

## IBA Comments on ICC Draft Legal Aid Policy<sup>1</sup> (December 2018)

### Introduction

The International Bar Association (IBA) has emphasised the importance of an adequately funded and well-run legal aid system to ensure that indigent defendants and victims have access to legal representation before the International Criminal Court (ICC or the Court), and to guarantee the fairness of judicial proceedings.<sup>2</sup> The revision of the ICC's legal aid system (LAS), in place in its current form since 2013,<sup>3</sup> is a matter of significance, and of urgency. The IBA welcomes the ongoing process of consultation with stakeholders and appreciated the opportunity to participate in the Legal Aid Consultation Meeting held on 3 December 2018. The IBA maintains a strong commitment to supporting the work of the ICC, and through the IBA's Hague Office and the ICC & ICL Programme<sup>4</sup> is pleased to provide comments on the draft legal aid policy (LAP).

In submitting these comments, the IBA acknowledges the past and ongoing efforts of the Registry to review the current LAS and welcomes the positive steps taken by the Registrar in relation to a number of longstanding issues for counsel working at the Court. In particular, the IBA supports measures taken by the Court to address income taxation issues for counsel and support staff, and to clarify and improve contracts and conditions of employment for members of legal teams. The IBA encourages the Court, the Host Country of the Netherlands, and counsel, to work towards solutions on these issues that support the equality of arms and uphold the responsibility of the Court to ensure fair and equal working conditions for all counsel and support staff.

The IBA also recognises that the Registry's approach to the LAS is significantly shaped by the guidance handed down by the Committee on Budget and Finance (CBF) of the

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<sup>1</sup> Legal Aid Policy of the International Criminal Court, Amendment Proposal, Version 1.2, September 17 2018 (hereinafter, 'Draft LAP')

<sup>2</sup> IBA, *IBA Comments on 'Concept paper: Review of the International Criminal Court Legal Aid System'* (9 June 2017) (hereinafter 'IBA 2017 Comments'); IBA Priorities and Recommendations for the 15th Session of the International Criminal Court Assembly of States Parties, November 2016; Evidence matters in ICC Trials, August 2016; Counsel matters at the International Criminal Court, November 2012; Fairness at the International Criminal Court, August 2011; IBA Presentation to the Hague Working Group Comments on Draft report of the Court on legal aid, July 2009; The ICC under scrutiny: Assessing recent developments at the International Criminal Court, November 2008; IBA Monitoring Report International Criminal Court, November 2007.

<sup>3</sup> ICC-ASP/12/3

<sup>4</sup> The IBA's ICC & ICL Programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals. The Programme focuses on the analysis and evaluation of legal, administrative and institutional issues which could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice. See [https://www.ibanet.org/ICC\\_ICL\\_Programme/Home.aspx](https://www.ibanet.org/ICC_ICL_Programme/Home.aspx)



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ICC Assembly of States Parties (ASP), and in particular, by the requirement to revise the LAS within existing resources.<sup>5</sup> However, the IBA observes that the revision of the policy within this framework creates constraints that may undermine the long-term viability of the LAP and the fairness of proceedings. Legal aid is an operational and technical matter for the Court and should not be reduced to its budgetary aspect. This was acknowledged by the ASP's focal point in 2012, who went on to advise that 'any revision of the legal aid system has to uphold and strengthen the founding principles of the legal aid, namely equality of arms, objectivity, transparency, continuity, and economy.'<sup>6</sup>

The Registry has benefitted from significant feedback and commentary during the consultation process to date. The current emphasis on revising the LAS within existing resources has resulted in a draft that does not reflect many of the concerns and issues expressed by experts and stakeholders including the IBA, in previous consultations on the LAS. In this regard, some sections of the current draft of the LAP represent missed opportunities to take on board advice and experience from practitioners and experts.

Nonetheless, as the need to finalise a revised LAP is long overdue, the IBA supports continuing to move efficiently towards the goal identified by the Registry for adoption of a revised LAP no later than the 18th session of the ASP in 2019. In finalising the LAP, the IBA strongly encourages the Court to seek to incorporate as many improvements as possible, and to continue to engage practitioners and stakeholders in constructive dialogue during the remainder of the revision process. In addition, the IBA encourages the Court to seek to ensure clarity and consistency in terminology and concepts included in the LAP, to ensure that the final LAP is user-friendly and unambiguous.

Finally, the IBA recalls that States Parties, through the ASP, have a fundamental role in ensuring that the Court has the resources to fulfil its mandate consistent with international standards of fairness, and with the fair trial provisions in the ICC's framework. It is the interest of States Parties, and of all stakeholders, to continue to invest in a strong and credible ICC. The provision of adequate legal aid is a fundamental component of a fair trial, and the IBA therefore calls on States Parties to support a revised LAS that will allow for sufficient resources to be provided to defence and victims teams, with the overarching goal of supporting fair trials. The IBA welcomes and strongly supports the ASP's creation of a facilitation on Legal Aid for 2019.<sup>7</sup>

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<sup>5</sup> See, eg, ICC-ASP/16/15, para 11; ICC-ASP/16/Res.6, Annex 1, para 8; ICC-ASP/17/5, para 113; ICC-ASP/17/Res.5 (Advance Version), Annex 1, para 8(a).

<sup>6</sup> See, IBA 2017 Comments p 4, citing the Report by the Focal Point of 26 September 2012.

<sup>7</sup> ICC-ASP/17/Res.5 (Advance Version), Annex 1, para 8(b).

These comments are intended to be read together with the IBA's comments of 9 June 2017, which remain relevant in respect of a number of issues discussed below. As in the previous IBA comments, the present comments focus primarily on legal aid for the defence. However the IBA again underscores that victims' right to choose counsel, and counsels' ability to represent their clients independently, remain fundamental principles of the Court.<sup>8</sup> In this regard, the IBA shares the concerns raised by Amnesty International and Human Rights Watch about the language in the draft policy that appears to restrict legal aid to counsel 'chosen by the Court'.<sup>9</sup> The IBA likewise supports a revised LAP that does not foreclose the possibility of legal aid for victims who choose their counsel or common legal representative.

### **Principles of the LAP**

The IBA notes that, while the draft LAP is governed by the same principles as the current policy –equality of arms, objectivity, transparency, continuity and economy – the definitions of the principles have been modified with implications for the fairness and sustainability of the LAS. The IBA joins other stakeholders in recommending maintaining the principles as originally drafted and approved by the ASP.<sup>10</sup>

Of particular concern, the draft LAP modifies the principle of economy, to state that: 'public international organisations are under the obligation to manage funds allocated to them in the most cost-effective and efficient manner possible'. In the current policy, the principle of economy states that 'in conformity with the legal texts of the Court [...] the legal aid system covers only costs that are reasonably necessary for an effective and efficient legal representation.'<sup>11</sup>

This modification puts at the center of the legal aid system the 'effective and efficient' allocation of funds by the Court, instead of having as its main objective the effective and efficient legal representation of accused persons and victims, while still recognising that funding is limited to necessary costs. The proposed change to the principle of economy not only reduces legal aid to a budgetary aspect, but institutionalises this approach. The IBA recommends not modifying the principle of the economy, as this proposed language is inconsistent with the goals of the legal aid policy, namely to ensure indigent persons can receive a fair trial.

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<sup>8</sup> IBA 2017 Comments, p 2.

<sup>9</sup> Comments from Amnesty International and Human Rights Watch submitted to the ICC Registry, 23 November 2018.

<sup>10</sup> See, OPCD, Initial Comments on the Legal Aid Policy of the International Criminal Court, 23 November 2018, comment 1.

<sup>11</sup> ICC-ASP/12/3, para 9.



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The principle of equality of arms was also substantially modified in the current draft. While the current equality of arms principle states that ‘the payment system must contribute to maintaining *a balance between* the resources and means of the accused and those of the prosecution’ [emphasis added], the proposed principle provides that the legal aid system must allow defense and victim counsel ‘to present their case before the chamber under conditions which do not place them at *substantial disadvantage* vis a vis their opponents’ [emphasis added]. This modification promotes a lower standard for achieving equality of arms and should be rejected.

In this regard, the IBA reiterates its view, shared by other members of the international community, that the way in which legal aid for indigent defendants and victims is addressed by the Court and the ASP could have significant implications for the credibility and reputation of the Court.<sup>12</sup> The ICC should promote the highest standards of equality of arms and fairness in its judicial process. In light of this, the IBA recommends that the definitions of the ‘applicable principles’ in the current LAP in are preserved in the revised LAP.

### **Selected substantive issues in the draft LAP**

Previous consultations and expert input with regards to the LAP noted the considerable disparity in the resources allocated by the ICC to defence and victims teams, both compared to OTP counterparts, as well as between the ICC and other international tribunals.<sup>13</sup> In this regard, during previous consultations substantial adjustments were recommended in a number of areas. These included remuneration for defence and victims counsel in the different stages of the proceedings for both Article 5 and Article 70 cases, core team composition, as well as a meaningful allocation of resources for defence investigations. The draft LAP addresses only some of the issues that have been raised, and in some important areas there is no substantial change between the current LAP and the amendment proposal.

#### *Remunerations*

As previously noted by the IBA, the inequality between defence counsel fees and their OTP counterparts has a direct impact on the quality of defence representation and on the fairness of proceedings. Consequently, the IBA, supporting both the LAS Report and the recommendations of other stakeholders including the ICCBA, has noted the need for recalculation of the fee levels, as well as the need to address income taxation issues for defence and victims counsel.<sup>14</sup> While, as noted, the IBA supports the actions taken by the Court to address issues of taxation, in the draft LAP the basic fee levels

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<sup>12</sup> IBA 2017 Comments, p 3.

<sup>13</sup> LAS Report, para 12; ICCBA, *ICCBA Response on the Legal Aid Issue*, 24 April 2017.

<sup>14</sup> IBA 2017 Comments, p 6.



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and the professional uplift do not reflect substantial changes.<sup>15</sup> The changes that have been made bear further consideration and clarification, to ensure that they actually represent a step forward for the LAS.

For example, some modifications have been made in the compensation package, providing options for a monthly remuneration scheme for counsel and associate counsel that include compensation for travel to and stay in The Hague.<sup>16</sup> However, these options could be further clarified, and appear to exclude other members of the team that might also need compensation for travel and stay. The options also do not appear to take into account possible cost disparities based on the different locations from counsel and other team members may travel to The Hague.

Likewise, while in principle the inclusion of a minimum wage floor for defence team members is positive, the minimum wage levels used in the draft LAP are significantly lower than the minimum wage level used by the OTP. As noted by the OPCD and others, the rates for remuneration on hourly basis are also lower than in other international tribunals.<sup>17</sup>

Consequently, the IBA maintains the recommendation for a recalculation of fee levels, taking into consideration the previous unanimous recommendations to recalculate the remuneration fees according to the current market; the type of work that it is being done; and the payment scales in the OTP and in other international tribunals and organisations.<sup>18</sup>

#### *'Core team' composition and legal services contracts*

In earlier stages of the consultations there was agreement among stakeholders that, due to the volume and complexity of the work at the ICC, the revised LAP must establish a larger and more robust 'core team' that remains throughout the proceedings. In the draft LAP, the 'core team' remains the same as the current policy: with one counsel, one trial lawyer (termed 'legal assistant' in the current policy) and one case manager.<sup>19</sup> During selected phases of the proceedings an associate counsel and field assistant will also be added.<sup>20</sup>

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<sup>15</sup> Comparing ICC-ASP/12/3 para 85 and the Draft LAP, para 48. The basic fee levels remain the same for Counsel (€8,221); Associate Counsel (€6,959); Legal Assistant (€4,889); and Case Manager (€3,974) and the structure and percentages for the professional uplift remain the same.

<sup>16</sup> Draft LAP, para 48.

<sup>17</sup> OPCD, Initial Comments on the Legal Aid Policy of the International Criminal Court, 23 November 2018, comment 35.

<sup>18</sup> IBA 2017 Comments, p 6.

<sup>19</sup> Draft LAP, para 35.

<sup>20</sup> Ibid, paras 36-38.



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The IBA reiterates its previous recommendation that a core team should be composed of: two counsels, one assistant to counsel, one case manager, and an evidence review assistant, with the ability to expand and alter based on justified needs and phases.<sup>21</sup> An increase to the core team composition is a more realistic reflection of the staffing needed to provide effective legal representation at the ICC, and will additionally decrease the administrative burden of teams having to request additional resources. The IBA welcomes that the draft LAP appears to have rejected the use of ‘case complexity’ criterion for resource allocation to the Defence.<sup>22</sup>

In addition, the IBA notes that the understaffing of the core team, as in the current system, has a relationship to the practice of teams hiring a larger number of junior staff who may have inadequate salaries and working conditions. As noted, the IBA welcomes the Registry’s stated intention to address contractual issues,<sup>23</sup> particularly as the lack of guidance and clear standards for contracts may disproportionately affect female lawyers in the early stages of their careers, who as the Registry has noted, comprise the majority of support staff.<sup>24</sup> The drafting of the legal services contract should be done in consultation with practitioners and other stakeholders, through a working group or other appropriate mechanism.

#### *Article 70 cases*

The draft LAP provides that, for cases under Article 70, defence teams will be composed of a counsel acting half-time and a case manager acting full-time, with further resources available on request.<sup>25</sup> While the IBA supports including specific provisions to address Article 70 cases, the IBA continues to support an approach that considers Article 70 cases on a case-by-case basis, taking into account the complex issues that Article 70 proceedings may raise, as well as the guidance of the Trial Chamber in *Bemba et al* that the Rome Statute does not make a distinction between Article 5 and Article 70 cases as it relates to entitlement to legal aid.<sup>26</sup> According to the Trial Chamber, the ‘actual needs’ of the applicant as well as ‘the interest of justice in the given case’ must be taken into consideration when allocating legal aid in both Article 70 and Article 5 cases.<sup>27</sup> A legal aid policy that creates a reduced ‘core team’ as a starting point for Article 70 cases may be counter-productive for efficient and fair resolution of Article 70 matters.

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<sup>21</sup> IBA 2017 Comments, p 7.

<sup>22</sup> See IBA 2017 Comments p 6-7 for the IBA’s previous comments on the use of case complexity criteria.

<sup>23</sup> Draft LAP, paras 4-5.

<sup>24</sup> See, for example, Annex 1 to the ICCBA Commentary on Draft Legal Aid Policy: Additional Comment Submitted Through the Counsel Support Staff Committee.

<sup>25</sup> Draft LAP, para 42.

<sup>26</sup> IBA 2017 Comments, p 8.

<sup>27</sup> *Ibid.*

### *Investigations, experts, and translations for the Defence*

The IBA welcomes the inclusion of the defence investigation budget in the draft LAP, however would recommend deletion of the restriction for carrying over unused funds from year to year.<sup>28</sup> As noted by other comments including those of the ICCBA and OPCD, it would be helpful to further clarify and articulate the costs that this budget will cover.

The IBA also welcomes the inclusion of a field assistant in the pre-trial, trial and reparations phases, as well as the inclusion of a professional investigator to assist counsel with the preparation and supervision of the investigation strategy.<sup>29</sup> However, the IBA joins other commenters in noting that the levels of remuneration and number of hours for these positions are low in comparison to other tribunals and are likely to be insufficient.

The IBA further notes that ‘preliminary expert advice or opinions’ as well as translation costs generated by investigations are included as ‘expenses’ to be applied for separately, without setting out provisional amounts or further guidelines.<sup>30</sup> In respect of experts, the IBA again recommends that the revised legal aid framework should take into account the increased prevalence of experts in international criminal cases, in particular those that rely on digital and other new forms of evidence.<sup>31</sup> A clear framework and fee structure for experts and translations should be included in the revised LAP.<sup>32</sup>

### *LAS management*

The draft LAP provides for a monthly lump-sum payment system, without submitting timesheets, for eligible positions. This is a positive measure with the potential to streamline the administration of the LAS. However, the matter of the proposed reduced activity periods in the draft LAP bears further examination and clarification. As other stakeholders have pointed out, there are questions about whether those periods truly are ‘reduced activity’ and about the potential for negative impact on the work and continuity of teams during and after these periods.<sup>33</sup> Under the draft LAP,

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<sup>28</sup> Draft LAP, paras 70-73.

<sup>29</sup> Ibid, paras 37, 38.

<sup>30</sup> Ibid, para 67.

<sup>31</sup> See IBA 2017 Comments p 9.

<sup>32</sup> See, eg, Special Tribunal for Lebanon, Legal Aid Policy for the Defence, STL/PL/2011/01/Rev.2., paras 4.9, 5.9, 14.1-11.

<sup>33</sup> See ICCBA comments on Draft LAP para 60; OPCD, Initial Comments on the Legal Aid Policy of the International Criminal Court, 23 November 2018, comments 38-40.



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counsel will need to submit a report on the implementation of the action plan to the Registry at the end of each phase of the proceedings or every six months. The content and purpose of this report should be further clarified.

Finally, the IBA notes that the draft LAP does not address other issues and recommendations made in the LAS Report and put forward by stakeholders including the IBA. Such issues include the need for a more detailed and transparent budgetary process, the streamlining of the application process to the list of counsel, and the streamlining of procedures to monitor fee claims. As the IBA previously stated, 'management and operational issues within the administration of legal aid have a real impact on the Court's efficiency and counsel's ability to provide an effective defence.'<sup>34</sup>

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<sup>34</sup> IBA 2017 Comments, p 9.