

## INTERNATIONAL BAR ASSOCIATION'S

### *ICC Monitoring and Outreach Programme*

#### Discussion Paper

#### Comments by the International Bar Association (IBA) on the Proposed Programme Budget of the International Criminal Court for 2009

##### A. Introduction

1. The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of 30,000 individual lawyers and more than 195 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community. In October 2005, the IBA started a new ICC Monitoring and Outreach Programme funded by the John D and Catherine T MacArthur Foundation. The monitoring aspect of the programme is mandated to observe the proceedings of the Court and assess the implementation of the Rome Statute and other legislative instruments of the Court with specific reference to the fair trial rights of the accused. The outreach programme works in partnership with bar associations, lawyers and civil society organisations disseminating information and promoting debate on the ICC through the IBA's membership network.
2. As a member of the Coalition of the International Criminal Court (CICC) the IBA participated in the consultations which led to the preparation of the '**Comments on the Proposed Programme Budget for 2009 of the International Criminal Court and other matters**' (**The Budget Team Paper**) by the Budget and Finance Team of the Coalition. This paper is therefore to be read together with the Budget Team Paper.
3. The IBA's comments in this document relate to item I, paragraphs 28-30 of the Budget Team Paper, headed '**Important increases required for legal aid and legal representation**'. In this regard reference has been made to the Proposed Programme Budget of the International Criminal Court.<sup>1</sup>

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<sup>1</sup> ICC-ASP/7/9

## B. Proposed Programme Budget- Legal Aid

4. In the report of its 8<sup>th</sup> session, the Committee on Budget and Finance (CBF) noted that ‘given the risks to the Court’s reputation in the delivery of legal aid and the significant financial implications, [the Committee emphasized] the importance of ensuring that defendants’ rights to a fair trial were maintained while upholding the integrity of the system of legal aid administered by the Registrar and ensuring oversight of the costs of legal aid by the Committee and the Assembly of States Parties’<sup>2</sup>.
5. The IBA notes that in the Proposed Programme Budget of the International Criminal Court (proposed budget), issued on 29 July 2008, the Court has requested a total of €102.63 million to cover budgeted expenditure for 2009. At paragraph 46 of the proposed budget, the Court indicates that the budget for legal aid will increase by approximately €2.2 million due to the anticipated commencement of a second trial. A total of €3,986.4 million has been allocated for contractual services and training<sup>3</sup> - a projected increase of €2,434.5 million or 156.9%. The expenses associated with the legal aid programme appear to be included in this line item<sup>4</sup>.
6. The IBA considers that the manner in which the issue of legal aid for indigent defendants is addressed could have significant implications for the credibility of the Court, a view shared by other members of the international legal community. For example, Human Rights Watch, in its recent report, *Courting History*, highlighted the fact that there may be “risks to the court’s credibility that can arise from real and perceived inadequacies in funding legal aid for indigent defendants. The court’s reputation as a fair and impartial institution may be undermined if there are indications that these defendants are being shortchanged in the assistance they receive from the court to mount an effective defense. Indeed, states parties must recognize that the costs for the court in this regard—including perceptions about the fairness of its trials—may be far greater than the actual expenses associated with operating the legal aid system.”<sup>5</sup>

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<sup>2</sup> ICC-ASP/6/2

<sup>3</sup> Proposed Programme Budget, Supra n.1 at page 116 Table 89.

<sup>4</sup> It is not clear why the budget does not make specific reference to legal aid as a line item in the breakdown of expenditure for the DVC. Instead, the expenses of the legal aid programme appear to be included in ‘contractual services’. The proposed budgetary allocation also includes training. It is not clear exactly what percentage of the proposed figure is to be specifically allocated to legal aid and how much to training.

<sup>5</sup> Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years* (available at <http://www.hrw.org/reports/2008/icc0708/icc0708web.pdf>), p90.

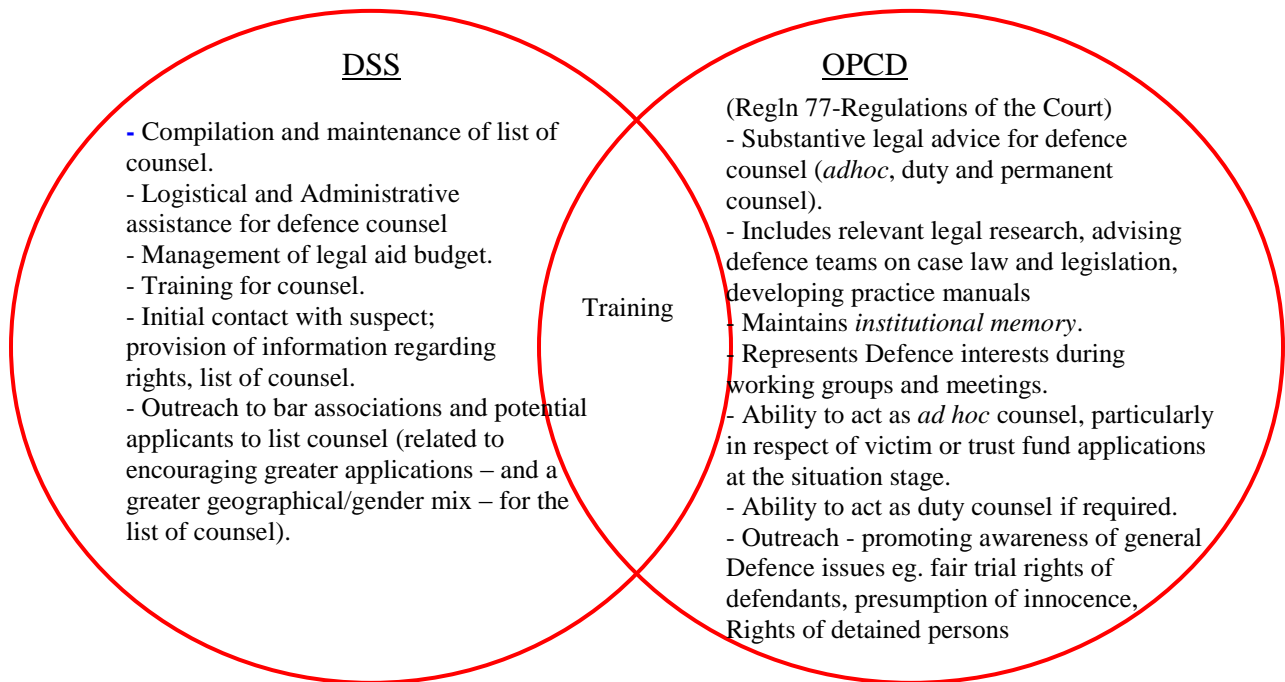
### **C. Perceived Overlap between the respective roles of the legal aid system and the OPCD**

7. The IBA understands that there is some concern regarding a possible overlap between the respective roles of counsel under the legal aid system and the Office of the Public Counsel for Defence (OPCD) which could lead to a duplication of funds/ resources. The IBA has also been informed about some concerns regarding possible duplication of roles between the Defence Support Section of the Registry (DSS) and the OPCD. In the report of its ninth session, the CBF noted that “*the Court had chosen to create a scheme of funding for the defence of indigent accused as well as a public defender’s office.*” The Committee was concerned that “*the provision of both private and public defence resources combined with the complexity of judicial proceedings in the Court could lead to an unprecedented level of expense.*”<sup>6</sup>
8. Concerning the OPCD and the DSS, the IBA considers that there does not appear to be a substantive overlap between these two offices. The OPCD plays a crucial role in providing substantive legal advice and support to defence teams and protecting the general interests of the defence during the situation phase while the DSS provides critical administrative management of the legal aid system of the Court and technical support for counsel. Counsel may for example have a dispute with DSS over legal aid, but could nevertheless benefit from substantive legal advice offered by the OPCD.
9. A breakdown of the respective functions of the OPCD is documented in the chart below. One noted overlap between the two offices is in the area of training of Counsel. The IBA considers that as it is the responsibility of the Registry to conduct training of defence counsel, the DSS may be better placed to organise the training for Counsel with the OPCD participating as trainers.<sup>7</sup>

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<sup>6</sup> See ASP, “Report of the Committee on Budget and Finance on the work of its ninth session” ICC ASP 6/12 at [http://www.icc-cpi.int/library/asp/ICC-ASP-6-12\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-6-12_English.pdf) at para 72

<sup>7</sup> Human Rights Watch in its report *Courting History* has however opined that “Given the OPCD’s substantive mandate (as compared to the DSS’s administrative function), it seems more appropriate for the OPCD to assume many of the substantive outreach functions—including training—relating to the defense. Indeed, the OPCD’s experience in providing this kind of assistance to individual defense counsel and representing the general interests of defense in proceedings strongly suggests that it is much better placed to do so”



#### D. Mandate of OPCD versus the role of legal aid

10. Much evidence of OPCD's mandate can be found from discussions and documents from the Preparatory Commission. Throughout the negotiations leading up to the creation of the Rome Statute for the ICC there was significant pressure to avoid the mistakes of the past, and to ensure that the defence was properly represented at an early stage in the proceedings.<sup>8</sup> At the Diplomatic Conference in Rome (16 June to 17 July 1998), the International Criminal Defence Attorneys Association (ICDAA) made a proposal for a unit with responsibility for guaranteeing the rights of the defence to be incorporated in the Rome Statute;<sup>9</sup> however, no formal proposal to that effect was put forward.

11. In the third session of the Preparatory Commission, which sat in New York from 29 November to 17 December 1999, many states parties were still arguing that there needed to be an *independent office to represent the rights of the defence*. France, Germany, Canada and the Netherlands submitted a joint proposal

<sup>8</sup> Rupert Skillbeck, Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone, 1 Essex Human Rights Rev. 66

<sup>9</sup> Described in Amnesty International, *International Criminal Court: Procedural Issues at the third session of the Preparatory Commission*, AI Index: IOR 40/004/1999, § 1, 1 December 1999.



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- recommending the establishment of a distinct unit within the Registry that would be “*responsible for guaranteeing the rights of the Defence consistent with the principle of fair trial as defined in the Statute and as applied by the Court.*”<sup>10</sup> In addition, NGOs with particular interests in these issues – including Amnesty International and the ICDA – promoted the idea of a separate unit.<sup>11</sup> These early proposals, which ultimately led to the creation of OPCD, should be read as the bases behind the unit’s purpose and its mandate.
12. Ultimately, the Rules themselves did not create a separate defence unit, but Rule 20 does require that the Registry be organized “in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute.” Rule 20 also requires that the Registry carry out its functions “in such a manner as to ensure the professional independence of defence counsel.” Rule 20 underlines the importance of an organisation of the Registry in a way that recognises the independence of the defence and the defence counsel.<sup>12</sup>
  13. Rule 20 should be contrasted with Rule 21 (which deals with ‘legal assistance’, and provides details on the list of counsel and on legal aid). The division of mandates between different rules arguably demonstrates the intent to separate the Registry’s commitments to ‘rights of the defence’ on one hand and to ‘legal assistance’ on the other. Pursuant to the authority of Rule 20, Regulation 77 of the Rules of Court provides for the establishment of the OPCD.
  14. There are a number of practical benefits provided by the OPCD. By offering substantive legal advice (to *ad hoc*, duty or permanent counsel) the OPCD acts as a parallel organ to the Office of the Prosecutor’s (OTP’s) Legal Advisory System.

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<sup>10</sup> Proposal submitted by Canada, France, Germany and the Netherlands in connection with article 43 of the Rome Statute of the International Criminal Court concerning the Rules of Procedure and Evidence as regards document PCNICC/1999/DP.1, PCNICC/1999/WGRPE(4)/DP.2/Rev.1, ¶ 1, 6 August 1999.

<sup>11</sup> See, e.g., Amnesty International, *Ibid.* (“Amnesty International strongly believes that the Registrar should establish an independent office of defence counsel which would have the responsibility for ensuring that the rights of the defence to have adequate time and facilities for a defence and to conduct a defence were respected.”; “the office of defence counsel should have the responsibility to take effective action designed to ensure that the rights of suspects and accused to adequate time and facilities for a defence and to conduct a defence are fully protected at all stages of the proceedings”); see also Elise Groulx, *The Defense Pillar: Making the Defense a Full Partner in the International Criminal Justice System*, 25-OCT Champion 20, at 24 (lamenting the fact that no independent office for the defence was created under the ICC Rules, as recommended by the International Criminal Defense Attorneys Association); Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 Int’l Law. 21, at 42 (“The court’s structure could be greatly strengthened by the creation of a Bureau of Defense Counsel, analogous to the Office of the Prosecutor. In the ICC Statute, there is currently no defense office of any type. This has the potential to create an institutional bias in the court towards the interests of the prosecution.”).

<sup>12</sup> Gérard Dive, *The Registry* in Roy Lee, 262

- It ameliorates the inequality between the parties; for example, the OTP benefits from years of experience in investigating the case and familiarising itself with it, whereas the Defence is a relative newcomer in proceedings and counsel may have little or no knowledge of the complex ICC system, or of the complexity of the case (the *Lubanga* case was described by the Registrar as ‘a case with complex ramifications and historic issues’<sup>13</sup>). The OPCD, with its provision of *substantive* legal advice and ‘institutional memory’ built up over a period of time, helps to minimise the inequalities.
15. The OPCD has also been appointed by the Pre-Trial Chamber in the situations in Darfur, Sudan and the Democratic Republic of Congo (DRC) to represent the general interests of the defence at the situation phase of the proceedings where no accused has yet been identified. The IBA considers that the appointment of the OPCD as ad hoc/duty counsel may actually enhance the Court’s ability to efficiently manage the legal aid programme.
16. There have however been some contrary views expressed on this issue. For example, the War Crimes Research Office in its report, **Protecting the Rights of Future Accused during the Investigation Stage of International Criminal Court Operations**, strongly recommends that ‘*the Pre-Trial Chambers should resume appointments of unaffiliated lawyers to serve as ad hoc defence counsel in the context of a situation as conflict of interests are likely to arise if the OPCD is appointed to act as defence counsel*’<sup>14</sup>. Human Rights Watch on the other hand in its **Courting History** report is of the view that there are numerous advantages to assigning the role of ad hoc counsel in the situation phase to the OPCD. Notably, HRW considers that ‘*by acting in this capacity, the OPCD saves the Registry money that would otherwise have been paid to outside defence counsel from the legal aid budget*’<sup>15</sup>.
17. The IBA considers that at this stage of the Court’s development, there are greater overall advantages to appointing OPCD to act as ad hoc counsel during the situation phase. From a practical perspective, there is usually no clear indication as to how long this phase may last as it could take years before a suspect is identified. During this time, the Court may nevertheless continue to receive applications for victims’ participation and notifications by the Trust Fund. In those circumstances, external ad hoc counsel could face significantly greater

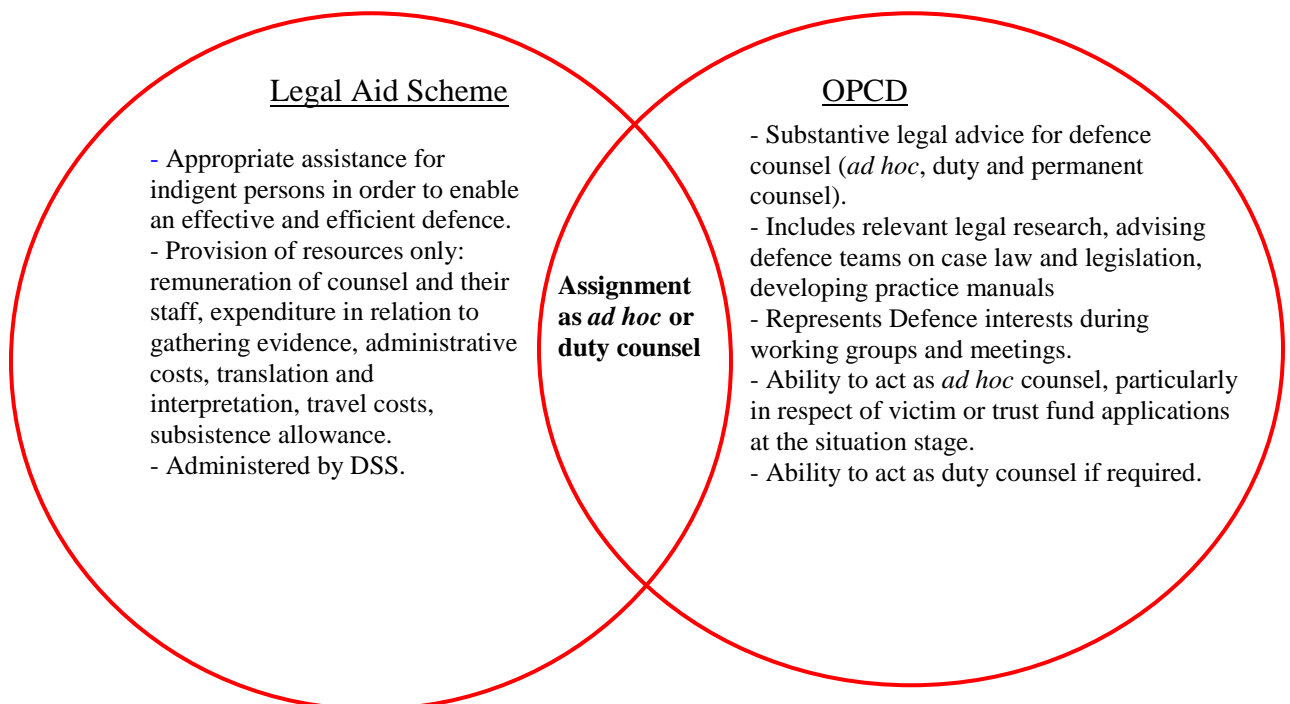
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<sup>13</sup> ‘Registrar’s Decision on the additional means for the trial phase sought by Mr Thomas Lubanga in his “Application for additional means under regulation 83(3) of the Regulations of the Court” filed on 3 May 2007’, 14 June 2007, [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-927\\_tEnglish.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-927_tEnglish.pdf).

<sup>14</sup> Page 48 of the WCRO report. The report may be accessed from the WCRO website at [http://www.wcl.american.edu/warcrimes/icc/icc\\_reports.cfm](http://www.wcl.american.edu/warcrimes/icc/icc_reports.cfm) (last accessed 4 September 2008).

<sup>15</sup> *Supra* n. 5 at pg. 82

challenges in dealing with these issues as well as coping with his/her regular practice. It is therefore incumbent on the OPCD to organise itself in a manner that minimises the potential for conflicts of interest to arise. Overall, the appointment of the OPCD at the situation phase will result in savings for the Court, provided that Unit is adequately staffed.



## E. Determination of Indigence

18. In the report of its ninth session, the Committee also emphasized ‘*the need to thoroughly and rigorously examine the claims of indigence made by accused persons. In this regard it was essential for the Court to ensure that it utilized the resources available to it to search for assets*’<sup>16</sup>. The ICC was then invited by the Assembly of States Parties (ASP) during its sixth session to present an updated

<sup>16</sup> Supra n. 5 at para 73

report detailing the different mechanisms for legal aid existing before other jurisdictions<sup>17</sup>. The Court's 'Interim Report on different legal aid mechanisms before international criminal jurisdictions' was published on 19 August 2008<sup>18</sup>.

19. The IBA will reserve any detailed comments regarding the Court's methodology for determining indigence following the submission of the Court's final report in this regard. However from the report, the Court indicates that its approach is consistent with that of the ad hoc tribunals, and the ICTY in particular.
20. Notwithstanding the methodology outlined in the report, the IBA is concerned that the report lacks any clear indication of the impact of existing sanctions and/or the freezing of assets of a suspect before the ICC when determining his/her indigence. The IBA understands that the policy employed by the Court is to make a preliminary determination of the estimated value of the assets of the defendant/applicant based on the information provided within the financial information form that is completed by the applicant. Additional information regarding available assets is later sought through a financial investigator.<sup>19</sup>
21. In order to arrive at a determination regarding the monthly disposable means (MDM) the obligations of the defendant (assessed according to the criteria outlined in the 'Report on the principles and criteria for the determination of indigence for the purposes of legal aid (pursuant to paragraph 116 of the Report of the Committee on Budget and Finance of 13 August 2004)<sup>20</sup> are subtracted from the assets. In its determination and assessment of the assets of the defendant/applicant, the IBA understands that the Registry will take into account the value of frozen/seized assets which can be proved to be linked directly or indirectly with the defendant/applicant. If the Registry determines based on its overall assessment after applying the formula that an applicant is not indigent or only partially indigent, the applicant is denied legal assistance and the applicant is required to pay counsel himself.

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<sup>17</sup> Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth Session, New York, 30 November -14 December 2007, ICC ASP/6/20, Vol. I part III, Resolution ICC-ASP/6/Res.2 para.13

<sup>18</sup> ICC-ASP/7/12

<sup>19</sup> The absence of an appointed permanent financial investigator (one was employed on a GTA contract) was also a concern expressed by the Committee in its report of the ninth session. A "Report on appropriate resources for financial investigations under the Court's legal aid programme" (ICC-ASP/7/4) was submitted by the Registry on 26 May 2008. The report proposes three options for financing the function of financial investigation related to legal assistance.

<sup>20</sup> ICC-ASP/6/INF.1



22. The obvious remedy for a defendant in such a case would be to appeal the decision of the Registrar on the basis that he has no access to his funds and is therefore unable to pay counsel. However, there are other considerations that are not as clear. What scope is there for counsel to recover funds from a defendant who refuses to pay for example? Will this create a delay in proceedings while the defendant spends time appealing this issue?
23. The IBA therefore requests that more clarity be provided by the Court concerning this very crucial issue. The Report (referred to in paragraph 21) does not clearly outline from a comparative perspective what approach has been taken by the ad hoc tribunals or other international criminal jurisdictions regarding this specific issue of legal assistance to defendants whose assets have been frozen. It would also be useful in our view, if a template of the financial assistance form is annexed to the Report.

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