

1 The International Criminal Court

2 Consultation Meeting on Legal Aid Policy

3 Venue: Conference Rooms 1 and 2

4 Monday, 3 December 2018

5 (Meeting starts at 9.08 a.m.)

6 MR DUBUISSON: (Interpretation) Good morning, everyone. Welcome.

7 I would just like to specify that what is said here will be recorded and a transcript will be
8 prepared of today's discussions. I think you are all aware of that; so I think you know
9 what to expect.

10 I would like to immediately give the floor to the Registrar, who will make some opening
11 remarks.

12 Mr Registrar.

13 MR LEWIS: Thank you very much, Marc.

14 I just wanted to open the session by talking about the basic approach we have taken to the
15 exercise that you are about to become involved in.

16 This is now the first engagement with practitioners using the legal aid system, but it is not
17 end of that engagement, as we continue to discuss and debate these issues in the months
18 ahead, and, of course, there will also be engagement with other stakeholders in the
19 system, including, of course, the judiciary.

20 The basic approach we have taken in approaching this task is to find a way to see if,
21 within the envelope of existing resources we have for legal aid, whether it is nevertheless
22 still possible for us to reform the system.

23 Now, of course I understand that some of the earlier proposals that were put and
24 considered last year included proposals to increase fee levels. We have however, at the
25 Court, had a very clear steer that any work we do on the subject of the reform of the

1 system must be within the existing envelope. We have not found it possible within that
2 broad instruction to find a way of increasing fees and staying within that envelope;
3 nevertheless, we believe there are ways to make the system simpler to use for everyone,
4 including practitioners.

5 We also very carefully looked at some of the issues the ICCBA asked us to specifically
6 consider in the context of a reform of the system. One of the principle issues was the
7 issue of taxation, which has been a subject that has been under some debate and
8 discussion for some time, but there were other issues about the basic structure of
9 payments and, in particular, whether some of the issues around the administration of the
10 fee and charges scheme could be simplified.

11 We have separately to these discussions on the actual scheme itself embarked on
12 engagement with practitioners on the subject of taxation. Acknowledging that that is
13 a matter that is not entirely within our gift, since it is a matter that we must discuss and
14 debate with a host state, we have separated the consideration of that issue and dealt with
15 it on a parallel but separate track.

16 Within that broad remit in approaching our task, the discipline we have applied to
17 ourselves in producing the proposals that you have now read and you will be debating in
18 detail later today is to approach it with the experience we have gained of administering
19 this system over many years. So we have a bank of knowledge based on the experience
20 of the Court and the feedback we receive on a case-by-case basis of how the system
21 operates.

22 We decided to use that experience as, if you like, our guide and benchmark for the
23 proposals we would consider.

24 As a starting point, we were aware that of course there had been substantial discussion
25 last year around the reports that had been conducted into the operation of the system, the

1 last one of those being the Rogers' report, and we were also aware that there had been
2 discussion and debate about that report already.

3 So one of the issues we did look at was to go through the Rogers' report on those
4 proposals that did not relate to fees, to analyse them and see in the basis of our experience
5 whether there were issues that would help improve the system. But on top of that, as I
6 have mentioned already, there was an overlay of the experience of using the system.

7 As you will see from the timetable for today, it is structured in a way to deal and allow for
8 discussion on some of the major issues of the proposals that are now before you. You
9 will, of course, I think have recognised that the approach that we have put together is an
10 evolutionary one, building on experience to use the experience we had to improve the
11 system. Obviously, there will be separate sessions for you during the course of the day to
12 discuss these issues in detail with the experts from the Court.

13 Now I won't say anything more about the general approach we have taken because the
14 value of this exercise is obviously to debate the specifics of what we have proposed but
15 also, of course, to listen to any proposals you have for change and reform of the system.

16 Now without further ado, I will hand over to Marc to deal with the first of these sessions.

17 MR DUBUISSON: (Interpretation) Thank you, Mr Registrar.

18 I will just load my presentation onto the screen.

19 Just to start off, a brief reminder what we are talking about exactly today and I will
20 explain what the directive on legal aid covers.

21 First of all, I will give you an overview or a reminder of the five principles. I will also
22 mention the space we have for discussion and dialogue. We have been debating these
23 matters for more than a year now; I will talk about the main changes and the whole issue
24 of taxation; and finally, the reform and its budgetary impact.

25 Here we see the five principles.

1 Equality of arms.

2 Of course, this is something that regulates our work each and every day. We need
3 a system of legal aid at the ICC that allows Defence teams and teams representing victims
4 to present, to make their case before a judge or before a chamber under conditions under
5 which they are not at a disadvantage.

6 Then we have the criteria of -- and we are listening to your feedback about these
7 principles, these criteria. Indeed, we need a certain reference point for the allocation of
8 certain resources and to be as fair as possible towards all teams, particularly in light of the
9 resources that may be there in comparison with the OTP's resources.

10 Then we have the principle of transparency. We are very often subjected to audits.

11 There is a considerable amount of oversight and we must ensure the proper spending of
12 resources within an international organisation.

13 Then we have continuity and flexibility. The earlier system was quite flexible, extremely
14 flexible, and so I think we need to talk in very practical down-to-earth terms about how
15 the system operates. We also know that any paralysis is prejudicial to the proper
16 administration of justice; any delay in a trial means an increase in costs.

17 It's also important for us to have criteria that allow us to allocate additional resources,
18 but we have to agree on a ceiling, a minimum that allows a team to live throughout an
19 entire trial.

20 And then finally our last principle, economy. We need to manage our funds in an
21 effective way, particularly in a cost-effective way. The system that we are part of expects
22 the best bang for the buck, so to speak.

23 Now, what is the timeline?

24 This reform has already been two years in the making and the Registrar reminded us that
25 we worked with Richard Rogers to gather information from all international courts and

1 on the basis of that, we were able to have some raw material for the creation of this new
2 system while remaining ... I must say that it was not possible to think too far out of the
3 box because the box is restricted. The box is a financial envelope, a budget, and the
4 previous Registrar was involved and it would appear that the current Registrar, who took
5 up his duties in April, needed some time to review the file to learn more about the reform,
6 the projects and to give us his own feedback on the directions we were going to take in
7 relation to certain issues. Some issues are still pending and up for debate.
8 Now what we think is that we thought we can work together, provide a draft and we
9 would have a seminar on this 3 December. We have already received your documents
10 but, of course, we expect further discussion later in the day so by January or perhaps
11 February, we can finalise the ultimate draft and it can be sent to the CBF in April.
12 This would allow us as well -- this would allow the CBF to look at where we are and what
13 the outlook is in terms of -- well, in financial terms. We will be discussing with you and
14 with NGOs, and we will try to take stock and determine what you expect and we can try
15 to see where the gaps are. This is part of a continuous process. We will try to improve
16 the draft in the next two years, so it's important for us to have these discussions.
17 So we have this first filter in April with CBF and then we will continue to work upon the
18 policy and we intend to present the improved -- or concept, so to speak, to the following
19 CBF in September. And the CBF will see what the financial impact will be under the new
20 policy and we will be able to show, to -- indeed to prove to the CBF that we have
21 remained within our financial envelope and been more flexible.
22 If we receive positive feedback, we hope that the ASP will approve the final policy that
23 will come into effect as of January 2020.
24 So what are the main changes?
25 First of all, redistribution of resources. The teams and -- may receive resources by phase.

1 We will simplify the system for paying travel expenses. We would like the teams to be
2 spending more time working for the Defence rather than defending themselves before the
3 Registry. We are partners and we mustn't see each other as adversaries; rather, we must
4 see each other as partners.

5 And then the next main change is a new contract.

6 Redistribution of resources.

7 As you can see from this chart, what is new?

8 Well, you can see that we have added an associated counsel during pre-trial and also at
9 the appeals stage, as you can read, until -- well, a maximum of 150 hours for that
10 particular phase and this is what we are suggesting today.

11 You can also see that we are remaining within the envelope because the main point of this
12 exercise is not to increase -- just to merely increase fees; that is not our approach.

13 Our approach is, in terms of investigations, for example, you will have €30,000 per year,
14 but you will have up to €150,000 and we realise that for certain phases, €30,000 will not be
15 enough, but you will have the ceiling of €150,000 without having to go back to the
16 Registry and ask for additional resources and you won't have to come back, ask for more
17 resources and defend your request.

18 One little note: During periods of reduced activity, that is, any period of time during
19 which the Registrar decides that an entire team is not necessary -- that is what we see at
20 the Court from time to time -- we are also working with maximum-fee levels and any
21 overruns or going past those amounts is out of the question. There is no going over that
22 line. We are talking about lump-sum amounts per month.

23 Redistribution of resources.

24 Here, we see the various fee levels and costs and the like. We wanted to point out that
25 this does not take into account salary indexing or fee indexing because -- well, in this case,

1 we are not truly talking about salaries.

2 Now there will be no additional scales or rises each year. In 2004, we were talking about
3 creating a mirror system. In comparison to the OTP, the mirror is now -- well, there still
4 is a mirror, but it is a bit of a funhouse mirror. It's not -- it's reflecting things differently
5 and there will be discussions with the CBF and with the States and we will determine
6 whether one day, there is a window to changing fees, but it is not on the agenda today as
7 you know.

8 For each count, we have a system. For each system, we added -- for each count added by
9 the Prosecution, calculations are done that lead to an increase. This system that we have
10 now is already flexible, so this is reflected. For each victim or groups of victims whose
11 request for participation is accepted, for any amount of 3,000 -- any time 3,000
12 additional pages are added, you see, we do have this criteria now that will allow for
13 flexibility within the system and that is also accompanied by an oversight mechanism and
14 we can, hopefully, provide further information when there is a request for additional
15 resources; so there will be some oversight.

16 Some missions can be brought in either for the victims; we can turn to the OPCV and
17 consult them to better assess any possible request for additional resources.

18 Today, what we do not have as an assessment or a measuring criteria is the impact of the
19 support of the OPCD upon the Defence. At present, we do not know what that impact is
20 and, in very practical terms, we did not take that into account for the time being.

21 Now, when we talk about redistribution of resources and we say that it's not flexible, here
22 are a few examples that show that it is actually relatively flexible.

23 The first case is the Bosco case, and here we see that in a specific case, in light of objective
24 criteria provided to us, instead of providing €32,000 per month to the team, we provided
25 up to €90,000 per month in accordance with objective criteria. We take them into account

1 and thus we were able to provide that funding and the Defence team had more resources,
2 and so you see, we were three times above the initial budget.
3 Just a little bit of an exercise -- and the mirror that I was mentioning, what does the mirror
4 reflect? The mirror between the Defence and the OTP?
5 For the OTP in the Gbagbo case, I took account of all the people on the Prosecution side.
6 I just counted the people. This is very gross data; this has not been analysed. There
7 must have been some interns. There might have been some experts in addition to staff
8 members. I just did that in order to demonstrate that when you look at the Prosecution
9 side, there were more than 60 staff members from the OTP, 60 different staff members. If
10 we look at the Defence teams on the other side of the courtroom, perhaps we might be
11 talking about 15 people.
12 So there is something that allows us to better measure the impact, and that is when we
13 come to questioning or cross-examination -- if you allow me that expression, since we
14 don't use that expression in this course -- there were 11 people from the OTP who
15 questioned witnesses. On average, three on the Defence side.
16 So I can understand within the OTP there are related cases. There is Côte d'Ivoire II.
17 There are teams working in a multidisciplinary fashion and when we talk about
18 questioning a witness in the courtroom, you have to wonder when we talk about the
19 equality of arms, it's not just a matter of resources. All the same, it's a matter of resources.
20 So you see the issue may be -- perhaps the States will tell us it's not normal for the
21 Prosecution to have 11 different people questioning witnesses at the OTP when you
22 compare to other Courts or other international tribunals. Obviously, there is a huge gulf
23 here.
24 Now is the problem there or is the problem that there aren't enough resources for the
25 Defence? I think there could be quite a debate about that and today's debate will allow

1 us to shed further light on this specific part of our Court.

2 Another specific thing that I can point out, if I ask how much was paid at the ICTY to
3 defend -- and we're talking about the equivalent of an Article 70 case, it's a rather limited
4 lump sum, and per month, we paid €150,000 for five teams just for an Article 70 case and
5 everyone said that it was a lot of work. Perhaps, but we do really have to wonder,
6 €150,000 per month during the trial for an Article 70 case. Basically, over one
7 month -- and I will take it back to a single team -- of the one team, it was the entire
8 Defence of Florence Hartmann.

9 So you can see, when people say the Court is not generous, not flexible, I disagree. You
10 need to see that we are very flexible and also generous, perhaps in terms of fees, that we
11 agree on. We also decided to focus on the resources of the teams representing victims,
12 particularly investigations. Even though per se there aren't investigations, there are field
13 activities and we decided to compensate these activities in the field in a relatively clear
14 fashion with a ceiling, but the ceiling actually is basically the same as that of the Defence.
15 So we are trying to facilitate access to such resources for the teams representing victims so
16 that they can do more work in the field.

17 Simplification of the system for travel expenses.

18 Once again, we do have a few questions. We were thinking about extending the current
19 system. For example, providing a certain amount every month, €500 a month or
20 applying the system used for staff members here at the Court; namely, a lump sum for
21 installation, €10,000, €10,500 and then nothing after that. And that is what we, members
22 of the Court, receive.

23 If the trial is shorter, you win. If it's longer, you may possibly lose out, but that is the
24 way -- that's how I see the final outcome. And then there's making the work easier; no
25 more going back and forth constantly asking for additional resources of the Registry in

1 that particular area.

2 And now, creation of a legal services contract.

3 First of all, you must remember that counsel are not deemed to be staff members of the
4 Court and the Registry needs to establish contracts, legal services contracts. These
5 contracts shall be signed between the Court and the counsel, the lead counsel or members
6 of the Defence team and this is something that we would like to hear from you about
7 because right now there are various models in existence.

8 What should the model or the template contain?

9 For example, the obligations of each side, planning of the work to be done, support staff,
10 fees and other forms of compensation and so on and so forth.

11 And as the Registrar was pointing out at the beginning of the day, there are still a few
12 difficulties when it comes to taxation. Before 2012, that was one period, and then after
13 2012, there was a different period. Beforehand, it wasn't even requested by the Defence
14 team because it was also the position of the host state that they would not ask for taxation.
15 Then there was a change, and now we have decided -- and we will do this together -- with
16 the Bar, we will work together to approach the host state and try to see what we can do in
17 relation to this issue.

18 Of course, we are facing a dilemma. On the one hand, our dealings with the host state, it
19 is very important for counsel, but also more generally speaking for the Court itself. So
20 the support that we receive from the host state -- for example, when I found myself
21 negotiating the liberation of four people in Libya, I can tell you that the Netherlands
22 Embassy in Libya played a key role. We had assistance. We were able to use
23 communication lines, offices, including the Ambassador's office himself; we had complete
24 support from them.

25 It was also the case when the -- well, just a transfer, rather, of Bosco Ntaganda who was at

1 the American Embassy in Rwanda. Once again, we were able to count on key support
2 from the Dutch state.

3 So those are only two examples. There are countless examples of how we have enjoyed
4 an excellent partnership with the Netherlands and they have supported us and thus we
5 need to preserve those good dealings; that good relationship.

6 Then on the other hand, we have States that are funding this Court; that are giving
7 50 million for legal assistance here at the Court and won't understand that 30 per cent
8 goes directly to the wallet of one state; namely, the host state. Why is it? Why is it?
9 Some large states that contribute quite generously to this Court during these difficult days
10 for the Court will see some of the money going into the coffers of a single state. So we do
11 have work to do there and we have to consider this, take a stance, consider mutual respect
12 for the funding states and the host state. That is why we are including the funding states
13 in this discussion, they are here today. We want absolute transparency when it comes to
14 discussions that are being held here.

15 Now, turning to the financial impact of the reform; first of all, I would remind you -- and I
16 will continue reminding you today -- we have an obligation to remain within the financial
17 envelope allocated.

18 Then there will be more resources, but they will be better calibrated in terms of the
19 various phases of a trial. What we want, first and foremost, is less bureaucracy, less red
20 tape, less losing time, wasting time with discussions between the teams and the counsel
21 support section when it comes to the allocation of various amounts.

22 And finally, we realise that we must do a lot more work when it comes to training teams
23 when these teams are appointed. I'm not talking about general training that we do once
24 a year, which is very good, which allows people to have -- well, to have additional people
25 on the list, more women on the list, but also we must ensure that we are training lawyers

1 to work here at this Court.

2 So there you have it. I think we can now get our discussions underway.

3 And please proceed, over to you, Xavier-Jean.

4 MR KEÏTA: (Interpretation) Good morning, everyone.

5 Thank you, Marc.

6 Thank you, Mr Registrar, for the introduction.

7 Before I get to the heart of the matter, I would like to mention that comparison you made,

8 Marc. You mentioned a mirror, a mirror; that the Defence and the OTP would be mirror

9 images. I think when the legal-aid system was set up, that was the initial idea, but I think

10 that this mirror you have described is a bit of a funhouse mirror. It's a bit off.

11 You referred to the assistance that my office, the OPCD can provide, but you also

12 specified that that's not taken into account yet. But I would like to say that if, one day, it

13 is taken into account, it has to be truly taken into account in a fair way in relation to the

14 teams.

15 Why do I say that?

16 Because if you look into this mirror, the OPCD was set up to assist Defence teams if they

17 wished, but I have six people, six people in my office. Six people in the budget and the

18 mirror should then include the aid received from other sources.

19 For example, there's the legal advisory section with five or six people, very capable

20 people. There is an appeal section; that also provides support to the team from the OTP.

21 Then there's the immediate office of the Prosecution -- of the Prosecutor, rather; then all

22 the various other advisers who provide input on various cases.

23 So I think if we consider their contribution, it would be six on our side and then 30 or

24 more for the OTP. And when we look at this mirror, once again I think there is still more

25 of a distortion. I wouldn't say you have broken it, but -- well, maybe.

1 You mentioned Florence Hartmann and the case that might have -- well, that that
2 case -- well, the assistance for her defence. You mentioned something having to do
3 with -- you talked about €150,000 per month. If you don't want to break the mirror or
4 twist it, you still need to have another look at the mirror and consider the OTP, an
5 Article 70 case -- and it revolts me that the case -- those cases have not yet been reformed
6 to have a group of experts or amicus curiae because that is not normal for a party
7 to -- a case to be able to hold the gun of an Article 70 investigation to the head of the
8 Defence.

9 When you consider all the energy and resources of the OTP that they were able to allocate
10 to set up that Article 70 case, all the resources that allowed the OTP to trigger the
11 Article 70. If that were the case, then we would have a real mirror. Not your example
12 with Florence Hartmann.

13 MR DUBUISSON: (Interpretation) Chief Taku.

14 MR TAKU: Good morning, everyone. On behalf of the ICCBA, we want first to show
15 our appreciation to the Registrar for bringing up this issue in almost just about eight
16 months when he took office because the legal aid policy of this Court has simply collapsed
17 due to many years of neglect. And when the ASP asked that it should be reformed, they
18 did that tying the hands of the Registry on their back because they said it should be on the
19 existing budget.

20 Now based on the existing budget, are the years of complete neglect when counsel for the
21 victims, the Defence teams and support staff were simply neglected and considered in the
22 corridors as if they were intruders. But we're telling the Registrar that he has taken this
23 up as one of the most important issues early in his mandate.

24 We've looked at the legal aid, the reforms proposed. We studied that in detail and made
25 very concrete proposals, but we want it to be noted and put on record that the ASP must

1 be informed that merely trying to patch up, panel beat a system that has collapsed -- and
2 that is why these reforms, if they go through, may help to keep the cases moving -- we still
3 need for them to provide an adequate budget and try to work very profoundly in order to
4 give this Court a permanent legal aid policy.

5 It is a miracle that we've pushed on and on and on to this date when finally the matter is
6 on the table. We had proposed a working group after this that will permanently work
7 with the Registry to look at this issue more profoundly, but we will continue to appeal to
8 the ASP through the Registry and through other channels that this legal aid policy, they
9 should provide the adequate resources and to ensure that the legal-aid policy works so
10 that a few years along the line, we do not find the inability of Victims and Defence to fully
11 participate in cases or the process on the cases done seem to be manifestly unfair.

12 I will ask Mr Cyril for purposes of efficiency to make comment on specific provisions and
13 support while we ask for the working group after this to continue on a working basis to
14 ensure or to assist, really to work together with the Registry to ensure at the end we will
15 have a better panel-beating project with regard to the -- to present to the ASP as
16 a temporal measure to a system which, we think, has simply collapsed. Thanks.

17 MR DUBUISSON: (Interpretation) Please, could you just limit yourselves to the
18 comments on the composition of the teams because that is the topic of this part; so please
19 just focus on the composition of the team.

20 We are also going to be talking about the composition of the teams, and I would like to
21 hear your ideas on another type of flexibility, which has always been a problem for me at
22 the Court.

23 The example is one of the composition of a team; wherein, you are told that there is a legal
24 officer, an associate counsel who would be equivalent to P-3 level, using UN
25 nomenclature. And so with two P-3s, many Defence teams are made up of three persons.

1 So the salaries are reduced from €4,800 to €3,000 and with the €1,800 in pocket, they are
2 able to pay for a third position. Now I would like to hear your views on that flexibility
3 which, by the way, creates more problems for the Court because then there is a reflection
4 on the absence of the OTP because the Defence, P-3, receives €3,000 while opposite in the
5 OTP, they receive €4,000.

6 That raises further questions. You see, most of the lawyers on the Defence teams are
7 young women, that tends to create some kind of discrimination as well. That is why I
8 want to seek your views on this flexibility which has been called for by some counsel to be
9 maintained as part of the service contract.

10 This is a matter that touches on the composition of the teams and I therefore want to find
11 out whether it is normal for the number of members in each team to be increased by
12 reducing salaries.

13 Can you address that, please. Thank you.

14 MR LAUCCI: Marc, what Chief Taku requested me to do at this point because I think we
15 had not yet realised that we had already entered into the discussion on a specific topic,
16 but it was just to make a very general comment as an introduction and in response to
17 what you've just submitted.

18 The general comment, which was prepared and discussed in the ICCBA is, to a large
19 extent, positive with the draft that was received. Of course, there are issues and we are
20 here to discuss these. Some are serious, and I'm sure we will have a full discussion on
21 that, but the general comment is positive for several reasons.

22 First of all, when we perused the draft policy that has been submitted, we could see that
23 some old requests from the ICCBA were taken into account and were included into that.
24 I'm talking about the automatic payment of the additional uplift for the compensation of
25 charges; extremely positive.

1 We -- sorry now time is passing, I need glasses.

2 We could see that the budget for the investigation for the Defence and the field budget for
3 the Victims was increased; all these things are positive ones.

4 We also measured that the draft legal aid policy was trying -- and, to some extent,
5 successful in fulfilling the requirement from the ASP not to increase the overall budget.

6 And after discussion, we thought that we shall have a very pragmatic approach on that,
7 which is to say, if it is possible to improve the system without increasing the budget by
8 making it more efficient, I mean, improving it, then we shall explore that to the maximum.

9 And that's really a pragmatic approach that we want to support.

10 If, in the end, we discover that it is not possible without increasing the budget, then we
11 will be able to say it, but with the solid conviction that there is no other choice.

12 But we are ready to explore all the possible efficiencies as long as these, of course, do not
13 impact on the work of the teams.

14 We will have to discuss all the details. There are, of course, some matters of great
15 concern in the draft, especially with respect to the level of remuneration and conditions of
16 work of the support staff; I'm not talking about counsel, I'm talking about the members of
17 the team, the composition. The reduced activity approach is found extremely
18 problematic and I'm sure we will have to discuss that.

19 Now making just general comments on the observation that you made in your
20 introduction, I have two or three points to mention. First of all, you have said -- you
21 seemed to mean that the ICC was criticised for not being enough flexible or not being
22 enough generous.

23 This criticism was indeed formed in part of the report that was made in what we
24 understand, ICCBA, was a former attempt to reform the legal-aid policy and that's
25 the report made by Richard Rogers with which the ICCBA had expressed some concerns.

1 We would like to be pragmatic and we would like to look positively to the future, not to
2 keep old discussion or disputes, but really looking forward in a positive way; so let's keep
3 it aside.

4 You mentioned taxes. Of course, I mean we had this side meeting and we are really
5 grateful for the announcement and the efforts that we will do together. You expressed
6 the difficulties that you did not want to -- this issue to impact on the relationship with the
7 host state, and we fully appreciate that.

8 Actually, your presentation was extremely telling by saying there was a time until 2012
9 and there was after, I think without creating any issue with the host state. It's very
10 simple to express that at some point in time, there must be something which has gone
11 wrong on their side, which was a unilateral change in the way the host-state agreement
12 was interpreted and applied. And I think that's a very pragmatic and reasonable and
13 non-contentious request, just to come back to the earlier position, and I think that's the
14 most positive and pragmatic way forward and we will, of course, continue to assist in that
15 direction.

16 As Chief Taku said, the final conclusion of the ICCBA was that it would be good to have
17 a working group composed of members of the Registry and members of the ICCBA where
18 all these extremely technical issues could be discussed, explored. Where we could make
19 sure that all the possible improvement and efficiencies are found in order to improve the
20 system within the current envelope, and if we -- this working group comes to the
21 conclusion that the current envelope is not enough, then we will be in a strong position to
22 explain, "Well, we have tried everything, it does not work."

23 So that's the positive and pragmatic approach that the ICCBA wants to have on these
24 issues. I reiterate that there was a very strong appreciation for the efforts that are made
25 on this matter, and I will stop there. The ICCBA may have to speak about the specific

1 question of the composition of the team, but it was just the introduction.

2 MR DUBUISSON: (Interpretation) Now I would like you to introduce yourselves
3 whenever you take the floor for the purposes of the record. Thank you.

4 MR MBAYE: (Interpretation) Thank you for giving me the floor.

5 And on behalf on Madam Bensouda and her office, which I represent here today, I want to
6 thank the Registrar and his team for the initiative to invite us to the brainstorming on this
7 legal aid issue.

8 It is indeed a pleasure for me to take part in these discussions because over a period of
9 about eight years, I have been working on matters relating to legal aid.

10 But let me start with a preliminary comment, which we might address when we get into
11 the substantive matters. There has been a distinction made between the Defence and the
12 OTP in these discussions. Marc clearly mentioned that there were a few aspects of this
13 alignment that have not been cross-checked and what he said pointed to the fact that there
14 is an ongoing discussion about equality of arms when it comes to the OTP and the
15 Defence.

16 Now in order for us to be practical and fruitful in our understanding of what the Defence
17 team is in regard to legal aid, it would be a mistake to make this parallelism so to speak
18 between the OTP and the Defence. But in certain areas, when it comes to the
19 remuneration, for example, there is an opportunity to think about these issues further.
20 You see, legal aid, to my mind, is something that includes parameters that could also have
21 been included in this document; particularly, when it comes to the counsel support section
22 contribution to the reflection on this matter.

23 Now, have we quantified and reviewed what this contribution can be in the area of legal
24 aid, particularly when it comes to access to legal aid? And I think that this is
25 a component that must be included in this discussion.

1 Another point is that of flexibility, which has been mentioned. When I used to work on
2 matters of legal aid, I used to mention this to the counsel. I would tell counsel that the
3 system is flexible enough, and at the time I was able to challenge any counsel to tell me
4 that there was a lack of resources problem at the time. And I said this. I pointed this out
5 and I think it's a valid question.

6 The system is flexible enough; however, what seems to be slightly unfortunate in the
7 current document is that we need to know how this flexibility worked and on what basis.
8 You see, in that time, the flexibility applied both to the Defence and to the Victims. There
9 were several decisions at the time which granted additional uplift for the Defence and the
10 Victims and the criteria that were used, have these been properly reflected in the
11 document? So there is an attempt to do that, but I think there is also a need to dig deeper
12 into this matter of flexibility.

13 The last point in relation to this document, and in very broad terms, when Professor Taku,
14 our learned colleague says that the system has crumbled, I think we can have a debate
15 around that point. I am not sure that one can say that the system has crumbled. The
16 Registry has consulted various legal associations when it comes to these legal aspects of
17 the legal aid system. There are some good expects which work very well and I think we
18 need to identify -- maintain them and improve on them, but I am not of the view that the
19 system has crumbled. I think that we simply need to dig deeper, strengthen our
20 reflections on this issue and see what can be done to sustain the system.

21 When it comes to professional expenses or charges and taxes, I think we need to further
22 consider what these expenses are within the system. If you look at all the cases before the
23 Court and you look at the Defence and the Victims and other intermediary teams, you
24 would see that at the end of the day, the professional fees are good enough to be able to
25 address even issues pertaining to taxes. We, however, need to see how we can further

1 define these matters and merge them or not merge them into overall remuneration.

2 MR DUBUISSON: (Interpretation) It is always good to hear from the OTP that the legal
3 aid system is working well for the Defence and for the OTP. That's a good thing to hear.

4 MR MBAYE: (Interpretation) That's not what I said, Marc. I said that when I was at the
5 Registry, the system worked very well.

6 MS MASSIDDA: Paolina Massidda, principal counsel of the Office of Public Counsel for
7 Victims.

8 Considering that the item of the session is team composition, I will limit my two
9 comments on team composition. We will have other sections -- to discuss other matters
10 later today.

11 And my comments will deal with what is now on page 11 and 12 of the draft policy. I'm
12 looking at the English version. It relates mainly to the composition of the teams in both
13 the Defence and Victims teams for reparation phase.

14 Now what you can see immediately in looking at the table is that the composition is
15 exactly the same for the Defence and for Victims teams at the reparation phase.

16 Now I am speaking from my personal experience, of course. I see that also my colleague,
17 Maître Nsita, is also in the meeting room. Now I'm not sure -- and I can be sure at least
18 in the cases in which we have been involved as counsel at the reparation phase that these
19 resources are enough.

20 But I think we need to understand that the work of a Defence counsel at reparation phase
21 and the work of a victim's counsel at the reparation phase, it's not the same at all.

22 Victims are full parties at the reparation phase, which means that they are entitled to
23 present evidence, to request for experts and, apart from that, the work of a legal
24 representative at the reparation stage entails a lot of missions in the field in order to be
25 able to consult with the clients to understand which kind of reparations they would like,

1 how to implement that. So it's really a full job, which I think it's not completely covered
2 now in the draft policy as it is, despite the fact that there is a certain flexibility which you
3 could cover for more resources.

4 Another point which I would like to deal with in this issue of a composition, I'm taking
5 the point from Mr Dubuisson's speech in relation to the professional investigator, which is
6 now covered -- it was already, but it's clear now for the Defence team -- again, page 11 of
7 the draft policy.

8 Now we cannot exclude at all the possibility that a professional investigator is also needed
9 in a Victims team at a certain point in time, and I can give an example just so that
10 everybody understands what I would like to cover here.

11 During the Ongwen trial, I decided as a Victims lawyer to present evidence in the form of
12 experts appearing before the Chamber. We had undertaken a certain investigation on the
13 expert himself in order to be able to understand if they want or not to appoint them and,
14 just for the sake of reasoning, this investigation does not cover only the fact with the
15 expert, but also what the expert has said, the competencies, has the expert written any
16 articles which could be not good for your strategy and stuff like that. Why I'm giving
17 these examples is because this should help you understand that it's not only a superficial
18 investigation that sometimes is needed, but a more in-depth investigation.

19 Now I wonder if this kind of activities can simply be covered by what is now called in the
20 draft policy, "field activities"? And if this is the case, if it is the idea of the drafters, I think
21 that some explanation should be included in the draft policy in order for Victims counsel
22 to know that this could be a possibility and of additional resources under the draft legal
23 aid policy.

24 And finally, my last comment relates -- again, I'm looking at page 12, again, of the draft
25 policy -- in which after the table for the Victims teams resources, there is something called

1 "reduced activity" with an asterisk. We, as OPCV made a strong comment about that in
2 relation to the fact that reduced activities cannot be applied to the legal representative of
3 victims at the reparation phase. It's simply impossible because of a type of activities that
4 I have just described.

5 And this leads me to the last comments in relation to paragraph 47 of the legal aid policy,
6 which indicates that following the end of a case, the common legal representative should
7 be allowed to work for an additional period and then this period shall in no case be longer
8 than six months.

9 Now this is -- I don't think -- it's a little bit arbitrary, if I can put it that way. First of all,
10 it's not clear in the policy why six months? Why this time? And not three, two, four,
11 seven, 10? So there is no explanation about the objectivity criteria which led the drafters
12 to arrive at six months.

13 Second, we have already experienced in reparations proceedings in which clearly six
14 months are not sufficient and I'm just referring to the Lubanga reparations proceedings,
15 for instance, to the Katanga reparations proceedings is exactly the same. So I think there
16 is some room for maybe more improvement in these different issues that I have identified.

17 Thank you very much.

18 MR DUBUISSON: (Interpretation) Thank you, Paolina.

19 MS ORLOVSKY: Thank you very much, Marc. Kate Orlovsky from the IBA Hague
20 office.

21 I first want to thank the Registry and all the colleagues present for this consultation. We
22 really do see this as a very necessary part of the revision of the legal aid policy that all of
23 the stakeholders, including practitioners and including the States Parties and civil society
24 organisations are involved. And this is because we do see a shared goal, which is that
25 this Court is capable of supporting a fair trial and I'm just going to make a couple

1 comments that again respond to the first portion of the consultations today
2 because -- well, this is the opportunity to do so. We will also be submitting written
3 comments in due course.

4 The IBA's position has always been that legal aid is an operational and technical matter
5 and should not be reduced to its budgetary component. And the whole discussion of the
6 financial envelope and staying inside of the financial envelope is, therefore, somewhat
7 inconsistent with the approach that we see as being the right approach for legal aid.
8 We do understand how we got here and, of course, we do understand the considerations
9 that have to be taken into account, but when we are entering into a policy discussion, we
10 are looking for a long-term sustainability. And as my colleagues have said already from
11 ICCBA, there will be some things that need further discussion to arrive at that with the
12 current draft that we have.

13 Just on that note, it's very positive of course that we adhere to the basic principles that
14 have always been part of the legal aid that were set by the Assembly of States Parties.
15 We do note that some of those basic principles have been adapted in the current draft and
16 change the nature of how legal aid is being presented, moving more towards economy
17 and less towards looking at equality of arms, and we'll comment further on that in our
18 written submissions.

19 Some of the things that we are very, very glad to see as part of this discussion and being
20 undertaken now are the issues of taxation as has been mentioned. We very much
21 support those discussions and we will look to, particularly the host state to enter into
22 productive discussions on that.

23 It is very much an equality of arms issue and as well taxation, not taxation, excuse me, the
24 contracts -- the contracts issue, and we note that in the written submissions that have
25 already been received, there are some quite-detailed ideas about what a contract should

1 include, and we very much support that the practitioners will continue to support the
2 Court in arriving at a contract that will indeed protect all members of a Defence team and
3 a Victims team, no matter their level of contribution. In this regard, we do think that
4 a working group may be an appropriate way forward, if not in the policy as a whole,
5 which actually I think would be a good idea, but at least on some of these really detailed
6 issues that will affect the staff of the teams.

7 Just to make another comment. Actually, I think that's enough for the first part. Well,
8 no, I will say that we did a very careful analysis of the current draft against the previous
9 legal aid policy and we do think that there is an opportunity to have a greater change, and
10 we understand that the financial envelope may be leaning towards a more restrictive
11 outlook right now. But there was a lot of material provided by us and by others in the
12 previous consultations that, for example, would have changed the team composition and
13 we don't see that reflected in the current draft. We do see that as a missed opportunity;
14 so we would welcome an opportunity for -- or at least the next draft to pick up some of
15 the issues that have already been flagged in the previous consultations on team
16 composition.

17 Thank you very much.

18 MR DUBUISSON: (Interpretation) Thank you, Kate.

19 Mariana and then Anand.

20 MS PENA: Good morning, Mariana Pena with the Open Society Justice Initiative.

21 First of all, thank you very much to the Registry for the invitation to attend this
22 consultation and for taking the time to sit with all of us to go through these very
23 important questions.

24 I would like to start off by saying that we appreciate and we understand the difficult
25 position that the Registry is in in trying to implement changes within existing resources.

1 While we are not going to comment on whether that is the right approach, we would like
2 to state that we think there is a scope for a number of changes within the current
3 envelope; that is why we support your efforts in this respect.

4 We also see this consultation as an opportunity to crystalise current practice. And my
5 comments on the team composition issue are going to be based on my understanding on
6 my own personal experience having been with the legal representation team for victims in
7 terms of the practice of the teams.

8 We have noticed that the team composition for pre-trial, trial and appeals evolves from
9 the original legal aid policy from, I believe, 2007, where you only had a counsel and a case
10 manager. I think some of us will recall that at the time, there was an effort to put
11 together a legal aid policy for victims without sufficient practice. So there was no
12 practice at another tribunal that the Court could get inspiration from to set up a system.
13 So the system was quite flexible at the time.

14 I see that, as I said, that has evolved and that now you have included a field assistant
15 based also on the practice and some of the earlier decisions from the Chambers at least
16 requiring the creation of a so-called support structure.

17 But what we don't see in the Court team for pre-trial, trial and appeals is legal support.
18 There is no legal assistant or trial lawyer, as you call it, for the reparations phase and
19 while acknowledging that, as Paolina was saying, that in the reparations phase victims are
20 full parties and there is a more prominent and sort of a -- from the work for victims, we
21 worry that while the legal aid work should cater for victims, at least should cater for some
22 sort of -- we always say multidisciplinary work because the counsel is not only at the
23 Court, but also in the field, there is some very core legal work at the Court. There's
24 review of submissions; there is drafting of filings; there is legal research and counsel is
25 keeping an eye both on what the field assistant is doing in the field and keeping an eye in

1 the courtroom, and we worry that not having a legal assistant or trial lawyer, the counsel
2 alone may not be in a position to fulfil those legal tasks.

3 The second comment I would like to make is on the question of reduced activities, and
4 this is something that at the Open Society Justice Initiative we have been saying for some
5 time. We made comments last year in writing. We note that the question of reduced
6 activity is evaluated from the perspective of the Court.

7 You look at the case and what the different phases are and what phases of reduced
8 activity are before the Court. But for legal representation teams, some of those phases of
9 reduced activity at the Court are the times the counsel is going to go to the field and
10 consult with victims.

11 So our proposal is that you are much more flexible in this respect and that you look at
12 what is and what is not reduced activity on a case-by-case basis, so that counsel that are
13 not in a position to have say, a full-time job at the Court at a certain time can use that time
14 for the very much-needed consultations with clients in the field.

15 Thank you.

16 MR DUBUISSON: (Interpretation) Anand has the floor and then thereafter, we'll take a
17 break.

18 MR SHAH: Thanks so much, Marc, I appreciate that.

19 On the issue of team composition, we do appreciate the addition of an associate counsel at
20 the pre-trial stage for 150 hours; we do think that is an improvement. We can certainly
21 debate as to -- sorry, Anand Shah with the ICCBA, I didn't give my name and affiliation.
22 We can certainly debate whether that hourly envelope is sufficient, but we do think that's
23 an improvement.

24 Now in terms of the investigation phase at the point counsel is appointed, we do believe
25 it's necessary that at least another team member, probably a case manager is added at that

1 stage. In our view, there is no real explanation or basis given as to why that's not the
2 case. I think as Maria was also pointing out, a lot of work goes on that requires someone
3 to be based at the Court. Counsel is not going to be based at the Court for the most part
4 at that stage.

5 So for efficiency purposes, in order to allow the Defence to properly commence its
6 investigations, we do believe that's something that needs to be considered, the addition of
7 a case manager at the time that counsel is appointed and prior to -- to be clear -- prior to
8 the initial appearance of the accused.

9 Moving on to, generally speaking, in terms of team composition, in the view of the
10 ICCBA, the core team, certainly on the Defence side and we think also on the side of
11 Legal Representatives of Victims and we do support the comments that Maria had just
12 made -- Mariana just made, that should consist of a counsel, a case manager and a legal
13 assistant or a trial lawyer, depending on the terminology you're using. And that's
14 because in terms of the complexity of these cases, the amount of work that needs to be
15 done and the fact that you want to be able to preserve that capacity and that knowledge
16 with respect to a case that is going on for some many years, you really need to be able to
17 preserve that. And I think the real issue is: how do we ensure that?

18 In our view, the real difficulty comes in the reduced activity phases and as far as we
19 understand, the reduced activity budget is now limited to essentially a lead counsel
20 salary. And we do not think that is sufficient to ensure this core capacity and this core
21 knowledge that needs to continue throughout the case on the Defence and Victims side.

22 That is something that we think needs to be addressed.

23 You can't frankly expect someone to hang around for months, potentially a year at a time.
24 There is work to be done. At the same time, you need to retain that capacity; otherwise,
25 you risk a deficiency in the Defence's own capacity. You risk a delay in proceedings as

1 well when that capacity is needed. So I think that is something else that needs to be
2 looked at in terms of this envelope that's been proposed for reduced activity phases.
3 Marc, you'd also mentioned the flexibility principle and we appreciate that and the impact
4 that could have in terms of equivalency between the Prosecution and the Defence, in
5 particular.

6 If that flexibility principle is being used via counsel, you certainly may have the case
7 where someone has the title of, let's say legal assistant or trial lawyer on the Defence side,
8 and their salary is much reduced in comparison to someone on the OTP side.

9 So two points there. Firstly, I think we need to revisit the qualifications in terms of the
10 positions on the Defence side. As far as we understand, OTP case managers are at a
11 P-2 level. Somebody can correct me if I'm wrong on that, but that was our understanding;
12 whereas, under the legal aid policy, a case manager is a P-1 step 5; similarly, with respect
13 to legal assistants or trial lawyers. On the OTP side, a trial lawyer, someone who has that
14 title, as far as we understand, that is a P-3 position. On the Defence side, a legal assistant
15 is a P-2, step 5; and I think we'd also note that on the Defence side, you could have quite
16 some -- it's quite a diverse range of experience for someone who might fall into the
17 category of legal assistant. Someone may have just three, four, maybe five years of
18 experience. You could also have someone who has a wealth of experience that's also
19 falling under that title; so we think that's something else that needs to be looked at.

20 Number one: What is the true equivalence between the Prosecution and the Defence and
21 the Victims in terms of how we're categorising these positions?

22 We, counsel, the position of counsel in general I believe is that they do wish to keep the
23 flexibility principle in place if it's needed in order to provide very necessary protections
24 for support staff. We appreciate that a minimum monthly fee or salary has been
25 proposed under this policy; we think that's very important.

1 The amounts that are proposed -- that, we believe needs to be revisited. I think it's been
2 linked in the policy to the Dutch minimum wage and we don't believe that that is
3 a relevant linkage. That needs to be revisited. And we can look at those numbers again
4 in terms of what is appropriate, but I think the underlying point here is that the flexibility
5 principle is, perhaps, counsel believe that's needed because they are not able to get the
6 necessary resources that they believe are required to properly represent their clients, and I
7 think that's some of the tension that exists there.

8 I will leave my comments there for the time being.

9 Thank you very much.

10 MR DUBUISSON: We could take the break now or we could continue our deliberations.

11 Is that possible for the interpreters?

12 Okay, well, Maître Nsita, you will be the last to speak on this point and Esteban maybe
13 has a few clarifications to make.

14 MR PERALTA LOSILLA: (Interpretation) Yes, let me do that now, two very brief points
15 relating to what Anand has said.

16 Now the case manager, from the time counsel is appointed, that is something we thought
17 should be left as a matter of flexibility with the request for additional resources, as the
18 case may be.

19 You see normally, the initial appearance occurs at a time shortly after the arrest warrants
20 have been lifted and then there is the initial appearance after the arrest.

21 During those 72 hours, counsel has to be appointed; counsel has to meet the client; and
22 therefore, quite normally, does not have the time to designate a case manager in that
23 context. Were the circumstances to be different, maybe there could be a case manager in
24 place before the initial appearance.

25 Now when it comes to other matters relating to the staffing, we will address those

1 subsequently. Thank you.

2 MR NSITA: (Interpretation) Thank you, Director, for giving me the floor.

3 I want to point out that I had asked for the floor when Paolina had the floor, but I am

4 surprised that I'm being given the floor last but it's nothing. It's nothing.

5 I want to somehow complement or add to what Paolina said a short while ago in relation

6 to field work. Allow me to insist on the issue of the presence of the legal representative

7 at the Court; some people may not be aware of this. I have heard mention of the

8 composition of Prosecution teams and the composition of Defence teams, the manner in

9 which both teams are put together, but nothing was said about how legal representative

10 teams are put together.

11 During the trial phase, legal representatives do the same thing and provide the same

12 services as the parties. At that time, the legal representative participates in everything

13 and ends up with the same volume of work with the same case file in hand.

14 I am happy to note that one of the principles mentioned here is that of objectivity. I do

15 remember what Judge Bruno Cotte said once, recognising legal representatives as the

16 third voice because they are present and participate in all deliberations. I hope we can

17 deal with this subsequently in our discussions within the ICC Bar Association.

18 However, allow me to point out here that when it comes to the teams for legal

19 representatives in relation to substantive proceedings, those teams do not correspond to

20 the tasks and the volume of work that the legal representatives have to do.

21 You see, it is, to some extent, the legal representatives who have a lot more work to do

22 here one may say to the extent that they take care of the proceedings in the courtroom and

23 they also have to deal with a huge and vast number of victims on the field, taking into

24 account the interests of each and every single victim.

25 Now that is what I had to say in very broad strokes when it comes to the staffing of the

1 legal representative teams at trial. I think that quite objectively the teams should have
2 a legal assistant based in the Court, but also an assistant on the field, probably a local
3 lawyer who would have to deal with a huge number of victims addressing their issues on
4 a daily basis.

5 Those are my thoughts when it comes to the staffing of our teams. We will file written
6 submissions in relation to further topics that we may have to deal with.

7 Thank you.

8 MR DUBUISSON: (Interpretation) Thank you all.

9 Coffee break. We will all reconvene at 10.50. Thank you.

10 (Recess taken at 10:36 a.m.)

11 (Upon resuming at 11.02 a.m.)

12 MR DUBUISSON: (Interpretation) Thank you very much. I think we were supposed to
13 resume at 10 to 11 so we're only 20 minutes behind schedule now, initially, in comparison
14 with the original agenda, so I think we'll have to restrict or cut somewhere perhaps one of
15 the discussions, one or the other.

16 I'd like to call upon Esteban now to talk about the new proposed contract.

17 Esteban.

18 MR PERALTA LOSILLA: (Interpretation) Thank you very much, Marc. I will be giving
19 a very short presentation because we're here to listen to you first and foremost. I'll be
20 giving a very brief intro.

21 To begin, thank you very much for your critical support to us in our attempts to update
22 this policy. And the Registrar has been quite supportive of the work done by the
23 division, the Judicial Services Division and the Counsel Support Section.

24 And now let's turn to the actual content of the contract. This contract would be between
25 the Court and the team members. As Marc Dubuisson pointed out, this would be a legal

1 services contract, not a work contract. So we need to make that distinction. It would be
2 a legal services contract and not an employment or work contract.

3 Why do I say this? Well, for a very simple reason: Because the International Criminal
4 Court is not the employer of anyone within the legal aid system, at least not today.
5 Today the employer, and this point was raised, the case managers, the support staff, the
6 assistants in the field are employed by the counsel. It is the counsel who designates
7 those people who make up his or her team. It is the counsel who negotiates conditions of
8 work. And if I refer to 7(4) of the code of conduct, it is the counsel who sets those
9 contracts. And the Court has an obligation under 21(4) to ensure the independence of
10 said counsel.

11 For those reasons the legal services contracts cannot include any references to conditions
12 of work broadly speaking. What we have done for a while now, we have been in contact
13 with the lawyers and now with the ICCBA with a view to establishing a catalogue of good
14 practices that could be recommended to counsel in relation to their dealings with team
15 members.

16 And who would have oversight over these conditions of work? Of course, first of all,
17 there would be oversight provided by peers, by the Bar Association, and complaints could
18 be made to the Bar Association or mediation could be engaged in.

19 The Registry could mediate if requested by the parties, but given that the Registry is a
20 neutral organ, I don't believe that would be a good idea.

21 In the case of serious misconduct, a matter could come before the disciplinary organs of
22 the Court.

23 So this session will be devoted to a discussion or your contributions, rather, to this list of
24 issues that should be dealt with and included in these legal services contracts between the
25 Court and the counsel or team members, be it Defence teams or teams representing

1 victims. Thank you.

2 MR DUBUISSON: (Interpretation) Very well. I think it's time to get things going.

3 Mr Nsita asked for the floor, but I don't see him. We'll give him the floor.

4 Anand.

5 MR SHAH: Thanks so much, Marc. Anand Shah from the ICC Bar Association again.

6 Thank you, Esteban, for that explanation to the Registry's conception of a legal services
7 contract and what it may or may not include. I think from the Bar's perspective, we do
8 feel certain components could be placed inside a legal services contract with respect to
9 support staff in relation to issues such as annual leave, sick leave, maternity, paternity
10 leave, notice periods potentially, things of that nature. And in our view that can be, that
11 can be viewed and structured in terms of how compensation is calculated. In terms of
12 let's say something like annual leave, for Court employees, for staff members of the
13 Office of the Prosecutor, that is as far as we understand, it accumulates on the basis of
14 2.5 days per month and presumably salaries could be calculated on that basis then. So
15 you would take out, when you're calculating the salaries for Defence and Victims team
16 members, you would take out those -- you would include within that 2.5 days of, for
17 example, paid leave.

18 When it comes to issues like sick leave and maternity and paternity leave, in our view
19 these contracts should permit support staff to request this sort of leave from their counsels.
20 Their counsels would have the ultimate say as to whether or not that is granted, but that
21 should be funded out of a separate budget so it does not impact on the core legal aid
22 budget of that particular team. And it makes it a real possibility and a real right, both for
23 the individual and for counsel to grant that. That means counsel could in fact engage an
24 additional team member to temporarily replace the person who may be going on
25 maternity leave, for example.

1 And we do feel that these issues need to be viewed in the context of equality of arms and
2 the reality of how cases and teams function at the ICC. As we're all aware, these are
3 cases that last for a very long time and for all intents and purposes, especially on the
4 support staff side, these individuals are working more or less at the Court on a full-time
5 basis for many years and this is the reality of life, that's why these basic rights are
6 provided for on the OTP side. If they're not provided for on the Defence side through
7 the legal aid policy, then that is a -- it has been a significant difficulty and will continue to
8 be a difficulty for Defence and Victims teams.

9 So we do feel that even within the context of a legal services agreement, some of these
10 issues can be included from the standpoint of budgeting.

11 And in the end we agree that it would be up to counsel and the Bar Association to ensure
12 that these standards apply in practice. But the framework needs to come from the legal
13 services agreement, as does the funding, proper funding from within the legal aid policy
14 and outside of the specific budget that's given to the Court.

15 These issues also play into, in our view, the larger issue of working conditions for support
16 staff, issues such as harassment, we're all aware of that nowadays that that is something
17 that is of great focus, and it should be. And the Bar has certainly taken strong steps in
18 that direction in terms of the Bar is in the process of setting up a hotline and a complaint
19 mechanism for harassment issues, the Bar has put forward proposals regarding
20 mandatory membership of list counsel as members of the Bar. And these sorts of things
21 will allow the Bar to have more say and influence over what counsel and support staff are
22 actually doing. So the Bar is working in that direction and we ask that the Court also
23 tries to meet us halfway and put these sorts of -- find a way to incorporate these sorts of
24 protections for support staff into the legal aid policy.

25 Thank you very much.

1 MR WALLEYN: (Interpretation) Yes, thank you. I do have a problem with the -- oh, I
2 should introduce myself. Luc Walley, Lubanga case and member of the executive of the
3 ICCBA.

4 Now the term "employer", this idea that the counsel would be an employer of his staff is
5 problematic to me. If we say that the counsel is the employer, he must receive the
6 necessary resources to act like an employer and to respect the, well, I presume the Dutch
7 legislation relating to employment and contracts. Either we have independent
8 agreements with these people or there is some kind of international status determined by
9 the Court and then we respect such a statute.

10 But if there is no such thing and we're told the Court is going to pay you a lump sum and
11 you do as you wish with it and we're supposed to hire some people, that means the
12 counsel is being given a legal responsibility that he cannot comply with. As long as
13 we're full time, yes, that's fine, but even then. If it's full time, okay, well, then we would
14 have to deal with sick leave, maternity leave, paternity leave. And then specifically for
15 Representatives of Victims and also for Defence counsel, once we enter some kind of
16 system, the reduced activity period of time or system, well, then as of next month it will
17 only be 50 per cent, but an employer can't do that kind of thing. So I think we'll have to
18 find a legal solution to that.

19 And I think it's dangerous to include in official documents that the counsel is the official
20 employer of his staff because then this person will have a certain legal responsibility.

21 MR DUBUISSON: (Interpretation) Yes, Kate.

22 MS ORLOVSKY: Thank you, Marc. I just wanted to say on this, as you well know,
23 I was very pleased that this morning the connection was made by the Registry between
24 the gender dimension of the support staff that are currently represented at the Court,
25 being that they're mostly women, and we do very much support that addressing these

1 issues is a part of the legal aid policy revision. I think it is entirely consistent with trying
2 to bring more women onto the list of counsel and list of assistants to counsel to address
3 these types of issues, which have been very well articulated by some of the submissions
4 received, including about issues like maternity leave.

5 And while I think it would be premature to identify the specific devices that should be
6 used by the Court, I think this is very much a matter that should be taken up
7 institutionally and in part that's because it's really important when we have these junior
8 staff members who don't have as strong of a voice and they're at the beginning of their
9 careers that they should not be subject to an unequal approach by the counsel who they
10 are working for, and there is very much a balance of power issue there. And I do think
11 that if the Court can support this in an official way, using some of the constructive
12 suggestions that have been received, it would be a very positive thing. Thank you.

13 MR DUBUISSON: Chief Taku.

14 MR TAKU: Permit me to raise an issue. I do not know where it falls squarely, but to
15 say that we have a category of individuals, very, very helpful individuals who also come
16 into Defence and Victims teams and they have access to -- they will follow through the
17 process, and these are interns. Unfortunately the internship programme of the Court is
18 one in which we have people, it's not paid, people are not paid, they work on a voluntary
19 basis, but their services in Defence team must be protected somehow in the sense that by
20 their acts or omissions it could bring about some consequences, have some impact on the
21 case. They play a major role, but they are not paid.

22 The spread of these interns, we do not find interns from many countries, especially the
23 third world countries and many other countries around the world, only people from very
24 small circles come. But nevertheless, it will be -- any other questions we have, these
25 individuals come into the team and they play a major role and there must be a way of

1 protecting them within the system. I do not know whether there will be some form of
2 contracts, or as they are assigned by the Court, whether the Court will also have some
3 individual guidelines on how to operate within teams or how they will be members of the
4 Defence team helping the Defence team say for six months or shorter or longer period.
5 They are not employees per se, yet you have the support staff who have contracts, specific
6 contracts as it is said, of course taking into consideration what my friend Anand has said.
7 So the position of these interns is something that with regard to questions of these
8 contracts, who is the employer? It is the Court. So you have members, people working
9 in the Defence team who are deemed to either be employed by the Court or they fall
10 under a programme run by the Court, but they are members of the team. They have to
11 go through the same ethical standards, apart from the fact that they are not paid for the
12 time being.

13 So I think you have to factor this into the suggestions that, the reforms that you are
14 making in regard to the contracts.

15 MS BUISMAN: Yes, thank you. Caroline Buisman, Defence lawyer.

16 I just wanted to make a few comments on this. First I think it's very important how it is
17 defined who is actually the employer. So I share some of what has already been said.
18 But also for the purposes of taxes.

19 I know at the ICTY someone actually did an inquiry and there was an opinion that, like if
20 the lead counsel is seen as the employer, there is a way of interpreting that and also there
21 will be taxes that lead counsel have to pay on behalf of the staff members. So that is
22 something that we really need to avoid.

23 I also think we have to be sure that it's all in compliance with Dutch law because it has to
24 be, especially because these sort of relationships can be seen as *de facto* like a contract.
25 And that also comes back to all these things that have been discussed, like pregnancy, like

1 certain rights to number of days per year for holiday. All of that is an obligation also
2 under Dutch law and I think we have to be very careful that we really look into this very
3 carefully what are the requirements because also otherwise people will eventually be able
4 to go and complain before tribunals if this can be interpreted as a *de facto* contract.
5 I think we need to look at these issues and really look at Dutch law when we consider
6 that.

7 MR DUBUISSON: (Interpretation) Aziz.

8 MR MBAYE: (Interpretation) Aziz Mbaye, OTP.

9 This is an excellent idea to look at this issue of whether there should be a contract within
10 the framework of legal aid concerning payments. I think that, well, I agree with the
11 speakers that there are some issues we have to look at very closely and determine how far
12 the Court can go on these matters, having contracts with external people who are lawyers
13 and members of teams.

14 As was mentioned a few moments ago, I think that do we want to establish a service
15 contract that would govern issues such as payment and dealings between the lawyer and
16 his team members? How far can we go when it comes to these matters?

17 Another thing that's important, the contract has to be looked at within a broader context.
18 We're not talking only about payments. There are other provisions that regulate the
19 lawyer's behaviour and his role within the Court. Now, would the contract reproduce
20 these things or is that necessary?

21 Another particular thing is that I'm wondering, should the contract be restricted to
22 payment and then develop some directives that would govern dealings between Defence
23 counsel and team members? Just to respond to the issues raised about harassment and
24 the like.

25 I'm wondering, you mentioned maternity leave that could not be resolved within the team,

1 will the Court have to get involved and deal with disputes?

2 So I think there are many issues at play here.

3 MR DUBUISSON: (Interpretation) Paolina.

4 MS MASSIDDA: (Interpretation) Thank you. First of all, I apologise because I was a bit
5 late for a session. Sorry about that and I hope I'm not repeating anything that's already
6 been said. Just two points.

7 Now, first of all, I think we have to recall very clearly the issue of independence of counsel.

8 Each contract must bear in mind the fact that Defence counsel acts in an impartial,
9 independent fashion. And I'm saying that in relation to the role that Registry might play.

10 Secondly, if the kind of contract that the OPCV already uses, perhaps that could apply as
11 well to these matters.

12 Now, just for the benefit of those here in the room, the OPCV, when we hire counsel who
13 are not staff members, we use a consultant's contract and in that contract we put in
14 writing that it is the lead counsel who discusses the contract with the counsel to be
15 appointed to the team. So it's a contract between lead counsel and counsel. The terms
16 of reference are discussed and put in writing. So there is a job description, there is also
17 compensation, the maximum amount that the person can earn per month. And, as well,
18 there's a reminder of the obligations under the code of conduct, the code that the counsel
19 must respect. There's also the requirement of the counsel appointed to the team to refer
20 any conflict of interest or any other issue that could have an impact on the contract and
21 could lead to changes to the contract itself.

22 So those are the most important parts of that contract.

23 The contract is entered into by way of human resources, but they are the administrators,
24 so to speak, that put the lead counsel in touch with counsel. So I think such a contract
25 could be envisaged.

1 Now, as far as the other issues such as maternity leave or adoption leave, why not, why
2 not, some people might adopt a child, or issues that have to do with vacations, vacation
3 days, for the time being that is not provided for in the consultant contract that we usually
4 have with our people in the field. Usually it's dealt with directly between the field
5 counsel and lead counsel.

6 And I could follow up on the last remark that Aziz just made. Thank you.

7 MR DUBUISSON: (Interpretation) Xavier-Jean.

8 MR KEÏTA: (Interpretation) Thank you, Marc. I think that each time we talk about a
9 contract we always run the risk that the contract could be interpreted in a particular way
10 and we're trying to ensure the security of the relations or the relationship. I've been
11 within the Court for many years and I've spoken out many times about certain behaviour.
12 Some lead counsel have been gentlemen, but others were horrid when it came to treating
13 their support staff. So you can't provide for everything within a contract. The Bar
14 could play a role there by perhaps establishing a charter to protect those who are in a
15 position of weakness and to ensure that they can't be dismissed overnight because lead
16 counsel is not happy.

17 So I think in our discussions we need to find some way of hitting the ball back into the
18 Court of those who we think of as independent counsel. And if the Code of Professional
19 Conduct does not cover everything, I think we have to acknowledge that our profession is
20 a profession of gentlemen and it is not necessary to describe everything to ensure that
21 people act in a dignified and humane manner. I think it's important to have that
22 reminder but also to remind the profession, my profession of certain responsibilities and
23 certain behaviours.

24 Just to conclude, this may seem minor or trivial, but it could have major consequences.
25 When Defence teams wish to travel and contact the Registry, external relations division

1 for a mission plan to go to the field, when I go to the field myself and my colleagues from
2 the OTP as well, we see the doctor or someone within the medical service to have a
3 medical box and sometimes the vaccinations are checked. That's about it. I think if we
4 are to have a certain equality of arms, I think that the people who travel to the field need
5 to know that, you know, they could lose their lives in the field or have significant health
6 problems. So I think there needs to be more support there, more medical support, at
7 least provide some, at least provide some advice.

8 MR DUBUISSON: (Interpretation) Thank you, Xavier-Jean.

9 Maître Nsita.

10 MR NSITA: (Interpretation) Yes, when it comes to contracts between counsel and staff,
11 let me point out from our experience within our team the following: When it comes to
12 relations between counsel and staff and matters of professional conduct, there is really no
13 big problem. However, the concern expressed by the staff with whom I have worked,
14 their concerns have particularly been in relation to matters of social security, taxation, and
15 any other such obligations that are incumbent on an employer in his relationship with the
16 staff.

17 These aspects are not covered neither by the Registry, nor by counsel because the texts
18 provide that staff assigned to a counsel have the same status as the counsel.

19 Now, most of the case managers with whom I have worked, at least three of them, have
20 expressed the concern consistently that they don't have any social protection, no proper
21 insurance policies to cover them, and so if they are expected to pay for their social services
22 and insurance policies from their own fees or allowances, that would have significant
23 consequences and I therefore wonder whether this is something we want to think about.
24 Thank you.

25 MR DUBUISSON: (Interpretation) Let me just bring in some technical aspect to our

1 discussion.

2 Most of what we are talking about is included in what is referred to as a common staff
3 cost. So when we look at the various statements and look at staff, we see that the States
4 Parties assign a certain amount, maybe 100 per cent to staff and 60 per cent of that is for
5 salaries, while 40 per cent covers common staff costs, including things such as education
6 grant for children to attend school, it includes home leave which enables the staff to travel
7 back home, staff from here would go to Australia, for example, and that's funded. So
8 that's another aspect.

9 Now, when we are asked to function within the limits of the available budget, it implies
10 that all these very interesting discussions that we have are going to impact the budget and
11 therefore we need to bear this in mind. If we begin to engage in discussions that expand
12 Court responsibility to other parameters, then we will need to convince the States Parties
13 to follow our thinking, not only in terms of dealing with the fees, but also in terms of
14 dealing with these other aspects that cover the social rights that you have just mentioned.
15 But this is not something that is already achieved today. There is no consensus around
16 that. We have already something in hand, but the suggestion that is being put forth is
17 something that can be envisaged in the future. So that's a technical point.

18 We know what obtains at the Court today. We have consultancy contracts, we have
19 individual contracts for individual contractors, and we also have a number of agreements
20 or conventions for interns. And these are the instruments that are available to the Court,
21 which can also be used in a creative way to bring in some of these aspects into how the
22 Court can provide some kind of support to independent lawyers or to independent
23 individuals, given that we may want to cover not only lawyers but also case managers
24 and what have you, these are the parameters which guide our work.

25 Now, when we talk about insurance, there is ordinarily an individual obligation to

1 provide their own insurance. If an intern is to come here, they must have their insurance,
2 otherwise they don't come into this country. So this is something that lawyers or
3 assistants have to do for themselves as a matter of rule.

4 The question then is how can we bring that insurance into a mixed programme in a
5 creative way that would not have a major impact on the budget? I think this is
6 something that we can talk about and which can be understood within the system.

7 At the very beginning of the discussion I heard someone say something about a
8 compensation notice or something along those lines. Now, let us be very careful here.

9 We are not talking about an employment contract here which would give rise to some
10 kind of compensation if somebody has to leave before the end of their contract. This is
11 not the type of contract we're talking about. You see, here in the Court if we use
12 in-house staff, we pay them a salary, but we also pay taxes. Although we do not pay
13 taxes on our salaries as such, but in our capacity as an employer, we do pay some taxes on
14 behalf of the person who is being employed and we cover social security matters as well.

15 So that kind of exoneration is also limited here in the Netherlands.

16 So let us be careful about this. Caroline Buisman mentioned this in her statement. Let
17 us be careful not to create something that the Host State might interpret as a contract
18 because that would raise other types of difficulties to the extent that my Dutch friends
19 would ultimately consider this to be an employment contract, which would then be
20 subjected to Dutch legislation. So we need to be, to be quite cautious as we deal with
21 these issues. And we need to work together, to think together to come up with a
22 proposal that has clarity in our relation to the State and that the budget should also be
23 such that can take into account these social aspects that have been raised.

24 Cyril.

25 MR LAUCCI: Cyril Laucci for the ICCBA.

1 (Interpretation) I'll speak in French, come to think of it.

2 I am very pleased to speak immediately after you, Marc, because I think you have given a
3 very good introduction to what I am about to say.

4 There are two things in a contract. A contract has various clauses, various terms that can
5 be negotiated between the parties and each party coming to the negotiation with a wish
6 list, things that have to be included, leave and so on and so forth. Well, that's on the one
7 hand.

8 Then you have binding clauses in a contract. And one thing that contracts do not like to
9 deal with is vacuums or lacunes when it comes to these binding clauses. For example,
10 the legal framework and two, the settlement mechanisms when it comes to conflict, legal
11 framework and settlement of disputes.

12 I can imagine three options that can be envisaged in the contract which we are talking
13 about now.

14 One of the first options was explored by one of the Defence teams in the Bemba *70 bis* case
15 when it attempted to request of the Chamber a number of benefits as accruing to its team
16 members, and the Chamber was of the view that the request was inadmissibility because
17 the Chamber was not competent or did not have jurisdiction. So that closes that option.

18 The second option is what Caroline Buisman talked about, namely national legislation of
19 the Host State. I do understand, Marc, from your comments that this is not necessarily
20 the best option for the Court whereby the contracts will be subjected to national
21 legislation. And so if the Court would wish not to be bound by national legislation, it
22 can function under its privileges and immunities and that will be fine. But that doesn't
23 solve the problem because the issue has not still be dealt with, that vacuum has not been
24 filled. So if the Court argues that it has immunity and privileges in this matter in relation
25 to national legislation, the only possible conclusion that will be drawn from that position

1 is that we will end up with a *de facto* work contract, *de facto* staff who will be subjected to
2 the employment laws applicable within the Court, subject to the recourse mechanisms of
3 the administrative tribunals that are open to the Court, the ILO.

4 So these are matters that touch on binding terms of the contract and therefore have a
5 direct impact on the other clauses or terms which I refer to.

6 And these are the few remarks that I wanted to make at this juncture.

7 MR DUBUISSON: (Interpretation) Xavier-Jean.

8 MR KEÏTA: (Interpretation) Xavier-Jean Keïta.

9 Cyril, you may also want to consider alternative methods of dispute settlement, mediation,
10 arbitration and what have you. I mean I just want to add this to what you have said.

11 Thank you.

12 MR DUBUISSON: (Interpretation) Marie.

13 MS O'LEARY: Thank you. Marie O'Leary, OPCD.

14 I just actually have some questions in this too that might help define the scope of what
15 we're doing because when we went into this a few years ago we were talking about it in
16 the context of a review of the 2013 policy to be done for the States to inform them whether
17 or not the choices that were made at that time were working or were not working. But
18 now there's this added layer of staying within the envelope. So I'm just wondering if the
19 review part is considered closed and now we're working within the envelope as a new
20 part of that or if it's all part of the exercise of review? Because I think it's quite difficult to
21 wholeheartedly review a policy, but there is this parameter put on it to say is it working
22 or not, but you have to stay within this box. It makes it a bit of a difficult exercise, to say
23 the least.

24 I also wanted to actually ask if we can define what the envelope is, because we've been
25 talking about the envelope and the envelope, and does that mean that we're going to stay

1 in exactly the same amount of money for year to year, or does it mean that that can also
2 then scale up and down with Prosecution increases or otherwise Court budget increases?
3 What do we mean when we're talking about the envelope? Because I think that would
4 be beneficial to this discussion.

5 And I just want to say on the contract model that what Caroline has raised is very, very
6 important and it's one of the first things I heard when I arrived here at the beginning of
7 2006. And I think we have the benefit now at least of looking to models like the STL has
8 worked with contracts for support staff and they've done that over the course of the last
9 10 years, and maybe that's not a part and parcel model that we want to import here, but it
10 might be something where we can look at elements that have been created there that can
11 be used again because I think it needs to be more than just financial, it also needs to
12 include what rights and responsibilities that team member has vis-à-vis the Court and not
13 necessarily vis-à-vis the team, but vis-à-vis the Court and the institution itself. What is
14 their role within the Court? And in particular, as Anand has raised, the harassment
15 policy. There was much discussion about whether or not the harassment policy applies
16 to Defence counsel and teams. That can be laid out exactly which AIs, exactly which
17 provisions, which privileges and immunities, all of the things that are applicable or not
18 applicable can be defined, including tax obligations as well. Thank you.

19 MR DUBUISSON: (Interpretation) All right. We will try to define what the envelope is.
20 I think that's a good question and I am happy the chair of the CBF is here and he can take
21 the floor at any time to correct me if I'm mistaken.

22 When we establish a budget we look at the costs for 2018 in relation to the various teams
23 and then we do a projection estimate of what the teams could cost us in 2019. But at that
24 time we do not know whether in any given case there might be a 70 bis which will require
25 additional resources. So there is always an uncertainty.

1 But when you talk about an envelope, a budget for 2017, for example, it's usually what
2 was estimated for 2017. So we do a projection for each team which leads us to a certain
3 amount of money in relation to that team. But that amount is flexible. We also try in
4 that effort to see whether we can absorb some kind of increase. And it's always delicate
5 when you use the word "absorb". It might give the impression that there is too much
6 money, but that's not the case.

7 Take an example, a concrete example where a security crisis occurs in a country and travel
8 is restricted so the amount of money earmarked for travel during that month or two will
9 not be used and therefore that would accrue as a gain and that amount can be used in
10 other lines of the budget or to increase other activities.

11 But the envelope as we understand it today is the budgetary provision as such that has
12 been approved and that includes an amount for legal aid, which is what we call the
13 envelope. So there was an amount set aside.

14 But if, for example, there would be a new team created, it would be covered by the
15 additional resources that may have been added for a 2019 budget as compared to a 2018.
16 And so the necessary adjustments would be made but working within a fixed envelope
17 which must be managed mindful of developments within the Court. That is why it is
18 very important for us to go back to CBF in April to make sure that we remain within the
19 envelope as such, but the envelope in itself has life.

20 And so I think this is what I can offer as a definition for an envelope.

21 Now, when resources are assigned to a team for about six months, we will be dealing with
22 that when we come to reparations. Today the average reparations period is two years.
23 Now, when we do six-month periods, that would be a 12-month period per year. But
24 come to think of it, we must update the expenses as things evolve. Now, if you are going
25 to deal with a six-month period in reparations, you understand that this covers the

1 12 months, and we need to be clear when it comes to defining our targets. And maybe
2 these are technical issues, but I believe that while functioning within the envelope, we can
3 still factor in aspects of flexibility into the annual budget. We have an annual budget,
4 but you know that cases in the Court tend to last somewhere between eight to nine years
5 and this is also a very important factor to bear in mind. Thank you.

6 Aziz.

7 MR MBAYE: (Interpretation) Abdoul Aziz Mbaye, OTP.

8 Now, I just want to touch on the envelope in global terms and share a few thoughts
9 relating to what my learned colleague Fidel mentioned a short while ago when it comes to
10 the issue of insurance, health insurance and what have you.

11 At this morning's session, first session, I talked about how the current system can provide
12 answers to some of the questions that are being raised. At the time I said that we might
13 want to look into this issue of professional fees. And right now let me point out that we
14 also have issues relating to expenses and taxes, so we have professional fees and then we
15 have other related costs. And here, for example, under field assistant I don't see any
16 entry on expenses and charges and this is because the field assistant can also be facing the
17 same challenges as those at headquarters.

18 Now, for health insurance, I believe that we can also consider certain practices which can
19 be helpful. When it comes to professional expenses, for the Court the expenses are in
20 relation to work related to the Court. Now, if a team member were here in Holland and
21 is working at the Court and has to pay for health insurance and has to travel to risk areas,
22 there must be some financial implication when it comes to coverage for these types of
23 situations. And I believe that under expenses and charges we could also consider this
24 type of option without exceeding the envelope and while remaining within the policy.

25 MR DUBUISSON: (Interpretation) So we now move on to the second part on reduced

1 activity phases and I'll ask Pieter to address that and we'll do this before the break
2 at noon.

3 MR VANAVERBEKE: I want to briefly enlighten you, I will try to enlighten you on the
4 issue of reduced activity and I saw this morning that it generated some questions and I'm
5 happy to answer all the questions at the end of -- during the session, *pardon*.

6 What is reduced activity?

7 It is a phase in the proceedings whom, as you heard from Marc, might be very lengthy,
8 where a full team is not completely warranted for a temporary -- for a period of time, and
9 hence, the lump-sum payment would go -- the payment would go from lump sum to
10 hourly base remuneration. So basically lump-sum payment, whether you work, or
11 whether a team or a person in the team works one day or five days or 20 days, the
12 remuneration stays the same, whilst an hourly based remuneration, the hours are
13 remunerated that the person has worked.

14 These phases or the phases of reduced activity you find in the draft policy, I want to stress
15 it's a non-exhaustive list. We just give some examples as we think or which has
16 objectively shown that activity for a complete and a full team is not necessary. And
17 we've done this in the past as well when we move to reduced activity. We do not do this
18 unilaterally, we go into consultation with teams. We've done this in the Article 70 teams,
19 for example, where we invite counsel, we inform him or her about what our intentions are.
20 And we do this not out of the blue, but we are guided by judicial decisions. As an
21 example of a judicial decision, that can be a Court calendar that a Trial Chamber has
22 established, for example, some certain deadlines to be met by teams, following which the
23 Chamber will stop the case for a while and prepare the judgment.

24 So consultation in this whole issue of reduced activity is majorly important.

25 Also, and maybe this is not really clear from the text as such, it can be that we have -- we

1 can differ between Defence teams and Victims teams, given the fact that we can go into
2 consultation by default where there's a possibility to have a different approach between
3 Defence and Victims teams.

4 Also there is also the possibility of additional resources once you might be in a reduced
5 activity period. Nothing prevents that counsel to ask the CSS or the Registry, "Can I
6 please have an extra case manager on activity based because we have unforeseen deadline
7 to which we have to respond?"

8 With regards to the loss of knowledge or the case file or the case memory being
9 maintained within the team, I think the flexibility principle of counsel having the
10 possibility to distribute the funds he or she has been given on a monthly basis as she or he
11 sees fit, together with the possibility of additional resources, can address the
12 maintenance -- or maintaining, *pardon*, the possible loss of knowledge within the team.

13 And having applied this philosophy and this practice to the reduced activity so far
14 because it's already enshrined in the current legal aid policy and strongly believing in
15 consultation and good communication with Defence teams, this has not lead to any
16 request for judicial review. So I think if we can take the decisions together, mindful of
17 the requirements of a specific team, Defence or Victims for that matter, at any given time,
18 I think this is a good recipe for success in applying this philosophy of reduced activities.

19 With regard to the reparations phase, I would just want to briefly touch upon two points.
20 The field presence is enshrined in the team composition, and it's still maintained that
21 according to the team composition and the funds and the resources allocated to Victims
22 teams in the reparations team that it clearly shows that it still is -- or it is the most
23 burdensome phase for Victims teams.

24 In regards to the phasing out or the six months resources still being allowed after a
25 decision has -- a final Chamber has decided upon the final reparations principles, and to

1 complement Marc, it's not a one-off. The six months can indeed become 12 months
2 because again it's in communication, it's in consultation, and the aim is to give the Legal
3 Representatives the possibilities to meet his most important obligation is informing his or
4 her clients as to what has happened and how the reparations are going to be implemented.
5 So we think that within six months that should be able to be executed.

6 Thank you. Happy to answer all your questions.

7 MR DUBUISSON: (Interpretation) Luc.

8 MR WALLEYN: (Interpretation) Luc Walley. Thank you.

9 I have two questions relating to the six months period.

10 Would that run from the issuance of the reparations order or from the time of a final
11 decision from the Appeals Chamber?

12 Second, for now and when it comes to victims, the system does not allow negotiations
13 when it comes to payment of fees during the periods of reduced activity. That is the
14 information available to us, whereas every now and then in the same case the Defence can
15 be given a fixed amount in terms of reparations, whereas such is not the case for Victims,
16 particularly given that the judicial work is comparable, whereas contact with clients is a
17 lot more significant with victims than with the clients. How do you explain that
18 distinction?

19 MR VANAVERBEKE: I would like to address your questions, Luc.

20 With regards to the hourly based remuneration, whether that's not negotiable vis-à-vis the
21 Defence getting a lump sum, if you look at the current legal aid policy, the difference is
22 made between Defence who are lump-sum payments whilst the Victims currently are
23 based hourly, are activity based. In the new policy it's all the same for both Defence and
24 Victims. So if it would come to reduced -- the same will be applied to the two sides, if
25 you may, Defence and Victims currently or will be lump sum, whilst by default the hourly

1 based remuneration will be on activity based and hourly remuneration.

2 Whether there's a need for an alternative approach such as getting a fixed sum for a
3 specific phase, we can always discuss about that in the communication. But the bottom
4 line or the base line is from now on, or when this policy is approved, it will be a
5 lump-sum payment for all, together with hourly based remuneration in specific phases.

6 And with regard to the six months, we can still discuss and debate about that when the six
7 months will count as a final six months after the Appeals Chamber or before that.

8 MS MASSIDDA: Sorry, just in relation to the six months, we can also maybe discuss
9 why six months, as I was already saying this morning during the first session because it
10 looks like, well, six months is just because it's half of a year. Why? Why? Could be
11 nine months, could be three months, could be twelve months, zero month. I don't know.

12 Thank you.

13 MR DUBUISSON: (Interpretation) Chief Taku.

14 MR TAKU: Yes, with regard to the retention of knowledge, in other words, they may
15 interpret to mean retaining the team, the Defence or Victim teams during the reduced
16 activities, for now, apart from the proposals made in the draft legal aid, we're looking at it
17 a bit in the abstract because there is something we do not know. Judgments in this Court
18 take unpredictably longer periods, indeed, sometimes let me say the trial went on for one,
19 two, three years would take about half, one year or more than a year for the judgment to
20 be rendered and this, nobody has control over this. And the members of the team will
21 think about other career pursuits. They were not just going to wait for an unpredictable
22 amount of time, one year, two years to wait for the judgments to come out. At the end
23 when the judgment come, the team is lost and they have to get new members, they have
24 to reconstitute the teams. And when they reconstitute teams, it become even more
25 expensive because the members, the new members of the team will have to familiarise

1 themselves with the file. Under the legal aid they have to spend several months reading
2 through the file in order to get into the case.

3 And I think this question of reduced activities, yes, indeed there are reduced activities
4 which will be taken care of, but we have also to think of creative means on how to keep
5 the team nevertheless so the team is not lost, and we find ourselves in the eventuality the
6 victims or the accused they are prejudiced because the Prosecution team is still in place
7 probably working on the team, they have continuing investigation responsibility that's in
8 place. But even if that were not the case, if they lose members of team at the end because
9 of the delay, undue delay in the judgment, waiting for the judgment, it causes prejudice.

10 So I'm just wondering, I recognise the effort you're making to say about the flexibility
11 within this time frame, but the flexibility per se indeed might not be enough to keep
12 lawyers and members of the team waiting for periods of time they have no control over,
13 one year, perhaps two years, who knows.

14 So I do not really know exactly whether it is at this level that we can look at this or the
15 judges themselves about the undue delay they take in giving judgments in this Court,
16 enough time frame for members of the team to be able to say: Can I wait further or not?

17 MR DUBUISSON: (Interpretation) Thank you.

18 Aziz.

19 MR MBAYE: (Interpretation) Abdoul Aziz Mbaye, OTP.

20 I can see that a certain philosophy is emerging and Paolina mentioned reparations and the
21 timelines there, and I also am looking at paragraph 82 that says that additional resources
22 are granted for a period of up to three months. I think we could look at the parameters
23 that explain this particular timeline. I think this needs to be more open and we should
24 leave it to the Registry to show greater flexibility. The system provides for consultations
25 and this possibility that the counsel might come back with information that would justify

1 and uplift over a particular period of time.

2 So I think it would be preferable to leave this open and not to set any particular duration
3 of time. Thank you.

4 MR DUBUISSON: (Interpretation) What is complicated for us is that during a period of
5 inactivity, how can we justify giving €4,800 per month when nothing is going on? We
6 need to be able to face the auditors and the CBF, and it's impossible for us to justify
7 allocating such an amount of money, such a large amount of money without anything to
8 justify that expenditure. So we have no other choice, we have to reduce the activity. It's
9 very simple.

10 So now it's up to us to see is there information or considerations we can take into account?

11 For example, one team is awaiting a decision and a team might say, "Oh, we need to do an
12 investigation," whatever, all kinds of possibilities, "I've already started working on my
13 appeal." That's also a bit complicated for us. A Defence team may say to us even before
14 the decision comes out, they may say, "Oh, well, I need my team because we need to,
15 we're working on our appeal already" but before a decision.

16 We have to be able to determine what the level of activity will be. We're not going to say
17 that, well, we are paying €4,500 for a staff member, maybe he's available for something
18 else. No. If we provide a certain amount of money for a team, it's to do work and it's
19 not to do something on the side.

20 So this is very important to us. We have to remember that you as teams, you don't want
21 to lose your knowledge or your team. And we know that the trial can last 10, 12 years, so
22 there will be several periods of reduced activity during these 10 or 12 years. You want to
23 keep your people, well, you have to compensate them.

24 On the other hand, sometimes the person in our own little world, this is a bit incestuous,
25 everyone is part of the system. You go to the STL, you come here, to the Kosovo

1 Chambers. So you have good expertise, and if you're recognised, if you start to reduce
2 your salary, maybe you'll take a job somewhere else. This is what we see. We often see
3 that it's the same faces, the same lawyers going around this circuit.
4 So if there were a greater distribution, if the list were -- well, rather than having an
5 artificial list, we have to be able to strike a balance between having lawyers or resource
6 people here who are pretty good that we can keep and then, on the other hand, we have
7 no activity. So this is the great difficulty for us. We're trying to see how we can find
8 some solutions during times of inactivity. Sorry, there will always be times of inactivity.
9 Now, when it comes to reparations, we have a better idea of how things unfold. There's
10 the work before a judge to determine what reparations shall be and then a decision is
11 issued and then there's the lawyers' work providing assistance and working with the
12 Trust Fund for Victims. I was talking about this during the break. This work which is
13 just, for example, we have a special programme in the Bemba case, that's quite exceptional
14 because that was an acquittal so there's no reparations. But the Trust Fund decided to
15 use its second mandate, which is usually carried out during the pretrial phase but which
16 was not. So we find ourselves faced with a specific unusual situation so we had to
17 provide an unusual response.
18 There was an assistance programme from the Registry. So to introduce a victim to the
19 Trust Fund for Victims, does that require the 100 per cent expertise of a lawyer? This is
20 what we're wondering. There won't be litigation, there won't be hearings, there won't be
21 submissions to the judges. No. It's a matter of making the necessary contact between
22 the victim. And we perfectly realise that it is absolutely necessary for the counsel to help
23 the victim because that person knows the victim well, but does that justify full-time work?
24 Does that justice the €11,800 per month?
25 So I think we're going to have to determine gradually how this phase unfolds and how we

1 intervene. This is a problem for us. It is, well, there's a whole series of problems really
2 and we are trying to respond to them. There are several cases where we are at
3 reparations stage and this is the first time that we have included reparations in the draft
4 legal aid policy.

5 Anand.

6 MR SHAH: Thanks so much, Marc. Anand Shah from the ICC Bar Association.

7 We certainly, the Bar certainly appreciates that there is -- it's a difficult issue, the issue of
8 reduced activities and the remuneration during this phase. I think maybe one way to
9 look at it, Marc, since you mentioned justification for the purposes of budgeting and
10 external audit, firstly is to decide what is, what is the core team that is required to
11 continue with the case. And from our perspective that is counsel, a case manager and a
12 legal assistant or trial attorney. That's our position. We think that's justifiable in terms
13 of the complexity of these cases and how long they last, and as we all sort of mentioned
14 the need to retain that knowledge and capacity throughout the proceedings.
15 So if there's some sort of agreement on what needs to be retained, then the next question is
16 what is reasonable in terms of retaining those personnel? So that I think is the real
17 question that we need to address, both questions. That's the second question.
18 And then I'm just wondering if you could give some background as to how you reached
19 the €11,437 cap. And as far as we understand, that would be essentially the full salary of
20 a lead counsel, remuneration plus fees. So that would be helpful as well, I think, if you
21 could provide that answer. Thank you.

22 I was just going to add one more thing. It's just when we're talking about phases of
23 reduced activity, I think we want to be careful in terms of what -- and you guys will
24 probably have better data than we would in terms of the time sheets that are being
25 submitted and what sort of activity is actually going on during these periods, but it is a

1 little bit of a misnomer to call it reduced activity phase.
2 Defence and Victims teams, as we're all aware, are quite limited in capacity in comparison
3 to the Prosecution, so there is a lot of work that needs to be done during these phases
4 when you're not in trial, when you have the chance to do the sort of work you need to do,
5 the sort of upkeep work, redacted versions of filings that need to be issued at the order of
6 the Chamber, witness relationships that need to be maintained, additional analysis that
7 needs to take place in preparation for expected phases of proceedings. There are other
8 things going on and I think there needs to be a recognition that when it comes to Defence
9 and Victims teams when you're in trial proceedings, for example, everyone is focussed on
10 that, there's not really a lot of time to do the sort of maintenance issues that you need to
11 do that the Prosecution does, that has a whole of course infrastructure to do that that
12 Defence and Victims teams do not have, and a lot of that work can and will be done
13 during this phase. And I think that's something else that needs to be taken into
14 consideration into what is reasonable activity during these phases. Thank you.

15 MR VANAVERBEKE: Thank you, Anand.

16 First the figures. The amount is indeed the counsel fees only, including I think option 1
17 of the €500 for expenses. That's that.

18 With regard to what is actually needed, and that's why I stress so many times the
19 importance of speaking and maintaining communication between the Registry and the
20 Defence teams, indeed the baseline is counsel fees only for reduced activities, but it can
21 very well be that a team has specific requirements during even this phase of reduced
22 activity, for example, providing redacted versions of all documents filed by a certain
23 deadline. So then we can enter into discussions and negotiations as to what we think is
24 actually needed for your team during that and that can be a bit higher than counsel fees
25 only.

1 MR SHAH: I think -- but, Pieter, that's a great, thank you for that, but I think again the
2 first issue I raised was whether or not we can come to an agreement as to what sort of core
3 team capacity should remain throughout the proceedings. And if it's agreed that some
4 sort of core team capacity should be retained throughout proceedings, then what is the
5 appropriate way to do that? And it doesn't seem that -- different cases of course will
6 have different realities and it may be the case that in one case there is not as much work
7 going on, but if we agree that we need to retain a core team, what is a fair and reasonable
8 way to do that? I think that, and I'm not saying it's an easy question in terms of the
9 budgeting, but I think that is a core question from our perspective. What core team
10 should be retained and how do you go about retaining that as a default position, as a
11 standard position as opposed to making additional resource requests?

12 MR VANAVERBEKE: Thank you, Anand. Our default position is in this matter that,
13 just to repeat myself, we give the counsel fees only and it is up to counsel to see who he or
14 she wants to retain within her team. We don't decide in counsel's place whether he
15 should keep the legal assistant or the case manager. Counsel has full flexibility and
16 autonomy to decide I will retain my legal assistant or not.

17 Practice has shown that counsel, for example, do not -- they come up with a distribution
18 level within certain positions within their team so they take a bit less for their own fees
19 and distribute the amount of 11,000 among the team members they need or they consider
20 as required to maintain on the team.

21 On top of that of course should there be certain needs to be met, then funds for an
22 additional position on an hourly based remuneration of course can be negotiated or
23 requested from the Registry.

24 MR DUBUISSON: (Interpretation) Cyril.

25 MR LAUCCI: (Interpretation) Thank you. Cyril Laucci, ICCBA.

1 What Marc said all in all and quite legitimately he said you can't pay counsel and team
2 members to do nothing for long periods of time. We get that. We understand that
3 completely. Now, that raises two thoughts. First of all, I'll start with the easier one.
4 The easy thing to say is that, well, once again, this has to do with the definition of reduced
5 activity. How do we define this period of time? It is currently defined in the draft
6 policy based only on activity within the Chamber, and yet, as Anand explained very well,
7 activity is not restricted to activity before the Chamber. Outside of session times there is
8 a certain level of activity that remains. And this is a comment that has been taken on
9 board by everyone who took part in these consultations on the draft policy.

10 Now, sometimes, yes, some people may see them as low times, periods of low activity, but
11 actually they are peaks. So I think we really need to think about how we define such a
12 period of time and how the true activities of the team are taken into account within the
13 definition. I'm not talking about the application of the flexibility policy. That comes
14 later on once we have clarified this definition.

15 Now, the second thing I had in mind is more complicated and this deals with broader
16 issues, issues of principle. The five pillars that legal aid are based upon were recalled
17 and I'm not going to reason abstractly about the equality of arms. Chief Taku said it was
18 necessary to keep, well, not the institutional memory but the team's memory at the very
19 least. Indeed. And if this memory is lost for financial reasons, that means once
20 activities resume, the teams will have a much more difficult time of it and will take a lot
21 longer time to get back up to speed and ready to work 100 per cent. So you might have a
22 short-term savings, but in the longer run you will lose money, you will have additional
23 expenses because the proceedings will last longer.

24 In terms of equality of arms, yes, but during that time what happens at the OTP? No
25 doubt the team members work on other cases and that's a matter of good management of

1 resources, but they're still there, they're still available and each time something needs to
2 be done, they are there. But that's not the case of Defence teams or teams representing
3 victims.

4 And my final point, and this is the most sensitive point, but it's in line with the earlier
5 points, it's been said that trials at the Court are rather long, I won't make any comments
6 about that, but in this particular case we find ourselves in a situation where the length of
7 the trials only harms the Defence team and the Victims team. Lubanga, for example, the
8 OTP failed in its obligations regarding disclosure, they were at fault and it was the
9 Defence, you see, if you follow the principle, it's the Defence and Victims teams that will
10 lose out. So this is difficult to deal with in terms of equality.

11 So ultimately trials may be extended almost indefinitely for various reasons and only the
12 Victims teams and the Defence teams in their practical terms suffer the consequences.

13 And I'm not saying that they should be paid to do nothing, I hope that's clear from what
14 I've been saying, but I think that the States Parties have expressed concerns about the
15 slowness of the proceedings. Savings during periods of reduced activity mustn't
16 contribute to the answer to that problem from a financial point of view.

17 MR DUBUISSON: (Interpretation) Thank you, Cyril.

18 For us, the staff members, the various organs of the Court, recently we've been asked to
19 work on synergies and efficiency and effectiveness, so this is perhaps an area we could
20 explore with Victims teams and perhaps we could create some kind of pool, and
21 depending during these periods of reduced activity, the people in the pool would be
22 available and that would justify allocating certain amounts of money for people. And
23 perhaps we could reduce the number of requests for additional resources. There could
24 be some compensation or even perhaps helping the OPCV, the OPCD, if it's doable from a
25 technical perspective. We've never talked about such synergies or efficiencies, so

1 perhaps we should put that on the table today. I think the States would be very happy to
2 see such efficiencies and synergies shared with the Victims and Defence teams.

3 Aziz.

4 MR MBAYE: (Interpretation) Abdoul Aziz Mbaye, OTP.

5 Thank you very much, Marc, for giving me the floor.

6 On this point, the periods of reduced activity, I think that this is not a theoretical issue, not
7 at all, because we have heard some specific examples that we have experienced ourselves,
8 and I think it's quite courageous for the Registry to try within the legal aid system to
9 identify periods of reduced activity. I think we agree that there could be a period of
10 reduced activities at any time during the proceedings. Many things come into play.

11 Everyone agrees that at certain times it's quite reasonable it can't be sustained to keep a
12 team. When you look at the purpose of legal aid, it is to compensate people for doing
13 work and lawyers may have -- I mean lawyers can also turn to the Registry and say, "I
14 don't need all these resources during this phase." Is it reasonable to have a default
15 option for such times? If we say that reduced activity is the exception, I think that the
16 solution, the default solution can be justified reasonably.

17 In practice, I think some solutions were suggested and such a decision is not taken just
18 because you think activities are reduced. Of course consultations are important at this
19 level and I think it's more at that level that we need to act before making a decision about
20 the resources allocated to a team in one manner or another. I think it's important to look
21 at it that way. Thank you.

22 MR DUBUISSON: (Interpretation) Given the time, I see Maître Fidel and then Keïta.

23 MR KEÏTA: (Interpretation) I'll let Fidel speak first. I don't want him to feel
24 traumatised if he's always the last one to take the floor.

25 MR NSITA: (Interpretation) Thank you, Keïta.

1 I'd like to say something about the reduced activity period focussing on the legal
2 representation of victims. I believe I heard Cyril saying that the teams' activities can't be
3 summarised as only what's going on during a hearing, and I would like to remind
4 everyone that in practice the Legal Representative is often designated just before the trial
5 begins, just before confirmation of charges hearings or just before trial stage. And when
6 this person is designated he hasn't had the time to analyse the thousands of applications
7 for participation that are being kept by the Registry and that are disclosed to him once he
8 has been designated. And then the trial begins at the same time.

9 So for the Legal Representative of Victims the only opportunities to focus on the substance
10 of the case is when there are slower times, slower periods. And during recess periods,
11 during recess counsel is in the field meeting with victims and as soon as hearings are
12 suspended even for short periods, the LRV dives into the files.

13 You have to also consider that we have tried many times to ask the Registry to provide us
14 with software that would allow us to manage or set up databases to manage all these files.
15 Up until now we have received no software package. The only tools we have are Excel
16 spreadsheets. So we have all these various spreadsheets to gather all the data from the
17 victims.

18 So for a team representing victims, what does a period of reduced activity mean? Well,
19 perhaps the time when we await a decision, because the Registry has often said, "Oh, well,
20 you can't work at that time, we can't give you an advance, so to speak, on legal aid, it
21 doesn't work that way." But when you have hundreds of files and you're waiting for a
22 decision to be handed down and knowing in practical terms that here at the Court such
23 deadlines or delays have ever been granted to LRVs. For example, when victims appear,
24 the Prosecution has all the time they want to prepare for their witnesses, the Defence has a
25 certain amount of time to prepare their case and their witnesses, but for the Victims, you

1 just hear this: "Well, between the end of the Prosecution and the Defence, we're going to
2 squeeze you in the middle there, identify your victims, do some investigations and bring
3 in the victims that you would like to have appear."

4 So the work of the LRV, once he or she has been designated, is unlimited. That person
5 works nonstop and then you come to reparations, the reparations phase.

6 Fortunately mention was made of synergy amongst the various organs in relation to
7 victims. We did conduct some joint missions with VPRS and they have databases and
8 we were able to work with their databases and with our Excel spreadsheets, but up until
9 that time, I never truly identified any period of low activity or a lull where one could say,
10 oh, you can reduce the teams.

11 On the contrary, even outside of the reparations phase I'm often asked, and Aziz will
12 confirm this, and the Registry has been cooperative and provided considerable support,
13 but I've often requested additional resources to do work in the field to set up a good size
14 team to do consultations with a group of victims and present reports and other findings to
15 the Chamber.

16 So I would call upon the Registry to analyse our situation very carefully. Yes, we realise
17 there are financial restrictions, but this is the way we work. If we want to be efficient and
18 effective, we have to have effective representation of victims. These are things that we
19 cannot compromise on.

20 MR KEÏTA: (Interpretation) I'll be very brief. It's break time. And it's a good thing
21 that we are reworking the legal aid system with a view to equality of arms. This is not a
22 cosmetic exercise where Legal Representatives are distinguished from other type of
23 counsel. And I think that Fidel should be the first to ask for the word "counsel" to be
24 used, counsel for victims, counsel for Defence, just as the Bar has already done. I see that
25 there is a cosmetic distinction there which should not obtain.

1 My neighbour here is the chief of cabinet of the Presidency and unfortunately the judges
2 are not here today. Maybe they are elsewhere, they are busy elsewhere and they are not
3 represented here, because in the end they are the ones who deal with these types of
4 requests for additional resources, they are the ones who make the decisions.

5 Now, Marc also talked about the efforts within the Court towards a greater efficiency and
6 I think that the OPCD, as it provides assistance to various counsel, has also observed the
7 deadlines and the pressures that they constantly come under. I avail myself of the
8 presence of the States to say that the judges have only one deadline and this is in relation
9 to the confirmation of charges phase, 60-day deadline for making their determination.

10 Aside that, there is no other deadline, and jurisprudence has indicated that even that
11 deadline can be extended.

12 So I think that this is something that could be looked into and would generate savings for
13 the State if all and sundry, all the judges were given deadlines, for example, to come to a
14 number of decisions. You can't spend a year or two for that determination.

15 MR DUBUISSON: (Interpretation) We take note of your comment, but I don't think that
16 we will use the legal aid policy draft to provide any deadlines to the judges.

17 MR KEÏTA: (Interpretation) I said that I was addressing myself to the States. The States
18 are present and I just wanted to point out to them that these deadlines do not exist,
19 neither in the Rome Statute nor anywhere else.

20 MR DUBUISSON: (Interpretation) Yes, we have taken note. We invited the judges, but
21 we also made a special presentation to the judges on this issue last week.

22 We will break now and reconvene at 1415. Thank you.

23 (Recess taken at 12.46 p.m.)

24 (Upon resuming at 2.19 p.m.)

25 MR DUBUISSON: (Interpretation) Good afternoon, let us now reconvene.

1 I want to note the presence of Hiram Abtahi, chief of cabinet of the President.
2 I want to give the floor to Esteban who will talk to us about travel and stay in The Hague.
3 Esteban.
4 MR PERALTA LOSILLA: (Interpretation) Thank you, Marc.
5 Once again, I am going to be extremely brief because what really matters now is your
6 contributions, your opinions, your thoughts on the draft policy in relation to this topic.
7 As you may already know, the legal aid system provides compensation for counsel and
8 associate counsel to cover travel and stay in The Hague in the discharge of their mission.
9 This compensation has been challenged for a long time by several parties or stakeholders
10 and what seems to be acceptable to all, I believe we can all agree on that, is the fact that
11 the current procedure in place is quite cumbersome for all who are entitled to this
12 compensation, and it is also cumbersome for the Registry services which processes these
13 applications for compensation and ultimately the order for payment.
14 In drafting this project before you, we considered two options which are now open for
15 discussion. The first is as follows: During the trial phase, apply similar allowances as
16 would be received by staff members of the Court. This would include installation fees,
17 which will cover the entire trial and, outside of that, pay for travel on the current basis of
18 cost when it comes to the pre-trial, appeals and reparations phases.
19 The other option, if you may, was somewhat borrowed from the STL and it calls for
20 payment of compensation or set compensation to counsel and assistant counsel, which
21 would be included in the monthly payments given out to counsel.
22 Obviously, we are aware of the fact that there is no perfect solution and we have tried to
23 come up with the best possible solutions, mindful of the mandate or the framework of the
24 mandate which we explained to you this morning, and also mindful of the context and
25 changes being proposed to the legal aid policy and also considering the financial and

1 budgetary considerations of the day.

2 We have these two options before you and, therefore, are now seeking your views, your
3 opinions and any other alternative solutions that you may have.

4 Thank you.

5 MR DUBUISSON: (Interpretation) Luc.

6 MR WALLEYN: (Interpretation) Luc Walley.

7 One question: Of those two options, I really do not see what provision applies to counsel
8 who are paid on an hourly basis. And I know that for now, it is done on the basis of an
9 application or a request, but if there were to be a hearing in The Hague during a reduced
10 activity period, what would happen?

11 I do not see anything provided for such minor trips. For example, where counsel may
12 come to The Hague for a day or two to attend to something at headquarters when there is
13 no hearing in court as such.

14 So that point is not clear to me, neither in the past system nor in the proposal.

15 MR PERALTA LOSILLA: (Interpretation) Luc, thank you very much for the question.

16 But maybe that issue is not very clear in the policy, but given that the policy seeks to move
17 as far away as possible from the hourly payments, I think during that time, the team
18 would either -- or the counsel would either get the monthly payment or the lump sum.

19 And what I'm saying, therefore, is that any mission that is justified to The Hague would
20 be taken into account, if not already covered by the monthly lump sum.

21 MR DUBUISSON: (Interpretation) The purpose of the new directive is also that it seeks
22 to reduce the amount of interaction between the teams and the Registry. I think that if
23 the issue is not clarified in the document, then we need to improve it. We need to
24 improve that component so that it is clear in the document, and if there has to be some
25 arbitration for any minor trip to The Hague and so on and so forth, that would be

1 a problem in the document because we need to address this kind of issue clearly and I
2 would like to receive any positive comments from you on this.

3 There might not be any budgetary impact if four or €600 are spent for counsel to travel
4 here, if the request is submitted. But if it is submitted through the Court, it will be
5 processed by internal resources and that will be more expensive in terms of internal costs
6 than the ticket itself. That is why I'm of the view that we can work towards finding
7 a better principle, which reduces or streamlines administration and that would be
8 a benefit, something that we can work on; something that can be improved.

9 MR WALLEYN: (Interpretation) In that context, I think the set amount should also be
10 modulated in relation to the residence of the counsel. Someone travelling to The Hague
11 from Kinshasa is paying much more than someone travelling to The Hague from Brussels.

12 MR DUBUISSON: (Interpretation) Yes, that is correct. When we draft our budget, we
13 make a distinction between travel within Europe and travel outside of Europe; so there
14 are set amounts that are applied for staff. And we might work on that basis to apply the
15 same to Defence or victims and I think your point is very well taken.

16 MR LAUCCI: (Interpretation) Thank you.

17 I think that this point I wanted to raise has already been dealt with because during our
18 ICCBA deliberations, we felt that this approach was too Eurocentric and that it might be
19 interpreted to be discriminatory against counsel who may come from Canberra, Buenos
20 Aires and Kinshasa. But I'm happy to know that the point has been covered.

21 Thank you.

22 MR DUBUISSON: (Interpretation) Thank you.

23 Can we then move on to the second point for this afternoon's agenda and then we will
24 look much more broadly at field-related issues and then travel in the field. Is that okay?

25 MR VANAVERBEKE: Just to get the ball rolling, some clarifications or further

1 explanations on the field budget for both Defence and Victims teams. I think the current
2 proposal as it is before you is a real step forward in a sense that it takes into consideration
3 average reality or realities -- judicial realities or what we have paid to the teams on
4 average over the last six or seven years. And you see that the amounts that are presented
5 to you now are far away from the amounts presented in the previous legal aid policy in
6 a sense that for a Defence team, €73,006 were foreseen and then for the victims, €43,752
7 were foreseen.

8 So we have been taking that reality into consideration; that is why we present either
9 a baseline sum of €150,000 for a whole case or €30,000 per year. And, again, and it's
10 repeating the same story, this is a start in terms of the flexibility principle and the
11 independence principle of counsel; so counsel can designate as he sees fit the amounts
12 that he's been assigned to.

13 And also, as I read in many comments or observations that the investigator has not been
14 taken into consideration in the specific paragraph on the Defence investigations budget
15 nor in the Victims investigations budget. Counsel can decide -- he or she can decide
16 whenever an investigator is warranted or required, so the investigation budget can cover
17 the fees and DCA for a professional investigator as well as the costs for accommodation
18 and flights of staff based at HQ to work and operate in field investigative missions. So
19 that is another issue.

20 Its flexibility? Counsel can, within the parameters, manage the funds and also should it
21 become necessary to have more funds because your case is more complicated or extended
22 over an extended duration, additional resources can obviously be requested which will
23 then be, again, in turn, assessed by the Registry.

24 So I think we have adapted the amounts to the reality and it honours the flexibility of
25 counsel. The reason why we have 30,000 per year and not the possibility of not carrying

1 over the funds -- it's not possible to carry-over the funds is because we have an annual
2 budget. We cannot start foreseeing savings which then can turn at one point in time, two
3 years down the line where your budget is, let's say €120,000, it's difficult to manage that
4 and budget for other teams within the whole legal aid budget. Thank you.

5 MR DUBUISSON: (Interpretation) Just one note, a few moments ago, we were trying to
6 define what we called the envelope and now we can say that we are not talking about
7 70,000 to 150,000 or beyond that envelope. Not at all. The envelope in recent years for
8 missions to the field has been more than €250,000 for all the teams; so each time it was
9 more than 150,000.

10 So what we did is that as of 70,000 or more, we have to go consult the Registrar and come
11 back, and we know that each time we were allowed more than 150,000. So instead of
12 having all this back and forth, we'll have the ceiling of 150 and we'll work on the trust
13 principle up until -- up to that amount.

14 We have our annual budget and in terms of duration, that's what we have always given
15 our team.

16 Just because we are setting a maximum of 150,000, that doesn't mean that a team will be
17 refused a greater amount. We don't see why the Defence teams or the Victims teams will
18 be working differently just because we increase a maximum. Of course, it will be
19 necessary to justify any travel.

20 Another point that we did not touch upon, and this is quite a sensitive issue, it's the
21 quality control that is done for counsel. That's a bit of a sacred cow.

22 Now after 12 years in Lubanga, you hear after all these years, or if you go to the field
23 during a judicial visit that some people never went to the field, be it the OTP Prosecution
24 team or others. Well then, we wonder. Or, if we hear -- if we meet with some victims
25 and they tell us that they have not had any meetings with counsel for several years and

1 then more resources are requested later on, we are legitimate when we ask why some
2 work wasn't done upstream because we cannot -- we can't interfere in what the teams do.
3 That is not the Registry's job. We have to trust the teams and trust that they will follow
4 the code of conduct.

5 But on the other hand, we do know -- and this maybe the case when we talk about
6 objective criteria so that we can decide upon key performance indicators for budgetary
7 considerations. So we have to create such indicators that show -- an instrument that
8 allows us to measure the work done by teams, particularly when you are in The Hague.
9 We see the teams in the courtroom; we see what is registered. We give -- we hear the
10 answers.

11 But when it comes to the field, we don't know much. So it's more complicated to
12 determine in and of itself how missions can be justified. So no doubt in the future -- and,
13 certainly, if we want to gain more support from States Parties, if we want to exceed the
14 budget, together we will have to develop performance indicators that will allow us to
15 work together better. Thank you.

16 So that's another item I am throwing out there for the discussion.

17 I beg your pardon, Anne.

18 MS BUISMAN: Caroline Buisman, ICCBA. Just some thoughts. Also, one point of
19 clarification, I do think I understand it and it's been said, so it's me, but I just -- so if I
20 understand it, it is either 150,000 or 30,000 each year but then there is no year limits; right?
21 That's the way it works.

22 But then you have a problem because 30,000 can be one mission or two missions; it's not
23 a lot of money. So then you almost, I think as a responsible counsel, you would go for
24 150,000 because like otherwise you're really -- like you would have to limit yourself at the
25 beginning of the year to 30,000, and you don't know necessarily at the beginning of the

1 year how many missions you are required to take.

2 So I think then everyone will go for the 150,000 and then after that's finished, then you
3 have to renegotiate. That's correct, right? That is what you just explained. Okay. I
4 mean, I don't -- yeah, I mean, I just don't really see the 30,000 per year as a real viable
5 option, but then maybe there will be Defence counsel who will take that. I don't know,
6 but that was just one point.

7 Another point is, things are really shifting quite fast. I can talk from experience, and I
8 really don't think we can complain on this, especially in the Katanga case. I think we
9 have always gotten what we have asked for -- I don't know if this is too much detail.
10 But all I want to say, so far I think that was quite a reasonable approach, but what I'm
11 concerned about is that the investigative methods are changing very, very fast now.
12 We're going to look at a very different reality when we are dealing with investigation,
13 then go to the DRC and interview witnesses. In a way, even that's expensive for the
14 flights and all that, but it's still very concrete.

15 Now we are going to have a situation with the social media, with modern technology
16 where there is going to be so many different options and I think now, in the future, we
17 really will face some new challenges for equality of arms -- for "adequate resources" I
18 think is more accurate, because equality of arms it will never be.

19 So I do think -- it's almost like it is just something I want to flag out because it's also
20 important for the ASP to understand that; otherwise, it's going to be closed justice. If you
21 have the leader of a country, he might be able to pay for all the -- also the technology that
22 we can use, like telephone, I mean telephone evidence. We have seen in Kenya how
23 expensive that can be and in a way, we, some Defence, we were lucky that we could a
24 little bit profit, benefit from the co-defendant who had a greater budget.

25 But what we want avoid in the future is that really, because it's -- sorry, I'm sort of

1 thinking out aloud, but it's becoming more and more global. Like it's not even states
2 anymore at some point. So then if you don't have the means and suddenly what you can
3 do, compared to people who can actually pay will really be quite significant. And also I
4 think, but it's maybe for later in the debate, because also expert evidence, but I think it
5 comes later, right?

6 Yeah, okay, so this is just to flag out also that the ASP is aware of this.

7 MR DUBUISSON: (Interpretation) That is a very good point you have raised and I will
8 take advantage of that to mention a computer project that we have within the Registry,
9 which is part of our five-year IT development strategy here at the Court.

10 We are developing a JWP, judicial workflow platform, which will respond to issues like
11 the ones you have mentioned. For example, 3-D presentations in the Court, social media,
12 information, and I remember Fidel was saying something about Excel spreadsheets, but
13 this platform will allow for the use of such spreadsheets.

14 This project is two years in the making and the States Parties have supported us and we
15 will be spending €3.5 million and that was allocated by the States Parties to improve the
16 computer systems within the various locations.

17 You have raised the issue -- the databases rather than having something in Excel. All of
18 these things are being discussed and we are working on a new system, a new electronic
19 system. Of course, once it's finished and developed, the technology will have already
20 jumped ahead, but I think it's something that will never end.

21 That point about the 30,000 versus the 150,000, well, yes, we could give 150,000 with a cap
22 and provide no further -- but we will try to limit, I mean we don't want people to think
23 that they just can go out and spend 150,000. People could say, "Very well, we'll spend
24 30,000." But we certainly realise that when the Defence needs to go in the field for
25 investigations, it will certainly cost more than 30,000. We are not going to get involved in

1 your ways of doing things. We know that you have peak periods, but we believe the
2 new system will be meeting your needs better.

3 Paolina.

4 MS MASSIDDA: Thank you. Just two quick -- Paolina Massidda, Principal Counsel,
5 Office of Public Counsel for Victims. Just two issues in relation to the field budget for
6 Victims counsel. Paragraph 46 of the English version of the draft legal aid policy
7 mentioned the appointment -- the possibility to recruit a field assistant and a case
8 manager from the appointment of a common legal representative in a case by the
9 chamber.

10 Now there is, first of all, I think an issue of principle because a field assistant may also be
11 needed before someone is appointed the common legal representative. So I don't know if
12 there is any flexibility in the draft policy to eventually cover for this issue.

13 And second, when a common legal representative is appointed, the cases show that
14 normally the lawyer for the victim is appointed for quite a high number of victims; so not
15 necessarily one field assistant will be sufficient.

16 Now I understand that the draft policy is simply picturing the main case and that
17 flexibility can be used, but I was wondering if it could not be worth maybe indicating
18 some objective criteria, which could be known by counsel to determine whether another
19 field assistant is needed or not. And I'm not only referring to the high number of victims,
20 but I'm also referring to the fact that in quite some cases, Victims counsel may have clients
21 in different countries.

22 I can give an example. In the Ivory Coast, in the Laurent Gbagbo and Blé Goudé case in
23 which I am appointed, I have victims from 12 different countries. Not in Africa, but a
24 little bit everywhere. In Latin America, Africa, Europe and so on and so forth. So I don't
25 see this covered in the draft legal aid policy.

1 I again understand that this can be covered by the flexibility principle, but I think that it
2 could be useful to point out these difficulties in the draft policy as a general issue, which
3 should be understood also from States, for instance, in order to understand maybe why
4 sometimes there is a divergency from the standard constitution of a legal team and
5 additional resources. Thank you.

6 MR DUBUISSON: Aziz.

7 MR MBAYE: (Interpretation) Abdoul Aziz Mbaye, OTP.

8 Thank you, Marc, for allowing me to have the floor.

9 I think that this addition of the field assistant is an excellent initiative and it can be likened
10 to the resource person.

11 Just one point, one thing that is not very clear after reading the document. Now the
12 payment of this person in the field, is that added to the envelope or is that within the
13 investigation budget? It's not very clear to me.

14 The other thing, I think I said earlier and perhaps I should stress this point, the field
15 assistant, that the taxes not be applicable to this person because it's not necessarily people
16 who are living in the place where the investigations are conducted. The whole issue of
17 taxation should be dealt with identically; so you have to consider that.

18 And then the other thing that we must consider for the viability of the system is domestic
19 travel or regional travel by the field assistant. Is that covered by the overall investigation
20 budget? Because that will have an effect on how quickly the budget is used up; so I think
21 we have to consider that as well.

22 MR DUBUISSON: Mariana.

23 MS PENA: Mariana Pena with the Open Society Justice Initiative. Just a quick addition
24 to Aziz's point on travel within the country. How about other expenses that field
25 assistants may incur? Such as, for example, for victims, there would be multiple phone

1 charges related to following up on clients and other expenses in the field.

2 It's understood that if it's the now-called field budget and there will be some sort of
3 mission that could be covered, but what about if there's not such a mission in the sense if
4 there is a counsel coming from abroad, but as Aziz was saying, the field assistants are
5 moving within the country, what expenses that are not travel related, but are nevertheless
6 related to the work that they accomplish are covered? And how are they covered?

7 What budget applies? Thanks.

8 MR DUBUISSON: (Interpretation) In practical terms, what would be preferable in
9 comparison to what we find in the policy? We just have one sentence right now about
10 reasonable expenses. What should we say so that it will be more specific or so that the
11 content will be more in keeping with needs?

12 MS PENA: I think it doesn't matter what the policy exactly says as long as that's
13 covered. At least from our understanding, a policy is a document at a certain level and
14 you will have a number of either administrative directions or SOPs or other documents
15 that implement and go more to the details, you may not be able to foresee everything in
16 the policy.

17 The question I was raising arises from the fact that when reading the policy, it wasn't clear
18 to me as to whether that is covered or not under that "D, Other Expenses". You could
19 clarify under that that those are covered there or those could be attached to the field
20 assistant. Again, it doesn't matter as long as it is covered.

21 Thank you.

22 MR DUBUISSON: (Interpretation) Thank you.

23 Luc.

24 MR WALLEYN: (Interpretation) Luc Walley. Thank you.

25 Just to pick up on what Caroline was saying, I think that in the future, the Registry could

1 possibly consider other technical possibilities to help counsel making contact with their
2 clients remotely. But, of course, that has serious consequences for confidentiality, but I
3 would imagine that under some circumstances or at certain stages of the proceedings, it
4 could be possible.

5 VPRS could assist and help organise meetings with victims, with the counsel being in
6 The Hague to inform them about a hearing, for example, or let's say certain guilty parties
7 are still involved in reparations, but are being detained in the DRC. There's more than
8 one possibility. The Defence counsel doesn't necessarily need to travel to the location,
9 perhaps we could have safe systems that would allow for remote communications.

10 MR DUBUISSON: Paolina.

11 MS MASSIDDA: (Interpretation) Thank you, Marc.

12 Just to take up where Luc left off -- Paolina, OPCV.

13 Now, you mentioned alternative means of communications, if I could call them as such.
14 Indeed, I think that at least for certain kinds of victims, that kind of thing already is
15 possible.

16 I will give you some specific examples. First of all, I would like to say it is important at
17 the beginning of the client-solicitor relationship to meet the clients personally because you
18 can't create trust via a video conference or over a Skype call. You really need to meet the
19 clients personally. Once you have established that trust, in my personal experience there
20 are other ways of communicating with people that are more simple and allow you to
21 respect the confidentiality of the discussion. For example, quite often we use Skype to
22 Skype; it's relatively secure.

23 In Côte d'Ivoire, for example, that is one of the systems that we use more because most of
24 our clients, if not all, have an email address, they can connect, the connection is good; so
25 that really facilitates discussions between the counsel and client. In other situations, for

1 example, in Uganda, we have thousands of victims and only a hundred and -- a few have
2 telephones and often the entire family uses the telephone. So it is much more
3 complicated to find different means of communication.

4 But I do think we can explore this possibility and perhaps it would be a good idea to see
5 how the Court could provide certain rooms to counsel that could be used for video
6 conferences or Skype calls in a secure environment, and counsel could merely reserve
7 these rooms when they need them.

8 Thank you.

9 MR DUBUISSON: Aziz.

10 MR MBAYE: (Interpretation) Abdoul Aziz Mbaye, OTP.

11 Just to pick up on this point. I think that reality has shown that several principles have to
12 be reconciled and I think Mariana Pena was correct to mention these issues with Fidel and
13 others.

14 At the time, back in the day, we did discuss such a system and what could be covered
15 from an investigations budget and what should be covered from other sources. Do we
16 have the same understanding of what should be covered? I think that this is the matter
17 of principle.

18 As for arrangements, it's true that at the time, we attempted to reconcile necessary
19 assistance; namely, finding a place to meet with the victim. That was much less
20 expensive than paying travel costs so members of the teams would travel and meet with
21 people individually. So are we in agreement that these costs will be considered as part of
22 legal aid?

23 Once we agree on that, as for the arrangements, I think that is a problem in and of itself; it
24 is just a matter of including it in the budget. I think the big issue here is the matter of
25 principle.

1 Thank you.

2 MR DUBUISSON: (Interpretation) I see Caroline, Cyril and Mr Nsita. Gender first.

3 MS BUISMAN: Yeah, exactly, that's how I felt too. I also will be brief, it is more the
4 things that have just been discussed. We obviously have the computer that we normally
5 use through which we can submit confidential documents directly to the client. Perfect.
6 It works perfectly in The Hague and I know -- though we had the issue in Congo and I
7 know that the initiative was there to also set it up in the DRC. I am not really 100
8 per cent sure anymore why it didn't materialise, but there was, at least, the discussion was
9 there to have a possibility for Katanga and Lubanga to go to the compound or the ICC and
10 from time to time, get the documents there.

11 This is actually -- whatever the solution is, I don't know. Maybe you can explain better
12 what the complications were all and also for future reference, but if that is something that
13 we could implement, it would be extremely useful given that it's got -- we're talking years
14 and -- but we've seen in reality. But now it's really difficult for the client to receive any of
15 the documents, and yeah, like it's on maybe a yearly mission that we can actually do that.
16 So that is something I think I would like -- I just wanted to add to the debate.

17 MR NSITA: (Interpretation) Thank you. I would like to clarify something in the text
18 with reference to the field assistant, but in the quote, mention is made of a lawyer or jurist.
19 So what is the profile of the field assistant?

20 I want to also ask about the remuneration for the field assistant. If I am not mistaken, it
21 would appear to me that in all the cases before the Court, we have worked with field
22 assistants who are either listed counsel or assistants on the list of assistants registered with
23 the Court.

24 The services of these resource persons on the ground are quite useful because they are
25 there to provide guidance and support for the victims and to answer their questions.

1 I know that their work and the explanations that they provide to the victims are of a legal
2 or judicial nature. These field assistants also make a significant contribution to the
3 drafting of various filings to the judges. They know the field; they know how the
4 countries function and so far they have been given the same treatment as the assistants in
5 The Hague.

6 But now, I see that there is a distinction in remuneration according to the draft text and
7 I'm wondering what, then, would the exact profile of the field assistant be? The future
8 field assistant? What would their exact profile be?

9 MR DUBUISSON: Cyril.

10 MR LAUCCI: (Interpretation) Cyril Laucci. On the same topic, I think that my question
11 could be answered along with his, that is, along with what Maître Nsita has just raised.

12 You see, Aziz asked for clarification as to whether the field assistant budget line was part
13 of the envelope or whether it was part of the budget of the field activities. I think it's the
14 same issue. It's an important question which deserves an answer.

15 The current legal aid, at paragraph 81, calls for remuneration for field assistants to the
16 amount of €4,047 per month. Now the draft has reduced that amount to €1,721 per
17 month; that is about 40 per cent of the current remuneration. No explanation or
18 justification has been provided for that and in my introduction, I said that staff team or
19 team members would be the great losers if the draft were to be adopted as is.

20 Now the field assistants are at the forefront of those who would be losing if one
21 understands the draft correctly; so there would be implications as to the profile of the
22 future field assistant. And I think I would like to also get an answer to Aziz's question,
23 where does this budget come from? And I hope that the issue of flexibility will not be the
24 only answer we get. Thank you.

25 MR DUBUISSON: (Interpretation) Thank you for raising that question.

1 The basic question -- the basic principle is equal work, equal pay; particularly, when you
2 come to work here at The Hague. That is the basic principle. Whether you are French,
3 Congolese, American counsel, when you're here at the Court, you are part of a team and
4 there is no distinction and the same applies to the staff of the Court.

5 Now when it comes to field staff, you need to determine whether you are using a local
6 staff or an international staff. The reduction that you see is actually a very important
7 issue. Do you want to maintain a higher amount of money for work that is not
8 necessarily technically a lawyer's job on the field as opposed to what a lawyer can be
9 doing at headquarters?

10 So I think it is for us to assess what happens most of the time because the counsel or the
11 lawyer on the field -- most of the time is doing outreach work, and here, it's G staff or P-2.
12 Is the field assistant providing legal assistance to the extent that they may be classified as
13 legal assistants, which is an administrative position in the Court?

14 Now we need to be able to determine whether this is the case. So the underlying
15 principle is that we want to avoid any forms of discrimination. While we understand
16 that working in The Hague is something that might relate to another person working in
17 the field who is not, in the strict sense of the word, a lawyer as such, then the question
18 must be: Why pay a lawyer's fee to somebody who is not doing the work of a lawyer?
19 That's the question.

20 But if you think that this is something we need to be a little more flexible about, then we
21 can engage in that discussion.

22 And as we said right from the beginning, the concept of flexibility does not apply when
23 we are looking at fees. Now if you do not want to close that discussion at that level, I
24 think this is the appropriate time to engage in this other discussion that is on the table.

25 Yes, Luc.

1 MR WALLEYN: (Interpretation) Yes, I would like to continue on this problem. The
2 issue might be that the same amount seems to apply to everything relating to the field, so
3 that even when it comes to paying a lawyer in DRC, in Georgia and wherever, the amount
4 might not be the same.

5 Are we, therefore, not in a situation where you can modulate the field fee along the lines
6 of the conditions in the local country?

7 MR DUBUISSON: (Interpretation) I have been told that, yes, indeed, in part, this is an
8 average amount and that yes, indeed, the fees can be at par with the national rates and we
9 could also use the United Nations' rates that apply. But again, that would be something
10 that is different from what is being paid here at the Court and that's the issue we need to
11 address.

12 Cyril.

13 MR LAUCCI: (Interpretation) Marc, you were saying that maybe this is the time to
14 speak or forever hold our peace. Yes, we can talk now and, yes, what needed to be said
15 has already been said; namely, that the amount proposed is insufficient -- it appears to be
16 insufficient. So at the very onset this morning, we said that we need to work together,
17 the Registry and other representatives, within the context of a working group to deal with
18 these issues.

19 MR MBAYE: (Interpretation) Abdoul Aziz Mbaye, OTP.

20 I think that this matter relates more to the envelope than to the profile of the person who
21 is expected to do the work. You know, as Marc was saying a short while ago, there is
22 some flexibility in the system when it comes to using resources. Ultimately, legal aid
23 seeks to ensure that there is quality work that is delivered, but I think also the system has
24 to be attractive. It is true that costs have to be checked at the Court, but do we need to go
25 to a certain level of salaries which can be attractive enough for qualified people to be

1 interested in these jobs?

2 So the issue to my mind is more related to the budget than to the profile of the person
3 who may be invited to do the job.

4 MR DUBUISSON: (Interpretation) This is also another consideration: The quality of
5 the work, but also the work proper that needs to be provided or to be done in the field.

6 Well, it's quite interesting to note that everybody seems to be satisfied with the issues in
7 the field.

8 Mariana raised a point, one or two things here, but very, very -- not too much discussion
9 about the field situation. Yes, we will provide greater support, electronic support to the
10 field, security and all of that, yes, but I'm aware that field security is a big issue which has
11 caused us to postpone a number missions. So that will be something to look into when it
12 comes to the duration of our trials and even to issues relating to reparations.

13 But you all seem to be quite satisfied with the security arrangements in the field. Is that
14 the case? There are a number of places, for example, where security might not be an
15 issue, but I would like to get your views and have a discussion. On another issue, which is
16 as follows -- you see, when you are entitled to a certain amount of money and you do not
17 spend that money, what happens is that savings accrue and they are ploughed back. But
18 we have an annual budget and the carried-forward savings will no longer exist and that is
19 why you would see requests; for example, "Last year, I had this amount. I didn't use it
20 for reasons pertaining to security. Can I have it this year?"

21 So let's be clear on this: The carried-forward savings will no longer apply. For example,
22 if you didn't travel last year, next year you cannot claim that you will be entitled to four
23 months of resources for your teams based on the savings of the previous year. This is
24 something that we, at the Court, cannot do in relation to shifting non-staff costs to staff
25 costs. But as Defence and Victims teams, you are able to do that within the year; so this is

1 something that has been stopped.

2 An amount is earmarked for use. If it is not used, it is not carried forward. What
3 happens sometimes is that three years after the fact, some teams come up to ask for
4 savings that may have been accrued and carried forward from three years ago
5 and -- making that request at a certain stage in the proceedings.

6 So these are all matters that we need to look into. Some of them -- some of the teams
7 have never asked for savings, for their carried-forward savings and must wondering what
8 is Marc talking about. But again, you see, this is something that we need to talk about.

9 There's a budget which is earmarked for particular activities and things have now
10 changed. Thank you.

11 Cyril.

12 MR LAUCCI: (Interpretation) Thank you, Marc.

13 On the very last point you made pertaining to savings, that is a point on which we have
14 received several comments during our ICCBA consultations. Most of the comments were
15 to the effect that the carrying forward of savings from one year to the next was
16 counterproductive and would not lead to savings as such, but could ultimately generate
17 expenditure that is not necessarily indispensable.

18 Now when it comes to the structure, the budget of the Court and the rules that govern it,
19 that is well known, but it is probably time to consider some solution. The most radical of
20 which was already proposed by the ICCBA more than a year ago was to take legal aid out
21 of the Court's budget and establish a fund for that purpose governed by budgetary rules
22 that would be different and which could enable some savings to accrue. These proposals
23 were made but not in the context of savings exclusively, but I think it is something that
24 could be said about that solution and which could also be revisited.

25 There are other less radical solutions, security in the field and so on and so forth. I have

1 had a few consultations in the field and yes, I can confirm that unfortunately it didn't
2 appear to us that these questions were not directly linked to legal aid and that is why they
3 were not considered.

4 Now if we open up this discussion, then it would mean lengthy discussions that may take
5 us away from legal aid, but we could still talk about that.

6 For example, the ICCBA has requested access to the agreements on privileges and
7 immunities in various countries where the Court is present. We have had not access to
8 those, but I don't think that this is something that we want to discuss at this meeting.

9 MR DUBUISSON: (Interpretation) I want to just make sure that we are able explore
10 everything. We have talked about contracts; we have talked about maternity; security
11 can also be part of contractual matters and so on and so forth. So I think that I want to
12 leave this debate as open as possible without any restrictions.

13 Now, you mentioned something about a fund. How would the fund be financed if it is
14 not through the regular budget of the Court?

15 MR LAUCCI: (Interpretation) The envelope. The envelope. The envelope that the
16 States allocate each year for legal aid. This should not go into the budget of the Court,
17 but should go to a special fund for legal aid governed by specific rules. Maybe this is not
18 the best solution, but we are talking about the possibility of savings and all teams agree
19 that this is a good governance measure, but that it does not work within the current Court
20 budget structure.

21 So the first idea that we come up with is simply to create a fund and put the legal aid
22 funds into that fund which is outside of the budget of the Court.

23 MR DUBUISSON: (Interpretation) No, I don't think that you can get out of the regular
24 budget as such if the funding is coming from the States because that would go into the
25 regular budget. Now you are talking about creating a major programme, which is

1 different, and this is a very technical issue. So in any event, the rules, the budgetary
2 rules that would apply would have to be the same because there is the financial rules that
3 are in place and there is auditing that has to be conducted.

4 MR LAUCCI: (Interpretation) I don't want to engage in --

5 MR DUBUISSON: (Interpretation) Okay, let's leave it for another time and a working
6 group, if we do create one, could deal with that type of issue.

7 Yes? Thank you.

8 MR SHAH: Thank you, Marc. I just wanted to clarify, you have just mentioned the fact
9 that under the new proposed legal aid policy, there will be no carry-over of any of the
10 funds in the various budgets that are set out in the legal aid policy. So as things
11 currently operate, as far as I understand, for example, when it comes to the budgets for
12 monthly salaries or fees for legal team members, that amount, if it is not being used -- let's
13 say, there is no associate counsel presently on the team for a matter of three months, that
14 amount could be reserved as a surplus and then carried forward indefinitely and then
15 used, sort of, under the flexibility principle to hire team members from that surplus
16 amount.

17 The same sort of principle applies, as far as I understand, with respect to the monthly
18 €3,000 budget for expenses that covers general expenses and travel expenses that
19 presently exists. And same, of course, with the investigations budget, which is €70,000
20 and carries forward, that carries forward on a yearly basis.

21 So if I understand correctly, Marc, you're saying there will be no carry-over possible
22 under this new policy, is that correct? For example, I think the only thing that would be
23 unclear is with respect to the salary budgets. For example, if there was a position that
24 a team was generally entitled to, but that position was not filled for a certain amount of
25 time, those funds could not be saved by the team and carried forward. Is that correct?

1 MR DUBUISSON: (Nodding of head)

2 Aziz.

3 MR MBAYE: (Interpretation) Thank you, Marc, for giving me the floor. This is an
4 extremely important question, whether funds can be carried forward or not.

5 I would have suggested that we deal with the issue of deadlines for processing any
6 budgetary or financial matters. Maybe we need to introduce into the system mechanisms
7 that inform everybody about the manner in which the budget is being expended or how
8 it's being spent and that can help us with that aspect. Thank you.

9 MR DUBUISSON: (Interpretation) I don't see any other -- I'm sorry, Luc.

10 MR WALLEYN: (Interpretation) I want to address the issue of security indirectly.

11 Many non-European counsel face the challenges of insurance. Insurance, quite simply, if
12 you have an accident in the field or you are attacked in the field or -- and this might not be
13 directly a security matter, you may have other medical issues; for example, one of our
14 team members was hospitalised on the day of the opening of the Lubanga trial here in
15 The Hague.

16 So what I'm saying is that there a number of counsel who, quite honestly, are not insured
17 and so if we have to have individual insurance policies negotiated in high-risk countries,
18 this might be quite a challenge.

19 So can the Registry consider collective insurance programmes that may be on offer for
20 counsel to pay into? Maybe if the Registry were able to negotiate some common
21 insurance policy which may be in place already for staff members of the Court, this could
22 be of interest to counsel.

23 MR DUBUISSON: (Interpretation) Are you saying that we should do a special
24 arrangement or make the Court-wide insurance system mandatory across the board?

25 MR WALLEYN: (Interpretation) No, maybe we need to do a piecemeal arrangement

1 because, you see, the counsel, whether they are French or otherwise, may already be
2 enjoying some level of insurance that covers them properly, but this may not be the case
3 with counsel from the DRC, for example.

4 MS MASSIDDA: (Interpretation) Paolina Massidda. Now when it come to the part that
5 is not covered by national insurance, take Italy, for example, it's not easy to find travel
6 insurance if you are travelling to the DRC, so that you wouldn't find it. And I think it
7 would be a good thing to try to explore the possibilities of also providing some kind of
8 insurance for the parts of insurance that are not covered by national insurance companies.
9 And I'm thinking here, for example, of the SOS possibility. We have SOS for all medical
10 issues in the field; so that kind of option could be considered and can be extended. I
11 don't know if I'm speaking proper French here, but this could be extended to counsel
12 appearing before the Court.

13 MR DUBUISSON: (Interpretation) Now when it comes to medical evacuation,
14 emergencies and what have you, the Court's medevac system would address those issues.
15 Now I think it's time for a break, if there are no other questions, and we can resume
16 at -- it's 3.30 now, we will have a 30-minute break and come back at four. Thank you.

17 (Recess taken at 3.28 p.m.)

18 (Upon resuming at 4.06 p.m.)

19 MR DUBUISSON: (Interpretation) Could I ask you to take your places, please. We will
20 resume and I will now give the floor to Esteban.

21 MR PERALTA LOSILLA: (Interpretation) Thank you very much, Marc, for giving me
22 the floor, I won't be speaking for very long. As was the case earlier today, I would say
23 that it's more important to hear your opinions and comments. And thus, this being the
24 case, this last session, if you wish, I think this is the catchall category, we could discuss
25 anything and everything that hasn't been addressed earlier today.

1 I'd just like to mention three things about the draft that we have provided you with. The
2 first thing, and I'll ask you about readability, we took the initial document and to get to
3 this draft, the first stage was we took the current policy and we rewrote it so the
4 document would be clearer and more readable. And we also changed the format so it
5 would read more as a policy, not as a report.

6 Secondly, as you saw, we tried to redistribute resources, the resources that the Court
7 provides to counsel. And previously we had talked about travel to The Hague by
8 counsel and associate counsel, and up until now, that has been paid for following a
9 particular budget item coming under spending, *dépenses*.

10 Now, that budget line has disappeared, but it doesn't mean that it's impossible to have
11 access to certain resources. What it means is that we leave it to be dealt with by the
12 counsel and the Registry.

13 Now, the third point that I wanted to raise was that of additional resources. We tried to
14 clarify the various factors that could lead to a request for additional resources. We've
15 understood that the way it was explained in the initial draft was confusing, and I won't go
16 into the details, but it was confusing. Thus, we tried to better explain the systems of
17 FTEs, full-time equivalents. That was transformed or translated into euros per month to
18 better explain the impact of these factors on the team's budget.

19 We also did something else. We said in writing that it was the Registry that would
20 compile, with the assistance of Defence, compile the relevant information about additional
21 resources so that the teams would not have to go through all their files for things that we
22 could do quite easily.

23 And finally, we better explained the various factors that, not quantified, could lead to
24 additional resources.

25 For example, and already in the current system there is a list, an indicative list, but other

1 factors that can reasonably justify an increased workload can lead to additional resources
2 for the team and those who have experience here are well familiar with this.

3 I will leave it at that for right now because I think the most important thing today is to
4 hear from you about all the other issues that were not discussed earlier today. Thank
5 you very much.

6 MR DUBUISSON: (Interpretation) Xavier-Jean.

7 MR KEÏTA: (Interpretation) Thank you. I've seen that over the course of the day we've
8 discussed quite a few details, interesting details, and this confirms to my mind and I do
9 see, as Esteban was saying, that we are well versed in this area and we can make a
10 contribution to a better use of the Court's resources. I don't think we need external
11 consultants, paid a small fortune, to set up or to reform a legal aid system to the tune of
12 €90,000. I believe there have been various proposals, and I think to gain some time, I
13 think it's possible to set up a working group, a small working group to take the essence of
14 what we've heard today and other remarks that will be coming later today so that we can
15 move forward together and achieve a system that can be validated by the States Parties.
16 Many States Parties are not represented here today, but I think it's a good thing. And
17 CBF and certain States and certain organisations did decide to come today.

18 MR DUBUISSON: (Interpretation) Mariana.

19 MS PENA: Mariana Pena with the Open Society Justice Initiative.

20 In looking at the programme, I thought this could be a good moment to raise a question
21 on indigence, since I think it's covered by all other matters.

22 And the question I wanted to raise is in our view, this review of the policy could have
23 been a good moment to revisit the practice applicable to determination of indigence for
24 victims. In the reports that we previously saw on legal aid, including the Rogers report,
25 there was a recommendation that a presumption of indigence applied to victims. The

1 reason is that the practice has shown that victims of the crimes that the Court has
2 jurisdiction over are normally indigent, do not have the funds or nearly the type, the
3 funds at the level that would allow them to cover for the fees that are covered by legal aid.
4 And when I look at the proposal, the proposal is so heavily focused somehow on Defence
5 and there is no specific mention of victims, so I wonder whether, my first question is was
6 that an omission? Is that still being considered? Has that not been revisited in your
7 work over the last few months? And then depending on what your answer is, I may
8 want to add a few comments.

9 MR DUBUISSON: (Interpretation) Cyril perhaps.

10 MR LAUCCI: Maybe, I mean, you are the chair, Marc, but since there are several
11 questions and my question is totally different from the one of Mariana, we could address
12 them in turn.

13 MR DUBUISSON: (Interpretation) Yes, we'll have to try to make up some time so as to
14 give some time to Esteban to find the paragraph. At least I will have tried, I'm trying just
15 so that he'll have a little bit of time. Sorry about that.

16 In actual fact, yes, we have had that discussion. And this issue, the question -- well, no,
17 I'll turn it over to you.

18 MR PERALTA LOSILLA: That's a very good question, Mariana. Thank you very much
19 because that's very relevant. And it brings us to the matter of, you know, the whole
20 debate about victims not having a right as such to legal aid but legal aid being necessary
21 for the proper representation of victims.

22 So this is addressed in paragraph 14, where we say that experience before the Court has
23 demonstrated that the Court must ensure that legal aid resources are made available to
24 indigent victims in order to ensure the effective exercise of the rights afforded to victims
25 under the Court's legal framework.

1 And then 15: Common Legal Representatives of Victims chosen by the Court and their
2 teams shall receive remuneration from the Court pursuant to the LAP.
3 That means then that there will not be any test of indigence at the time of financing
4 Common Legal Representatives. So any victim who wants to be represented by the
5 Common Legal Representatives already appointed by the Chamber will not have to prove
6 any indigence.

7 MS PENA: If I may, I think that warrants an explanation, because it's not absolutely
8 clear in the policy that there will be no -- because it comes under the same section as the
9 Defence, it appears as though there would be an inquiry into the victims' financial status.
10 And I'd also like to take a moment to raise a question that colleagues from Amnesty and
11 international Human Rights Watch who are not here today raised in their written
12 comments with respect to the question of Common Legal Representatives and legal aid
13 for representatives chosen by the Court.

14 At the Open Society Justice Initiative we also support that interpretation, which is that
15 there may be multiple readings of the legal texts and there is a legal -- there is a decision
16 from one of the Chambers that states that only those chosen by the Court are entitled to
17 legal aid. But there are other possible readings and we are actually concerned about
18 what that means in practice.

19 We think that what is important is that victims are part of the process and are part of the
20 selection. Whether ultimately the decision is made by the Court or not is another
21 question. You know Rule 90(1) states the principle that victims should be involved in
22 choosing their legal representatives. There are a lot of caveats to that first paragraph in
23 Rule 90. But we believe that this policy should also support that very important
24 principle of victims being involved in the decision. Again, whether the Court is involved
25 or not I think is a matter that comes later. But I don't see that recognition of victims'

1 involvement in the choice of counsel in this policy. Thank you.

2 MR PERALTA LOSILLA: Thank you.

3 MR DUBUISSON: (Interpretation) I should specify, since I did give a presentation to the
4 judges that it's not as clear to everyone, in particular for the judges who are the first to be
5 concerned. Some of them see different interpretations of this. So this is a point that
6 we'll be dealing with for a while I think. And we did not wish to deal with the
7 decision-making matter to be taken by judges by way of a policy.

8 I realise that this is quite timely, this particular topic is still a hot potato.

9 Chief Taku followed by Luc.

10 MR TAKU: Well, the issue of the judges are there and the practical issues that are arising
11 in the course of the proceedings. Issues involving victims is very, very -- issues that are
12 evolving before the Court because I think this is the first time, the first court, first
13 international court that is looking at the status of victims very, very in detail.
14 We have found in cases generally looking at the notion of victims that apart from the
15 participating victims, we have also on the side of the Defence victims, some will find
16 victims perpetrators, victims who are witnesses for the Defence and who may have been
17 involved in other proceedings. The jurisprudence is evolving. We're all trying to
18 contribute into it. It is a very, very interesting issue. It came just in time to resolve a
19 major problem in international law. It's evolving. Let's keep an open mind to see how
20 it evolves. I support the focus on the protection of the right of victims, although now I
21 am counsel for the Defence, I'm also victims counsel on the list, as the case may be, and
22 many of us are ICCBA and ICCBA represents both victims and the Defence, and many
23 lawyers, many people who are also victims on both sides, because victims and accused
24 person come from the same communities, therefore, victims are represented by counsel in
25 the cases.

1 What I wanted just to say is it's an issue that is developing, very, very interesting in many
2 regards before the Court. And that's why I think the judges actually in some cases are
3 the appropriate people to look at it. It is very difficult to discuss, to formulate a standard
4 to deal with the issue because they may develop on a case-by-case issue. But I believe
5 very strongly that at the end we'll find a formula that will satisfy everyone. In fact, the
6 victim pool is very huge, very, very huge before the Court. Thanks.

7 MR WALLEYN: (Interpretation) Thank you very much. In paragraph 44, which deals
8 with this problem of legal assistance for victims, I think there is a reality and a triple
9 mistake. On the one part it says the only reference to legal aid is in Rule 90(5) of the RPE.
10 That is not correct. There is also a provision in the Rules of the Registry that says that the
11 victims shall be informed by the Registry that they may enjoy assistance from the Court.
12 So this confirms the principle that victims are entitled to legal aid to be paid for by the
13 Court and in addition, they are the ones who can make the request. Thus, it does not
14 depend on a decision from the judges.

15 Secondly, we have Rule 95 that does not limit the possibility, and that confirms that a
16 Common Legal Representative can benefit from legal assistance from the Court.

17 But, well, you can flip the sentence around, but it does not prohibit anything. And that's
18 never been the policy of the Registry. Even with that single decision from the Ongwen
19 case in which the Chamber interpreted the rule extremely restrictively, the Registry took a
20 different decision which was in keeping with 10 previous years of practice.

21 And then the common representative of victims chosen -- well, this rule does not state that
22 the Chamber chooses. It says that the Chamber may ask the victims to choose a common
23 representative or if they are not able to do so, the Chamber may ask the Registry to
24 designate a Common Legal Representative. So it is only under exceptional
25 circumstances that the Chamber designates or decides who shall represent the victims.

1 So I think it's important to review this passage and make adjustments in accordance with
2 the practice, particularly the Registry's practice. Common Legal Representatives may
3 request legal aid from the Court regardless of whether they are representing people at the
4 request of the victims or the organisation was done spontaneously or even possibly if it
5 was the Chamber that had to make a decision, if that was the only possibility.

6 MR DUBUISSON: (Interpretation) Yes, yes, it is a matter of interpretation. So I do
7 think we will have to have a strategic discussion or a tactical discussion about how we
8 should approach this issue, because it's a bit hazy right now, we are not entering the
9 debate and we are not offending judges on one side of the issue or on the other. I'm not
10 so sure that we'll be able to get out of this one. This document also has to be ultimately
11 approved by the judges, so we're really, this is really very early days.

12 MR WALLEYN: (Interpretation) Yes, here one interpretation has been chosen, but there
13 is certainly not unanimously, not by the judges and not by the Registry either.

14 MR DUBUISSON: (Interpretation) Duly noted and we will try to be even hazier.
15 I also see Cyril wanting to take the floor.

16 MR LAUCCI: (Interpretation) Yes. I think we've come to other issues. There are
17 many other issues. And the document with comments raises some points. Now, just
18 one point, and this is something we hear time and time again. And this has to do with
19 something -- well, we really shouldn't be talking about this today, namely, the 74 counsel.
20 There are many different viewpoints and many have said that there is no reason for
21 Article 74 counsel to be compensated out of the legal aid budget and that Article 74
22 counsel should be paid out of the OTP budget. In any event, these are completely
23 different rules that would apply to Article 74 counsel. And of course I'm talking about
24 counsel designated to assist OTP witnesses.

25 MR PERALTA LOSILLA: (Interpretation) Just as one point, you say that these counsel

1 should be paid for by the OTP. I understand you're making reference to witnesses called
2 by the OTP.

3 MR LAUCCI: (Interpretation) Absolutely.

4 MR PERALTA LOSILLA: (Interpretation) And then what about -- these are real
5 witnesses, not potential witnesses. What about witnesses called by the Defence who also
6 need, should that come out of the Defence budget?

7 MR LAUCCI: (Interpretation) My remark has to do with OTP witnesses. That's what I
8 was trying to drive at. That is what the comments were about. So that comment is not
9 to be found in the written comments that we submitted, but I think it's important to
10 mention that, because it came up several times within the various comments received.

11 MR DUBUISSON: (Interpretation) Just to make sure, if the Prosecution pays, then
12 perhaps the Prosecution will have some oversight over that particular counsel. Might
13 not there be some conflict of interest?

14 Now I'll give the floor to the representative of Amnesty International

15 MS LOIERO: Thank you. I realise the discussion has moved on in the meantime, but --

16 MR DUBUISSON: Your name, please.

17 MS LOIERO: Sorry?

18 MR DUBUISSON: Your name.

19 MS LOIERO: Sorry. Chiara Loiero with Amnesty International.

20 I wanted to chime in on what has been said before on the Legal Representative for Victims.

21 Indeed as Amnesty International we have submitted some comments together with

22 Human Rights Watch on this point. And we will be submitting broader submission on

23 other points, so welcoming the opportunity to hear more details about the policy.

24 But to just come back briefly on that point, to what was said before, we also think it's very

25 important that this policy does not foreclose possibilities that are still open, as you said,

1 hot topics, but it's very important that these are left undetermined, let's say, in one way or
2 the other in this policy. Thank you.

3 MR DUBUISSON: (Interpretation) Thank you. We have been asked in the Registry to
4 make representations to the judges on this matter, and I think I will be interested in
5 hearing everything that you have said about not limiting ourselves to only one judge.
6 We have to appear before the judges and we need to tell them why we prefer 91(2) rather
7 than 90(5) or 92. So your written submissions will be useful. They would help us to
8 defend these points. And as has been mentioned, the Registrar has made a decision, but
9 the Registrar is a principal of this organisation, and we have a duty to defend the position
10 of the Registry, and your suggestions will help us in that task. Thank you very much.
11 I see Caroline and I see one other person I think. Dominic and Caroline and Marie
12 Mathiaud.

13 MS BUISMAN: Okay. I'll take it. Thank you.
14 I just want to, in the other issues also, and I already raised the issue of expert testimony, I
15 think, I'm looking at point 5, 5, point (c), yes, Article 67, sorry. And it refers to the
16 solicitation of preliminary expert advice or opinions in the legal representation. I think
17 we really need some more clarity on that, maybe some more -- well, especially because we
18 haven't recruited experts, but I've understood from others that there was some concern, it
19 wasn't very clear, if and when they're being paid. You have the expert's opinion and
20 then there might be testimony. I think all this is unclear.
21 And I believe in other tribunals there is a clear budget just for expert evidence. And it's
22 something I think we should really maybe reconsider, maybe there is a need for that in the
23 ICC as well, especially in light of this changing I think culture where we will start dealing
24 with very technical evidence where you really need more, there is more need of forensic
25 expertise. All of that is going to be extremely expensive. So there might be need for

1 more guidelines on that and maybe more money.

2 MR DUBUISSON: (Interpretation) Well, on that point, let me say that when this Court
3 was being built, there was a list of experts and this was deemed to be necessary so that not
4 anybody who claims to be an expert would be qualified. So we needed to filter them and
5 outline what the qualifications would be as a measure of quality assessment. And the
6 corresponding level was P-4, the relevant pay level would be P-4 for payments.

7 Now, two things happened. And at the request of the OTP there was a change and there
8 is no longer any obligation to choose from the list. And this was at the request of the
9 Prosecutor, but everybody is able to avail themselves of this opportunity and any party
10 can suggest any expert who would then be listed. So if there is any problem, we would
11 go back to the requesting party. But all experts have so far been vetted and deemed to
12 have qualified.

13 Now, on the other hand we have a problem because the Defence teams say: "We are
14 paying for the expert, and with 30 years of experience the minimum level should be D-1.
15 But the Prosecutor proposed a D-1 for their own expert, whereas we can only fund up to
16 P-4."

17 So there is a need to harmonize the situation whereby the Prosecutor can hire an expert at
18 a D-1 level whereas the Defence is limited to P-4. So the Defence should be entitled to
19 have an expert of the same level. And so there is a matter of equality of arms here. And
20 that is why as the Registry we believe that the concept has to be harmonized so that any
21 Defence team should be able to avail itself of good experts.

22 This type of thing also creates problems. Now, if everybody were to respect the various
23 stipulations or provisions, then we would not have these type of problems. But when
24 one of the parties goes beyond to do what they want to do because they have more
25 resources, then it becomes important for us as Registry to make the same resources

1 available to the other party.

2 So right now we are already much more flexible when it comes to the amounts of money
3 and references involved when dealing with experts. But it is a very complicated matter.

4 We cannot legislate on this matter, so to speak, because sometimes there is no discussion,
5 there is no real problem, but at times it becomes an issue. And there you have it.

6 And this also is different from dealing with experts appointed by the Chamber in matters
7 of reparation, because the reference here is P-4 and so there is a college of experts who
8 have already been outlined by the Registry. There is a list. You may have already seen
9 this. And then what happens is that we must go through this process to include experts
10 on the list post facto. And quite often we find out that some of the experts do not have
11 the qualifications they claim to have had at the time of application, so this matter has to be
12 settled by the Chamber. And these are the types of problems that we encounter
13 regularly.

14 I see Dominic, Dominic and then Marie.

15 MR KENNEDY: Thank you very much. Dominic Kennedy, ICCBA.

16 It's basically a general, I guess, overview of an issue that seems to be missing. I don't
17 know whether it's an oversight or intentional. There seems to be no mechanism in place
18 for an annual inflation, which obviously other courts have got in place. So year on year a
19 cost of living increase, something to account for the annual inflation. There seems to be
20 nothing in the policy apart from when it mentions minimum wages for the Netherlands.
21 But there is nothing for the general overall policy.

22 MR DUBUISSON: (Interpretation) The point is well taken and this will be dealt with
23 under the relevant chapter. We will take that into account.

24 Marie.

25 MS MATHIAUD: Thanks. Mary Mathiaud, Registry Legal Office.

1 I would like to raise maybe three little points. I think that for the legal adviser Rule 74,
2 the intent, if I'm not mistaken, was to cover them at paragraph 68, just so we are all on the
3 same wavelength, and that's under duty or ad hoc counsel, of course more ad hoc counsel.
4 So I think it was envisaged, but that's true that it's not said legal advisers.

5 And maybe that raises another issue of the old policies that we are missing a full chapter
6 on definition of terms in this policy, which would I think help for the debate.

7 Another point is when we speak about stages of proceedings, we never see the stage of
8 enforcement. And it may become a reality and also an important point for the States
9 Parties to know that at enforcement stage as well we may need some counsel. And it's a
10 decision to make whether we want to consider it as a reduced activity stage or not. But
11 at least maybe a mention would be worthwhile in this policy.

12 The last point I wanted to raise, and this is a question more to the practitioners concerning
13 the contracts and the legal services contract, whether since we would cover duty counsel
14 and ad hoc counsel, whether the same contract would be needed for them or not or
15 whether we would make a difference of contract, because of course their intervention is
16 much more limited. Is it worth a contract or not? This is a question.

17 MR DUBUISSON: (Interpretation) Marie and Aziz.

18 MS O'LEARY: *Merci*, Marc.

19 Thank you, Aziz.

20 I just have a couple points to go back to the representation and the budget situation that
21 was raised over here.

22 Mary O'Leary, OPCD.

23 In my legal tradition, this may not be the same for everyone, if I'm representing someone,
24 it doesn't matter who is paying. So if I'm assigned to somebody as their duty counsel, it
25 doesn't matter if it comes from the Prosecution's budget, Registry budget, it doesn't matter.

1 I am loyal to that person as my client. The budget is a secondary item.
2 So I think that part of this is maybe not a part of the legal aid policy but a part of the
3 budget and how we structure the budget, because I would like clear lines myself
4 personally and I think OPCD and many others have raised this before that perhaps we
5 could have clearer numbers in the budgets that go to the States not just CBF as far as
6 where the legal aid budgets are going, how much of that is for duty counsel for the
7 Prosecution witnesses, how much is duty counsel for Defence witnesses. It's clearly
8 itemised right now for Victims counsel and Defence counsel, but not anything beyond
9 that. And I think better numbers might help alleviate some of this, not necessarily in the
10 policy, but in the budgets.

11 And I just have one point that's maybe a bit premature, but I just personally would like to
12 know as far as next steps, when we're submitting further comments for 31 December, I'm
13 not going to make any other points because we've done them quite extensively on the
14 draft, are you looking to improve those drafts? Are you making new drafts? Are you
15 making a concept note? What is the next document you are preparing that we can help
16 feed into from this?

17 MR DUBUISSON: (Interpretation) That will be addressed in the conclusion. Thank you
18 for raising that point.

19 Aziz.

20 MR MBAYE: (Interpretation) Thank you, Marc. I just want to hop back to the issue of
21 the expert. Marc, you raised a question that I don't fully grasp, but I will be asking for
22 additional clarification so that I can make the relevant submissions to this discussion.
23 But when it comes to the expert, the question was asked whether it is the OTP that would
24 pay for those services. If I'm not mistaken, experts are appointed and validated by the
25 Registry and are paid for by the Registry and I think that this is the angle from which we

1 must address the issue of legal representatives as well when it comes to legal aid.

2 MS MASSIDDA: Just two seconds, because Marie was asking in relation to duty counsel
3 and ad hoc counsel, I don't know if anybody else wants to answer that question, that in
4 my opinion should be two separate categories. One category of contract is maybe duty
5 counsel or ad hoc counsel, but what we were discussing here this morning was more a
6 sort of contract for people in a team, for more extended period of time. I mean normally
7 duty counsel or ad hoc counsel tend not to have a need of a team. So the contract has to
8 be different I think compared to a contract which is offered to someone who is involved
9 daily in a teamwork either for a Defence counsel or a Victims counsel.

10 MR DUBUISSON: (Interpretation) Marie and then Maître Nsita.

11 MR NSITA: (Interpretation) Let me clarify a thing or two in relation to what Paolina has
12 said. I have served previously as ad hoc counsel under Rule 70. And at the time it was
13 said that my activities would be extremely limited in time, but it ended up taking up
14 about two years of my time in order to dispatch those duties. I was paralysed, not
15 physically paralysed but held down in The Hague, at the Court in The Hague and for that
16 reason I needed additional resources to be able to do the other work that I had to do.
17 Now, based on a judicial decision, the Registry appointed a consultant to work with me
18 and he provided support in this work which took quite some time. Therefore, this is
19 something that needs to be addressed properly because it can happen, and it has to be
20 dealt with when it does occur.

21 MR DUBUISSON: (Interpretation) That's the exception that confirms the rule, right?
22 So I do not see anyone else asking for the floor. And it is now 16.47. It's a good time to
23 conclude. It's a good time to conclude.

24 First of all, I'm extremely happy and I hope you too are as happy as I am for the holding
25 of this meeting and these very fruitful discussions that have taken place today. We've

1 had more than 50 persons representing various legal interests, counsels, NGOs, States
2 were invited, some members of the CBF were here, the Presidency was here, judges were
3 invited. We tried to invite everybody in the spirit of transparency to have a discussion, a
4 fruitful discussion around this issue.

5 I think quite clearly it emerges that at the realm of the Registry there is a new attitude, a
6 new attitude towards ongoing improvement of our services in line with the new
7 Registrar's desiderata.

8 There is also a clear demonstration of a will to achieve our objectives and there are
9 challenges, but we need to meet those challenges when it comes to Host States and taxes,
10 when it comes to States Parties and constructive dialogue within the context of various
11 discussions and also discussions with the CBF with a view to reaching consensus on the
12 way forward and the various arbitrations that need to be done. This is the spirit of
13 ongoing dialogue that is now in place.

14 From today's discussions, what can we say is the way forward? First of all, from the first
15 part this morning dealing with reparations, I point out the six-month concept which
16 should not only be limited to six months when it comes to reparations but could be
17 extended to 12 months. And that is why we need to put in place a flexible mechanism
18 covering six, eight or nine months, as Paolina said. So we need compromise on that
19 point with objective criteria in place. So we will look into that.

20 Reparations, a positive attitude in addressing that.

21 We can also look positively at the possibility of increasing field staff at various phases.
22 This might not be necessarily objective, but it is something that we can look into in the
23 future based on the actual activity on ground. The same would apply for an additional
24 legal officer who may be limited in the number of hours ascribed and so on and so forth,
25 because this would in a way provide greater assistance, but in a very specific framework.

1 We also said that when it comes to investigations and the Defence, there might be need for
2 a case manager. Some of the information that we have gathered today is that some of
3 these activities may not have any impact on the budget, but now if you were to increase
4 significantly the number of hours for a lawyer, that might have a budgetary impact, and
5 that is why we need to be very specific when we make recommendations to the CBF and
6 to the States, because if we were to act outside of the envelope, this would be the
7 budgetary impact.

8 We also need to look at the strategy to put in place and then to see when and how to
9 operate outside the envelope, because we cannot amend it.

10 Now, we also talked about the reduced activity phases. And we said that we cannot
11 limit ourselves to limited activity within the Court. It must be that we bear in mind what
12 is happening in the field, and as Registry we want to make this a point of honour to pay
13 more attention to what is happening in the field. And that is why we want in the context
14 of reduced activity to pay greater attention to what is happening in the field and to realise
15 what actually goes on when it comes to reparations where there is need for more time,
16 particularly if some of the things that needed to be done upstream were not done. We
17 need to have the resources at the right time because one day or another we're going to
18 have to deal with these very issues and these might slow down the system.

19 We also said that we want to explore the possibilities of synergies, efficiency and what
20 have you during this reduced activity period so that staff can be used for other purposes,
21 either assigned to various specific groups or through the Bar Association. So these are
22 things that we need to look at.

23 When it comes to travel, the amounts assigned need to be modulated and there needs to
24 be greater flexibility. And the various countries in which we are operating need to be
25 taken into account, particularly when impressions of discrimination could be given, and

1 that's why there is need for a constructive, an absolute need for a constructive solution
2 that bears in mind all the various parameters.

3 Now, when it comes to field issues, we need to understand what this is all about. We
4 need more technical support to counsel in The Hague, but more so in the field. We also
5 have to be more involved in training. And I want to say here that we already have had a
6 meeting with the Bar Association and we are putting in place a training system which is
7 far more advanced than the annual training programmes that we have. And this training
8 will be targeting lawyers or counsel working at or with the Court.

9 And then there is the delicate issue of discrepancies in fees and allowances between the
10 field and HQ. We need to define what the field assistant actually does, the nature of
11 their work. And this is a very delicate issue on which we must find some kind of
12 agreement in order to determine what type of assistance would be involved in that matter.

13 Now I conclude with two essential points on the future of our work. Mention was made
14 of a working group. And I think that as a focal point on this issue at the Registry, I think
15 I can say that, yes, we agree with the creation of this working group. There will be need
16 for some practical modalities to be laid down. When there is a group, a working group,
17 there is need for the group to work together. But this proposal, any proposal that comes
18 off from that group will be a proposal from that group, but I think that the Registry will be
19 happy to participate in the deliberations of that working group. But I think it is also
20 important that the Registry makes sure that various schools of thought are represented in
21 the composition of that working group.

22 We may also consider having observers in the group, NGOs and what have you. So we
23 need to work on developing the practical modalities in the days ahead to see how that
24 group can be composed and work towards improvement.

25 Finally, the next stages, what is the way forward. I thank Marie for the question she

1 asked. We have all met here. We have all taken down notes. And I think that we
2 need to move forward taking into account all that which has been discussed today. The
3 working group will look into today's feedback and all other previous submissions that
4 you have been so kind enough to submit to us, and then we will see what needs to be
5 modified. But at the same time we will be careful not to open the debate too broadly,
6 because this morning the question was asked, what are we talking about? And we said
7 the envelope. But if we now open up discussion to everything else, then we will not be
8 talking about the envelope. That is why we need to ensure that we remain or we centre
9 this discussion within the context of the envelope, that we identify what the creative
10 suggestions are, what can be done and we look at the impact.

11 And then we are also aware that we need to be conscious that it's the States that will
12 decide. We need to work with the CBF and to determine whether we are still within the
13 framework of the envelope. And you know, an envelope might be elastic, but not too
14 elastic and States do not like envelopes that are too elastic. So that is why we have to
15 work to define this type of envelope and we agree that this is what we need to do.

16 The Registrar will make sure that all of these things are clearly taken into consideration
17 and the Registrar is aware that the States are quite circumspect. There might be new
18 cases coming before the Court at some point. This might bring in new dynamics and
19 what have you. So let us be hopeful that tomorrow will be a lot more positive.

20 You have the document before you today. Let me reassure you that we will take into
21 account your suggestions. We will amend this document within acceptable limits, limits
22 acceptable to all.

23 And finally, let me thank all of you for your attendance today throughout the day for your
24 active and positive contributions. I thank you for the submissions, the written
25 submissions that you have made. And I want to thank the CSS team for ensuring that

- 1 this meeting actually takes place. And I also want to thank our friends, the interpreters,
- 2 even though we are going very fast, we want to thank you. And I want to wish all of you
- 3 a very pleasant evening. Thank you.
- 4 (Meeting concluded at 4.58 p.m.)