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IBA Comments on 'Concept Paper: Review of the International Criminal Court Legal Aid System' (9 June 2017)

Introduction

The International Bar Association (IBA) is committed to supporting the work of the International Criminal Court (ICC or Court). As the IBA has previously stated, legal aid is a fundamental component of the ICC's administration of justice, and is due both consideration and analysis.¹

The IBA thus appreciates and supports the ongoing efforts by the ICC Registrar in taking on the complex task of reviewing the legal aid system, and inviting comments on the 'Concept Paper: Review of the International Criminal Court Legal Aid System' published by the Court in May 2017 (LAS Concept Paper). The IBA welcomes and is pleased to contribute to the external consultations in the form of both written comments on the LAS Concept Paper, and participation in the roundtable on 19 June 2017 to discuss the 'Registry's single policy document on the Court's legal aid system', at the seat of the Court in The Hague.

The aim of improving the operation of the ICC is shared by all organisations interested in the work of the Court, and interested in the promotion of international justice, equality of arms and the rule of law in general. It is in this spirit of constructive dialogue that these comments are offered.

Methodology

The IBA commenced the IBA ICC programme in 2005. The Programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals and encourages the legal community to engage with the work of these Courts.

The ICC & ICL Programme's work includes thematic legal analysis of proceedings, and ad hoc evaluations of legal, administrative and institutional issues which could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice. In that context, the Programme has developed expertise on the ICC, defence rights and other issues related to legal aid schemes. The

¹IBA, *IBA Priorities and Recommendations for the 15th Session of the International Criminal Court Assembly of States Parties*, November 2016,

https://www.ibanet.org/ICC_ICL_Programme/Programme_commentaries.aspx.



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IBA has provided input to the Court at various stages of the development of the legal aid system. The IBA has also provided input on the process for making the indigence determination for accused persons and for victims.

The ICC & ICL Programme has produced a number of documents and reports relevant to the issues raised in both the January 2017 Report 'Assessment of the ICC's Legal Aid System' (LAS Report) and the LAS Concept Paper, and has also drawn on them in drafting this paper. These include: *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.

In preparing these comments, the IBA also sought views on the LAS Concept Paper from IBA membership, through its relevant committees.

In the context of this review, the IBA focuses its comments primarily on legal aid for the defence, while also noting that the ICC's legal aid system also addresses legal aid for indigent victims, as required by the Regulations of the Court. While legal aid provisions for victims and accused persons reflect their different positions in the legal process, the IBA underscores that victims' rights to choose counsel, and counsels' ability to represent their clients independently, remain fundamental principles of the Court.² The victims' right to have a counsel representing their interests 'must go with all the key attributes of any lawyer bound to discharge his/her representation agreement', including *inter alia* independence, fair representation and primacy of the client's interest.³

This paper focuses on issues relevant to the legal aid scheme in general, and on areas of particular importance for the equality of arms in ICC proceedings.

² *Ibid.*

³ ASF, *Victims' Choice v. Legal Aid? Time for the ICC to Re-Think Victims' Participation as a Whole*, May 2016, para.32. Also with regards to independence, Judge Kuniko Ozaki, in a partly dissenting opinion in the *Bosco Ntaganda* case, has emphasized that the legal representative of counsel should not only be independent, but also appear to be independent. See ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-650-Anx, *Second Decision on Victims' Participation in Trial Proceedings*, 16 June 2015, paras 12-13. The CICC Legal Representation team has expressed similar views (CICC Legal Representation Team, *Comments and Recommendations on the Proposed Victims Office in the Context of the Registry Revision*, 3 April 2015, p.2).

Scope of the Concept Note and of the June consultations: the need for a comprehensive and expedited approach to legal aid reform

There are multiple issues to be considered in the review of the legal aid system. The IBA notes that while the LAS Report provides a rather comprehensive analysis of the issues at stake, the LAS Concept Paper is much more limited in scope. As much as the IBA understands the need to go step by step in the review of such a complex scheme, some of the issues not included in the LAS Concept Paper are both crucial and intertwined with the issues that have been included. The IBA hopes that the consultation process and discussions will not be limited to the issues raised in the LAS Concept Paper and/or that further consultations and experts' discussions will be held in due course.

At the same time, the IBA emphasises the importance of clarifying and revising the legal aid system as soon as possible, given its importance to ongoing proceedings. The IBA therefore encourages the Registry and the ASP to expedite the establishment of the revised system, taking into account data from cases which have progressed through the full trial phase, including the *Bemba et al* Article 70 case, as well as input from counsel, representatives for counsel issues at the ICC and external stakeholders.⁴

An adequately funded and well-run legal aid system is essential to ensure the fairness of judicial proceedings

Discussions around the legal aid scheme and its review have primarily been the responsibility of the Registry and the Assembly of States Parties (ASP), as the supervisory mechanism of the Court. While the ASP's discussions on legal aid are part of the Budget facilitation,⁵ the IBA emphasises that the review of legal aid is not solely a budgetary matter. Legal aid is a technical and operational matter that requires the balancing of core principles, to ensure the fairness of judicial proceedings.

It is therefore crucial to not reduce legal aid to its budgetary aspect, as emphasised in 2012 by the Focal Point for legal aid within the Bureau of the ASP, who stated:

A perceived reductionism of legal aid to its budgetary aspect would, in the view of the Focal Point, not be appropriate nor supportive to the goal of managing the legal aid costs. It is important to reiterate the fundamental

⁴ IBA Priorities and Recommendations for the 15th Session of the ASP, *supra* n 1.

⁵ See notably ASP, advance version of the *Report of the Committee on Budget and Finance on the work of its twenty-eighth session*, ICC-ASP/16/5, 23 May 2017, Section F. 'Legal aid', paras 124 and following.



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importance of the legal aid system to ensure the fairness of judicial proceedings, and the rights of the defendants and victims to quality legal representation and high degree of professionalism. It should also be noted 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.⁶

These founding principles of the legal aid scheme –equality of arms, objectivity, transparency, continuity and economy— have been established since 2004.⁷ It is in the spirit of these principles that the current review of the legal aid scheme should take place.

The IBA underscores 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.⁸ The Court’s reputation as a fair and impartial institution may be undermined if there are indications that these defendants are being short-changed in the assistance they receive from the court to mount an effective defense.⁹ It also has a complementarity aspect as, by ensuring that defence rights are fully respected at the ICC, the Court is setting standards relevant to all States prosecuting international crimes.

In the context of the legal aid review, it is therefore important to recall that the quality of legal representation has an impact on the fairness of the judicial process. States parties must recognise 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.¹⁰

The need for a robust defence at the ICC to achieve equality of arms

International criminal tribunals operate in a unique environment. In national justice systems, in general judges and lawyers operate within well-established and tested regulatory systems that are overseen by long-standing institutional frameworks and

⁶ “Legal Aid - The way forward, Report by the Focal Point, 26 September 2012”, *the Hague Working Group (HWG) recommended to the Bureau the appointment of Ambassador Leon Marc (Slovenia) as the Focal Point for legal aid within the Budget facilitation*, para. 15.

⁷ ICC ASP, *Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons*, ICC-ASP/3/16, para. 16.

⁸ See *Comments by the International Bar Association (IBA) on the Proposed Programme Budget of the International Criminal Court for 2009*, September 2008, para. 6 and references therein.

⁹ *Ibid.*

¹⁰ *Ibid.*



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national bars. The defence function before international criminal tribunals is fundamental but experience has shown that defence rights at international tribunals are fragile. The position of the defence should always be viewed in juxtaposition to the institutional strength of the prosecution and its high degree of institutional independence, relatively substantial budget and large number of permanent, experienced counsel.¹¹ In this regard, the OTP has a permanent advantage over the accused, particularly given that counsel for the latter is retained on a case-by-case basis.¹²

It is well established that equality of arms does not mean absolute equality in resources of the parties; the principle of equality of arms is more concerned with procedural equality. However, the achievement of procedural equality does have implications in terms of resource allocation.¹³ To safeguard fair trials, equality of arms must be at the centre of the debate regarding any reform of the LAS. For this reason, the IBA stresses that equality of arms must remain at the forefront of all institutional and policy reforms, and should not be displaced by budgetary, financial or political concerns.¹⁴

The role of the defence within the unique context of international criminal tribunals also means that comparative analysis and lessons learnt from other international tribunals are very relevant to any review of the legal aid at the ICC. In this regard, the IBA commends the comparative approach taken in the LAS Report, and encourages further reflection on the standards adopted by other tribunals as relevant to the ICC's practice.

Allocating sufficient legal aid resources as a matter of policy and on a case-by-case basis

The IBA strongly urges the Court and States Parties to ensure that adequate resources for the defence are available as part of the regular legal aid policy, but also in response to specific needs and requests that may arise.¹⁵

The IBA notes that the International Criminal Court Bar Association (ICCBA) has provided substantive comments on the LAS Concept Paper.¹⁶ The approach of the

¹¹ Lord Justice Fulford, Sir Richard May Memorial Lecture: *'International Criminal Courts: Progress Made, Progress Needed'*, Chatham House, October 2014.

¹² *Ibid.*

¹³ IBA, *Fairness at the International Criminal Court*, August 2011, p.9.

¹⁴ *Ibid.*, p. 10.

¹⁵ IBA, *Evidence matters in ICC Trials*, August 2016, p.32.

¹⁶ ICCBA, *ICCBA Response on the Legal Aid Issue*, 24 April 2017, in particular pp. 9-23.

ICCBA has been fully endorsed by IBA membership, through the IBA War Crimes Committee, which stated that it shares the analysis and backs the demands of the ICCBA for ‘a substantial increase of Legal Aid for Defence as well as for Victims Counsel during all relevant stages of proceedings as well as the demand of a fair solution of the tax problem’. Consistent with the position of the ICCBA, the IBA War Crimes Committee ‘shares the view that only a meaningful increase of Legal Aid will be able to safeguard the overall fairness of the proceedings and the quality of work in the future.’¹⁷

Remunerations

The LAS Report’s assessment of the ICC legal aid scheme notably shows that the levels of counsel fees at the ICC are considerably lower than in other international criminal courts;¹⁸ and that the principle of equivalence with their counterparts in the prosecution to ensure fairness and an effective defence is currently not respected.¹⁹ This inequality is not only unfair, but will over time materially impact the quality of representation and proceedings, if the ICC is unable to attract and retain highly-skilled counsel for defence and victims.

The IBA therefore supports both the LAS Report and the ICCBA recommendations as to the recalculation of the fee levels, as well as the positive resolution of the tax-exemption issue, to establish a level of overall remuneration that is reasonably equivalent to counterparts in the prosecution and before other international criminal tribunals.²⁰

‘Case complexity’ and ‘core team’ composition

One approach to determining legal aid, used at some international criminal tribunals, is allocating legal aid resources according to a formula that evaluates the ‘complexity’ of the case, using a number of set factors. While the IBA supports seeking a means to ensure that additional resources may be allocated as needed to an especially large or complicated case, the overall application of the ‘case complexity’ criterion for resource allocation at the ICC is neither effective nor practical. As recognised in the LAS Concept Paper,²¹ this criterion would not be easily applicable to the ICC where situations and cases may vary widely and are thus much harder to compare in an objective manner.

¹⁷ Correspondence from the IBA WCC to the IBA Hague Office, 5 June 2017.

¹⁸ See LAS Report, in particular paras 21 and 24.

¹⁹ LAS Report, paras 133 and following.

²⁰ LAS Report, p. 59; ICCBA *Response on the Legal Aid Issue*, pp.23-29.

²¹ LAS Concept Paper, p.6.



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The IBA therefore recommends an approach that further considers changes to the ‘core team’ throughout the proceedings, by providing for a core team composed of two counsels, one assistant to counsel, one case manager, and an evidence review assistant, with the ability to expand or alter based on justified needs and phases.

The IBA also finds that the case complexity criterion is not an accurate or effective means to allocate the investigation budget. The determination of ‘case complexity’ is made at a very early stage of a case, based on a number of factors mostly related to the content of the charges and the indictment. Those factors are not determinative of the level of investigations that a defence team will undertake to provide an effective defense; nor does that determination take into account the specificities of the investigation requirements such as the type of information sought, location of investigations, and type/nature of the defence presented. In addition, investigation needs evolve as the case develops and as investigation leads materialise.

While the IBA does not support the adoption of the case complexity criterion as the principle means for setting legal aid levels at the ICC, it could be explored further in limited and specific instances, in particular for the appeal phase, and as discussed below in Article 70 cases.

Article 70 v Article 5

The right to legal aid applies for defendants charged both with core crimes offenses (‘Article 5’ cases), as well as with offenses against the administration of justice (‘Article 70’ offenses). In 2014 the ASP requested the Court to consider ‘policy options’ regarding the level of legal aid to be provided by the Court to indigent accused in Article 70 cases, ‘including the establishment of specific criteria and a quantitative ceiling, as appropriate’.²²

While some Article 70 cases may be appropriately distinguished from Article 5 cases for the purposes of Legal Aid, the IBA supports a cautious approach in this regard. The experience of Article 70 cases to date has shown that they may involve multiple accused or rely on complex evidence, both factors which increase the resources needed. In fact experience shows that Article 70 cases may be as resource intensive as an Article 5 case. In this regard, the IBA emphasises that it is important to ensure that legal aid

²² ICC ASP, *Resolution on the Programme budget for 2016, the Working Capital Fund and the Contingency Fund for 2016, scale of assessments for the apportionment of expenses of the International Criminal Court and financing appropriations for 2016*, ICC-ASP/14/Res.1, 26 November 2015, Section J, para 14.

for each case alleging offenses against the administration of justice be evaluated on a case-by-case basis, with the possibility to evaluate the complexity of the case.

This approach is consistent with the findings of the Trial Chamber in the first Article 70 case to go the trial at the ICC. In the *Bemba et al* case, the Trial Chamber emphasised that the Rome Statute does not make a distinction between Article 5 and Article 70 cases as it relates to entitlement to legal aid.²³ The Chamber ruled that while the Registrar has the power to allocate legal aid, he or she is also obliged to fully take into account the ‘actual needs’ of the legal aid applicant as well as ‘the interest of justice in the given case’ when making this decision, regardless of whether it is an Article 5 or Article 70 proceeding; and that the allotted resources must allow for ‘an efficient and effective defence’.²⁴ As the Court proceeds to evaluate the legal aid policy in relation to Article 70 cases, the IBA emphasises the importance of upholding these principles.

Experts and Investigation budget for the Defence

The IBA notes that the ICC Legal Aid scheme currently in force does not contain specific provision for experts.²⁵ In practice, ICC defence teams have been directed to cover costs for expert fees from the relatively small budget that each team has to cover team expenses.²⁶ The ICC Counsel Support Section, which is responsible for managing the allocation and distribution of legal aid, has noted that ‘the ICC legal aid system has flexibility as one of its basic principles’, allowing counsel to ‘use available savings to further remunerate experts’. Under this flexible approach, a counsel may also request additional resources from the Court for this this purpose.²⁷

The IBA notes that excluding funding for experts from the core legal aid budget is both inconsistent with the realities of international criminal cases, and inconsistent with the current standards applied by other international criminal tribunals. For example, at the Special Tribunal for Lebanon, the Legal Aid Policy allows for a set amount of

²³ ICC, *Prosecutor v Bemba et al*, Decision on the Defence Applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, ICC-01/05-01/13-955, 21 May 2015, para 35. This paragraph refers to articles 55(2)(c) and 67(1)(d) of the Rome Statute.

²⁴ *Ibid.*, paras 37–38.

²⁵ See ICC ASP, *First Report of the Bureau on legal aid*, ICC-ASP/11/2/Add.1., 2012, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-2-Add1-ENG.pdf (accessed 20 June 2016).

²⁶ At the time of writing of the *Evidence Matters in ICC Trials Report* this budget was EUR 3000/month.

²⁷ IBA, *Evidence Matters in ICC Trials*, p.32; IBA Consultation with ICC defence Counsel, 29 February 2016; and IBA email correspondence with ICC Counsel Support Section, 24 May 2016 in the context of the IBA research and analysis for the *Evidence Matters in ICC Trials Report*.



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funding specifically to hire experts, with €75,000 allocated for the pre-trial phase and an additional €75,000 allocated for the trial phase.²⁸

The IBA anticipates that the need for experts will become more urgent in ICC cases. As the IBA has noted, trial practice at the ICC is evolving to incorporate different sources and types of evidence, in particular technologically-derived and digital evidence.²⁹ The ability to analyse and present such evidence is heavily reliant on experts, and as such advances in evidence have clear resource implications. This should be accounted for when revising the legal aid framework, to ensure that the defence has the means to access experts and technology as needed for sufficient periods of time, consistent with the right guaranteed to the accused under Article 67(1)(b) to have adequate time and facilities to prepare the defence.

The IBA also notes that the limited resources available for defence investigations in the current legal aid scheme may lead defence teams to use a locally based resource person instead of a more costly international investigator with training and experience in international criminal investigations. Such resource persons may not receive sufficient training in key competencies such as ethics and the legal requirements for witness testimony, compared to a professional investigator. This may impact the reliability of witnesses and the quality of the legal proceedings. These issues support increasing resources for defence investigations, with a clear objective of supporting defence teams in hiring professional and well-trained investigators.

The LAS management

The LAS Report highlights numerous management and operational issues in relation to the current legal aid system at the Court.³⁰ Many of those issues can be improved or addressed within the current framework by streamlining processes and looking at other international criminal tribunals to identify best practices in the management of legal aid schemes. The IBA notes that 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.

²⁸ STL, Legal aid policy for the Defence, STL/PL/2011/01/Rev.1, 19 October 2015, Sections 4.9, 5.6, 13, see www.stl-tsl.org/en/documents/stl-documents/defence-office-documents/1190-legal-aid-policy-for-defence accessed 20 June 2016.

²⁹ IBA, *Evidence Matters in ICC Trials*, chapter 2.

³⁰ See for instance LAS Report, paras 183-190.



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The IBA agrees with the LAS Concept Paper that “LAS procedures should be lean, meaningful, and transparent.”³¹

In that respect, the IBA supports:

-A more detailed and transparent budgetary process that outlines more specifically the functions and activities supported by legal aid. For instance, the legal aid budget, which represents 3.25% of the total ICC budget, could be broken down to clearly provide information related to: the number of persons employed and at what level; the number of investigation activities; and the number of ad hoc and duty counsel assigned and the length of assignments.

As highlighted in the LAS Report, ‘CSS should provide more detail in budgetary documents on how legal aid is spent to ensure that the ASP, diplomats, judges, and others are better placed to make decisions on the LAS’.³²

-Streamlining of the Application Process to the List of Counsel

The IBA encourages the streamlining of the application process to the ICC List of Counsel and the speeding up of the review of received applications in line with the recommendations in the LAS Report.³³

-Streamlining of Procedures to monitor Fee Claims

The IBA supports changes regarding the monitoring of counsel’s fees as to streamline and alleviate the burden on both the teams and the Court. In that respect, the options laid out at pages 8-9 of the LAS Concept Paper seem clear, reasonable and in accordance with best practices of other international criminal tribunals.

In addition, the Counsel Support Section and its facilities should be strengthened through training, technical expertise and new IT systems as to support the LAS management.

³¹ LAS Concept Paper, p.3.

³² LAS Report, para. 190 (recommendations).

³³ LAS Report, p. 70.



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