51
09/06	9 575.28
<b>Total</b>	<b>76 035.31</b>

Year	Cost
2005	13 234.51
2006	62 800.80
<b>Total</b>	<b>76 035.31</b>

### Annex III

#### Details of payments made to Mr. Thomas Lubanga Dyilo's defence team up to 1 March 2007

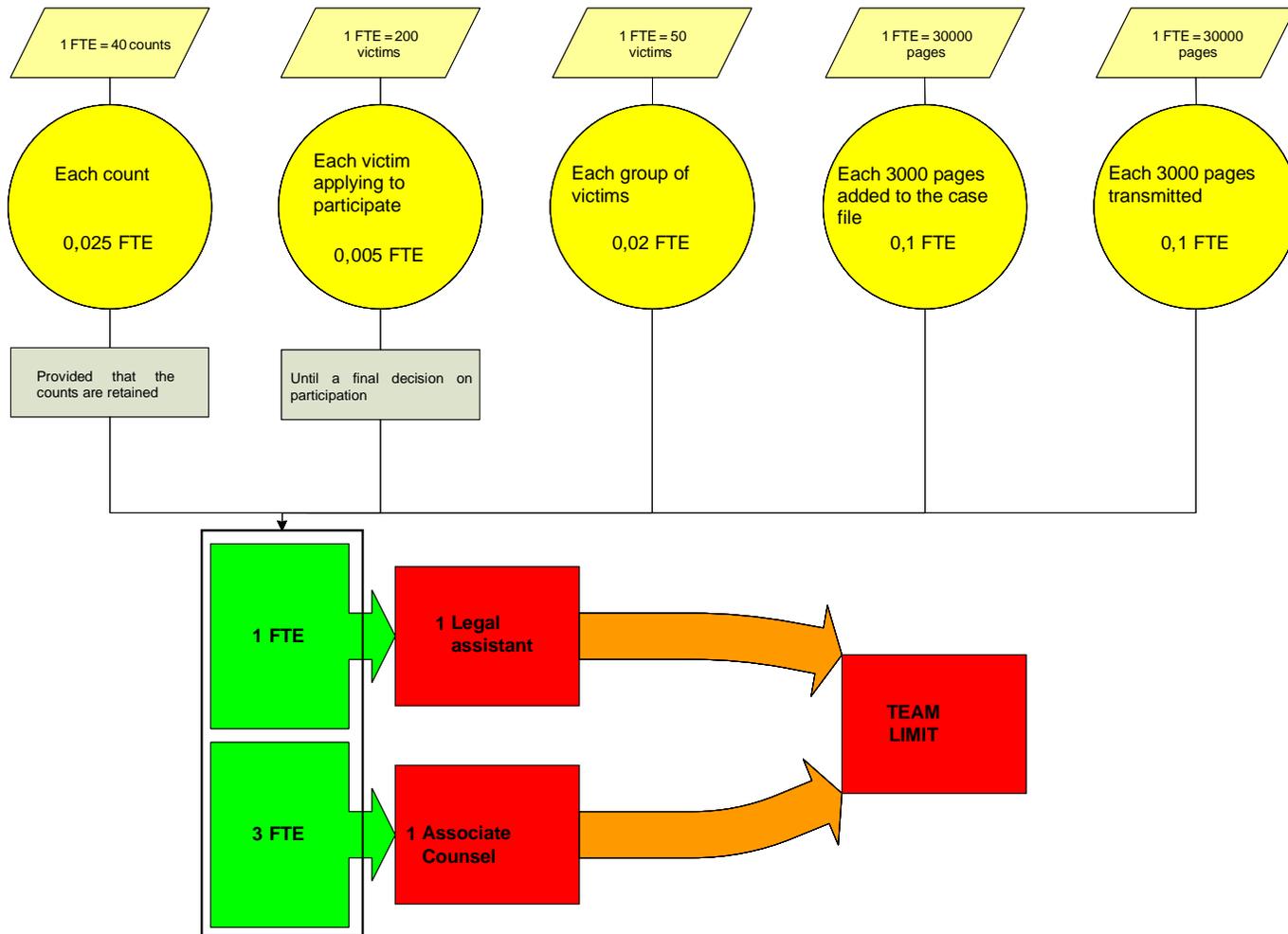
Fees – Counsel	96 484.14 €
Fees – Legal assistant	32 467.56 €
Fees – Assistant (case manager)	17 603.67 €
Fees – Resource person	18 560.00 €
Travel costs (excluding investigations)	29 429.90 €
Travel costs (investigations)	27 337.61 €
<b>Total</b>	<b>221 882.88 €</b>

# Annex IV

+ 4 000 € / month for expenses						
+ 55 315 € for investigations						
Existing System	Counsel P-5  12 410 €	Counsel P-5 Assistant -5 G  19 864 €	Counsel P-5 Associate Counsel P-4 Legal assistant P-2 Assistant -5 G  36 509 €	Counsel P5  12 410 €	Counsel P-5 Legal Assistant P-2 Assistant -5 G  26 451 €	
	Until the first status conference before the Trial Chamber					
Commencement of investigations	1 Until initial appearance before the Pre-Trial Chamber	2	3 Until the end of the closing arguments	4 Until delivery of decisions	5 Appeals phase	Decision on the appeal
	Until the decision on confirmation of charges becomes definite					
Proposed System	Counsel P-5  15 165 €	Counsel P5 Legal Assistant P-2 Case Manager P-1  26 150 €	Counsel P-5 Associate Counsel P-4 Legal Assistant P-2 Case Manager P-1  38 701 €	Counsel P-5  15 165 €	Counsel P-5 Legal Assistant P-2 Case Manager P-1  26 150 €	
	+ 4 000 € / month for expenses					
+ 70 138 € for investigations						
+ ADDITIONAL RESOURCES (see attached table)						

# Annex V

## Variable additional resources Additional team members



## Annex VI

### Update of remuneration for each member of a team<sup>1</sup>

Category	Equivalent category in the Office of the Prosecutor	Remuneration under the existing system	Proposed remuneration <sup>2</sup>
Counsel	Senior Trial Lawyer, Trial Division (P-5)	€8 864 / month	€10 832 / month
Associate counsel	Trial Lawyer, Trial Division (P-4)	€7 184 / month	€8 965 / month
Legal assistant	Associate Lawyer, Trial Division (P-2)	€4 705 / month	€6 113 / month
Case manager	Case manager (P-1)	€3 454 / month(G-5)	€4 872 / month
Investigator	Criminal investigator (P-4)	€7 184 / month	€8 965 / month
Resource person	Assistant investigator (GS-OL)	€3 454 / month	€4 047 / month

<sup>1</sup> See paras. 30, 45, 53, 55 above. These figures do not include any compensation for professional charges.

<sup>2</sup> These figures have been calculated according to the gross pensionable salary of a staff member of the appropriate grade, at step V (see para. 56 above), taken from the United Nations system salary tables approved in the autumn of 2006.

## **Annex VII**

### **Consultation with Legal Associations on 23 February 2007**

#### **List of Associations that received Working Documents of the Registry**

1. ASF-Belgium (Avocats Sans Frontières-Belgique)
2. ASF-France (Avocats Sans Frontières-France)
3. ADC-ICTY (Association of Defence Counsel - International Criminal Tribunal for the former Yugoslavia)
4. CICC (Coalition for the International Criminal Court)
5. FIDH (International Federation of Human Rights)
6. ICB (International Criminal Bar)
7. ICDAА (International Criminal Defence Attorneys Association)
8. OLAD-ICTY (Office of Legal Aid and Defence-International Criminal Tribunal for the former Yugoslavia)
9. UIA (Union Internationale des Avocats)
10. UIBA (Association of Ibero-American Lawyers)

## List of Invitees

### ICC Staff:

1. Mr. Bruno Cathala, Registrar
2. Mr. Didier Preira, Head of the Division of Victims and Counsel (DVC)
3. Ms. Fiona McKay, Chef-Victims Participation and Reparations Section (VPRS)
4. Mr. Esteban Peralta-Losilla, Officer-in-Charge, Defence Support Section (DSS)
5. Mr. Xavier-Jean Keita, Principal Counsel, Office of Public Counsel for Defence (OPCD)
6. Ms. Paolina Massidda, Principal Counsel, Office of Public Counsel for Victims (OPCV) *represented by Ms. Sarah Pellet, Legal Officer*
7. Ms. Melinda Taylor, Associate Counsel, OPCD
8. Mr. Sam Shoamanesh, Associate Legal Officer-DSS
9. Ms. Isabelle Guibal, Document and Database Administrator, VPRS
10. Mr. Abdoul-Aziz Mbaye, Assistant Legal Officer-DVC
11. Ms. Viktoriya Romanova, Intern Office of the Head-DVC

### External Invitees:

<u>Organisation</u>	<u>Réprésentative</u>
1. ADC-ICTY	Mr. Michael Karnavas, President
2. ASF-Belgique	Ms. Martien Schotsmans, Head of the Legal Department
3. ASF-France	Mr. François Cantier, President
4. CCBE <sup>1</sup>	Mr. Colin Tyre, President
5. CICC	Ms. Isabelle Olma, Legal Officer
6. FIDH	Ms. Mariana Pena, Liaison Officer to the ICC
7. IBA <sup>2</sup>	Mr. Mark Ellis, Executive Director
8. ICB	Mr. Jeroen Brouwer, Co-President
9. ICDA	Ms. Elise Groulx, President <i>represented by Ms. Virginia Lindsay</i>
10. OLAD, UN-ICTY	Mr. Martin Petrov, Head
11. UIA	Mr. Pascal Vanderveeren, Member of the Executive Committee
12. UIBA	Mr. Luis Martí Mingarro, President

### Reports sent for feedback to Legal Aid Commissioners:

1. Mr. Laurent Pettiti, appointed Legal Aid Commissioner, ICC (France)
2. Mr. Kenneth Carr, appointed Legal Aid Commissioner, ICC (UK)
3. Mr. Fernando Oliván López, appointed Legal Aid Commissioner, ICC (Spain)

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<sup>1</sup> CCBE: Council of Bars and Law Societies of Europe

<sup>2</sup> IBA: International Bar Association

## List of Participants

### ICC Staff:

1. Mr. Bruno Cathala, Registrar
2. Mr. Didier Preira, Head of DVC
3. Mr. Abdoul-Aziz Mbaye, Assistant Legal Officer-DVC
4. Ms. Viktoriya Romanova, Intern Office of the Head
5. Mr. Esteban Peralta-Losilla, Officer-in-Charge, DSS
6. Mr. Sam Shoamanesh, Associate Legal Officer-DSS
7. Ms. Fiona McKay, Chef-VPRS
8. Ms. Isabelle Guibal, Document and Database Administrator, VPRS
9. Mr. Xavier-Jean Keita, Principal Counsel, OPCD
10. Ms. Melinda Taylor, Associate Counsel, OPCD
11. Ms. Sarah Pellet, Legal Officer, OPCV

### External Attendees:

<u>Organisation</u>	<u>Réprésentative</u>
1. ADC-ICTY	Mr. Michael Karnavas, President
2. ASF-Belgique	Ms. Martien Schotsmans, Head of the Legal Department
3. CICC	Ms. Isabelle Olma, Legal Officer
4. FIDH	Ms. Mariana Pena, Liaison Officer to the ICC
5. ICB	Mr. Jeroen Brouwer, Co-President
6. ICDA	Ms. Virginia Lindsay
7. OLAD, UN-ICTY	Mr. Martin Petrov, Head, and Ms. Sandra Vicente, Legal Officer
8. UIBA	Mr. Fernando Oliván López

## Written Observations Received

### ICC Staff :

1. OPCD
2. OPCV

### External Submissions:

1. ASF-Belgique
2. ASF-France
3. ICB

## Annex VIII

### **Addendum to the report on the operation of the Court's legal aid system and proposals for its amendment\***

1. In his Report on the operation of the Court's legal aid system and proposals for its amendment, dated 29 March 2007<sup>1</sup>, the Registrar referred to the possibility that an addendum should be appended to the report containing, firstly, any amendments made in the light of the latest consultation with the counsel community, which took place on 28 and 29 March 2007 and, secondly, amendments relating to compensation for professional charges.
2. The Registry does not see any need for further changes to the amendments proposed in the above-mentioned report deriving from the conclusions of the consultation on 28 and 29 March 2007.
3. This addendum concerns the amendments to the 40% increase in counsel's emoluments, intended to cover the increased professional charges associated with their appointment to the Court.
4. In the existing system, this compensation is paid to ad hoc counsel, duty counsel, counsel representing one or more participants in the substantive proceedings and counsel's legal assistants. It is paid at all stages of the proceedings.
5. It is proposed that the payment of such compensation should be limited to the trial phase or to the pre-trial and appeals phases if the constraints imposed by the Court's calendar justify counsel's presence at the seat of the Court for a period exceeding 15 days. Only counsel or members of counsel's team who operate their own professional practice, alone or in association with others, may claim this compensation for professional charges, on production of information and supporting evidence which will enable the Registrar to determine the rate of compensation applicable. This rate shall not exceed 40% of fees.

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\* Previously issued as ICC-ASP/6/CBF.1/1/Add.1.

<sup>1</sup> Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/CBF.1/1).