

**1 November 2009**

**DEFENCE COUNSEL - TRIAL LEGAL AID POLICY**

This policy shall be the authoritative version of the modified payment scheme for trial (“2006 Trial Payment Scheme”), as previously amended on 1 April 2005 and on 1 May 2006. In case of any inconsistency between this policy or amendment made and any previous information disseminated, this policy shall prevail.

The policy shall apply to all cases in trial

The revised amounts included in the 2006 Trial Payment Scheme shall apply as of 1 November 2009 to all cases in trial to which the Defence Counsel Trial Legal Aid Policy applies, as provided in the Memorandum of Understanding on the Application of Amendments to the Pre-Trial and Trial Legal Aid Policies and in the Proposal to Amend Annex I to the Directive on the Assignment of Defence Counsel, signed on 1 May 2006 by the Registrar of the International Criminal Tribunal for the Former Yugoslavia and the President of the Association of Defence Counsel.

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**DEFENCE COUNSEL PAYMENT SCHEME  
FOR THE TRIAL STAGE**

**A. DETERMINATION OF THE LUMP SUM**

- 1) A lump sum allotment shall be determined by the Registrar after consulting with the Trial Chamber and the parties after evaluating both: (1) the estimated duration of the phase (*see* Section D *infra*), and (2) the complexity of the stage (*see* Section E *infra*).
- 2) Such factors may be difficult to assess in advance, particularly for large cases. To make the forecasting more manageable and the forecasts more realistic, the trial stage will be divided into different phases: (a) the Prosecution phase, and (b) the Defence phase. In the event that either of these phases is expected to last longer than 12 months, it may be subdivided into two separate phases. Separate lump sums will then be calculated and allocated for each phase of the trial at the time the respective phase is set to begin. In the event that the entire trial stage is expected to last less than 12 months, it may constitute one phase for the purpose of this policy.

**B. NATURE OF THE LUMP SUM**

- 3) This payment scheme has a lump sum nature. In contrast to the previous system (the “2001 system”) in which Defence Counsel were allocated a maximum allotment of hours, the lump sum is allocated for a specific phase of the proceedings and is linked to the completion of this phase. It is not contingent on the number of hours actually worked per month or the actual duration of the phase.
- 4) All aspects of representation except for necessary travel and DSA are to be covered by the lump sum. These include, but are not limited to:
  - lead counsel fees
  - co-counsel fees
  - legal assistant fees
  - investigator fees
  - consultant fees
  - interpretation and translation costs (see par. 5)
  - office costs
  - administrative expenses
- 5) Included in the lump sum are interpretation costs and costs of translation of documents other than those documents to be adduced as evidence which should be translated by the International Tribunal’s translation services (CLSS), in accordance with the Registry’s interpretation and translation policies. However, interpretation and translation costs incurred to facilitate client counsel–communication pursuant to Article 21 (4) a), b) and f) of the Statute are not included in the lump sum. Defence teams may invoice separately for such costs, up to a maximum of €1000 per month.

## C. DISTRIBUTION OF THE LUMP SUM

- 6) From an analysis of various domestic lump sum or costing systems in other countries, it appears that the standard practice is to disburse the lump sum at the completion of the case. However, ICTY proceedings can be lengthy and the Registrar does not believe that it would be appropriate to require Defence Counsel to work for long periods without any payment. Accordingly, the Defence team will receive an up-front payment, a monthly stipend paid automatically for each month of the phase, and a final End-of-Phase distribution. The up-front payment and the monthly stipend are effectively an advance payment of the lump sum in instalments and do not represent any allotment of hours. Thus, irrespective of whether the court is sitting every available day, the Defence team will continue to be paid stipends each month for the duration of the phase, in accordance with paragraph [21] *infra*. At the completion of the phase, upon a determination of the actual number of sitting days and submission by Lead Counsel of a more detailed accounting of the work done throughout the phase as well as details on the type of work performed by the team members, the lump sum will be re-calculated and reconciled with the amount that has been advanced to the Defence team (e.g. as up-front payment (if applicable) and monthly stipends).

### I. Up-front initial distribution

- 7) The Registrar recognises that at the commencement of the Prosecution phase, the Defence team may incur several costs associated with relocation and the establishment of their office in The Hague. The Registrar will therefore issue 10% of the lump sum at the commencement of the Prosecution phase in the beginning of the trial proceedings, to facilitate any extraordinary expenses that might be incurred. No up-front payment will be made for the Defence phase.

### II. Distribution of Monthly Stipend

- 8) As stated above, the monthly stipend is a distribution of the lump sum in instalments and does not represent a monthly allotment of hours or a monthly salary. The stipend is calculated by dividing the lump sum by the estimated number of months, and multiplying this amount by 70% for the Prosecution phase and by 80% for the Defence phase.
- 9) Defence Counsel will be required to submit a monthly statement, constituting a pro forma invoice<sup>1</sup> signed by the Lead Counsel, advising the Registrar how to distribute the stipend between the respective Defence team members. Payments will then, in principle, be made within one month of submission of a valid and acceptable invoice, directly into the accounts of the respective Defence team members who have been officially assigned by the Registrar. At the end of the phase, the entire Defence team will be required to account for the hours and work performed in the course of that phase, with a detailed statement presented to the Registrar (see below).

### III. End-of-Phase Payment

- 10) At the end of the respective phase, the Defence team is entitled to receive that part of the lump sum that was withheld, which equates to the re-calculated lump sum, as determined pursuant to section D.I., less the 10% initial payment (in the case of the Prosecution phase) less any amounts paid out in monthly stipends. If the actual duration of the phase

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<sup>1</sup> UN accounting rules will require an invoice, a requirement which can be met with a *pro forma* invoice – a form requiring dates and signature – for processing.

is the same as the estimated duration, then the End-of-Phase Payment will equate to 20% of the lump sum: 10% up-front + 70% in monthly stipends + 20% End-of-Phase Payment = 100%.

- 11) This sum will be paid within one month following the acceptance by the Registrar of the End-of-Phase Report, which must be submitted by the Lead Counsel within 60 days of the end of the respective trial phase as per paragraphs 12-15.

#### **IV. End-of-Phase Report**

- 12) The End-of-Phase Report must contain a formal accounting of hours covering the phase as well as details on the type of work performed by each team member during this period. More specifically, the End-of-Phase Report shall include the following information:

- a) For each month, the name of each member of the Defence team and their respective assignment/tasks for the particular month;
- b) For each month, the number of hours worked with a detailed description of the work performed by each member of the Defence team;
- c) For the total phase, a recapitulation of the total number of hours worked by each member of the Defence team and by category of work; and
- d) For the respective phase, a recapitulation of the work performed and its output<sup>2</sup> with sufficient specificity to allow the Registrar to verify that the work was performed. The End-of-Phase Report will include information such as the number and names/pseudonyms of witnesses met and interviewed, amount of research done, number and headings of filings prepared and filings submitted, and documents reviewed including disclosure and the number of pages of such documents.

- 13) In the review of the End-of-Phase Report, the Registrar shall verify if :

- a) All information requested in paragraph 12 is included;
- b) The work performed by each Defence team member is sufficiently described to establish that it was accomplished for the purpose of presenting the case for the Defence at trial;
- c) The work reported by all members of the Defence team was actually performed and justifies the payment of the lump sum; and
- d) All legal aid funds were paid to authorized individuals (members of the Defence team or other persons duly assigned by the Registrar), as requested by Lead Counsel.

- 14) The Registrar may request Lead Counsel to provide additional information highlighting specific concerns and questions to be addressed before deciding on the amount to be paid.

- 15) Based on the End-of-Phase Report and any additional information received from Lead Counsel, the Registrar shall disburse the remainder of the lump sum, unless he has reason to believe that irregularities in the work or conduct of the Defence team may have taken place. In such a case, the Registrar shall either: a) consult with the Chamber seized of the case and/or the Association of Defence Counsel practising before the Tribunal, or b) refer the matter to the Disciplinary Panel or the Chamber seized of the case. Only after such consultation or referral and after having given Lead Counsel an opportunity to respond,

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<sup>2</sup> The output of the work performed will in no way be judged upon the success or failure of the Defence team's performance.

may the Registrar decide to refuse payment of all or part of the End-of-Phase Payment. The Registrar may also, if instructed by a Chamber, deduct any fees associated with the production of a motion which the Chamber has declared frivolous or an abuse of process, in accordance with the Rules of Procedure and Evidence.

- 16) Should the Lead Counsel disagree with the Registrar's decision not to pay all or part of the End-of-Phase payment or with the amount to be disbursed, Lead Counsel may request a review of the Registrar's decision in accordance with the procedure set forth in Article 31 of the Directive on the Assignment of Defence Counsel.

#### **D. CALCULATION OF THE DURATION OF A PHASE**

- 17) As the Trial Chamber is ultimately responsible for controlling the proceedings, the estimated duration of the Prosecution phase will be based on the time allocated for the presentation of the Prosecution case, as set by the Trial Chamber at the Pre-Trial Conference in accordance with Rule 73*bis*(C), and the anticipated time it will take to issue the Rule 98*bis* ruling after the Prosecution phase.
- 18) Similarly, for the Defence phase, the estimated duration will be based on the time allocated by the Trial Chamber for the presentation of the Defence case (Rule 73*ter* (E)). If the Trial Chamber's allocation of time is not yet available at the time of the Registrar's decision, the Registrar may, at the request of Lead Counsel, employ a provisional estimate based on the information then available, in order to allocate a provisional lump sum. The duration of the phase shall be adjusted as soon as the Trial Chamber sets the time for the presentation of the Defence case. For the purpose of this payment policy, the Defence phase shall end with the presentation of the Defence's closing arguments.
- 19) As a general principle, scheduled court recess periods, such as the summer and winter recess, are not taken into account in determining the estimated duration of a phase. However, the Defence may be remunerated separately for work performed in these periods in accordance with paragraphs 27-29 below.
- 20) Where the phase extends beyond the estimated duration because the Trial Chamber has allocated additional time for the presentation of either the Prosecution or Defence case, the Registry shall calculate the revised estimated duration based on the new allocation of time.
- 21) Where the phase extends beyond the estimated duration without an allocation of additional time by the Trial Chamber for the presentation of the respective case, the Registry, after obtaining information from the Trial Chamber as to the precise circumstances and reasons why the phase has been extended, shall continue to disburse the monthly stipend until the end of the phase, unless the court has not been, or is expected not to be, sitting for 30 or more consecutive days. In such cases, the Registrar shall decide on a payment schedule after consultation with Lead Counsel.
- 22) Where the phase ends earlier than initially estimated, the Registrar may decrease the lump sum for the phase in accordance with its actual duration. In determining whether such a decrease is warranted the Registrar shall:
  - a) Acquire information from the Trial Chamber with regard to the reasons for the decreased duration of the phase, including the performance of the Defence; and

- b) Request Lead Counsel to provide information on the work performed during the phase by each member of the Defence team and make representations as to the decrease of the lump sum.

### **I. Reconciliation at the end of the phase**

- 23) Once the phase is completed and its actual duration is known, the Registrar shall recalculate the lump sum in accordance with the revised duration in order to undertake reconciliation between the funds so far paid to the Defence and the funds the Defence is entitled to receive, based on the recalculated lump sum.
- 24) In recalculating the lump sum, the Registrar shall take the following days into account:
- The actual number of sitting days, and
  - The number of non-sitting days for which he is satisfied, based on information from the Trial Chamber and submissions from Lead Counsel, that reasonable and necessary work was performed by the Defence team. This does not normally apply to periods of 5 or more consecutive working non-sitting days, unless information available to the Registrar dictates otherwise. If work was performed on such days, the Defence may be entitled to remuneration under the recess payment scheme, as outlined in paragraphs 28–29 below.
- 25) For this purpose, the Defence is required to keep and submit to the Registrar together with the End-of-Stage Report detailed information regarding the work that was performed by each Defence team member during all non-sitting days which took place during the phase.
- 26) If the recalculated lump sum is consistent with the provisional lump sum, the corresponding End-of-Phase payment will be made in full. If the recalculated lump sum is bigger than the provisional lump sum, the corresponding increase in the lump sum shall be paid to the Defence with the End-of-Stage payment. If the recalculated lump sum is smaller than the provisional lump sum, the corresponding amount disbursed to the Defence team which exceeds the recalculated lump sum shall be subtracted from the End-of-Phase payment.

### **II. Remuneration for recess periods**

- 27) Periods of 5 and less non-sitting working days will be considered during the reconciliation outlined above. If reasonable and necessary work was performed on such days, these days will be added to the revised duration of the phase. Periods of 6 or more consecutive non-sitting days, including days of scheduled court recess, are not ordinarily included in the revised duration for the purpose of recalculation the lump sum, but Lead Counsel may request that the Defence team be remunerated separately for work performed during such periods.
- 28) Lead Counsel shall submit a written request to the Registry for the remuneration of work performed during such recess periods, accompanied by detailed accounting of hours and an explanation why the work had to be performed during the recess. The accounting must include a detailed description of work for each Defence team member for which Counsel is seeking payment which would allow the Registry to ascertain the reasonable and necessary character of the claimed work. In addition, Counsel should demonstrate the time spent per separate activity per day, and the hours of the day in which the activity was performed. In short, the Registry needs to be satisfied that (i) the work performed during

the recess was reasonable and necessary for the preparation of the case, and (ii) the work could not have been performed outside the recess period. This information should be submitted together with, or as a part of, the End-of-Phase Report.

- 29) Should the Registry, as a result of Lead Counsel's submission, and possible input from the Trial Chamber, determine that payment for work during the recess period is justified, it will allocate a percentage of a regular monthly stipend to the Defence team, calculated by reference to the hours worked by each member of the team and *pro rata* to the relevant part of the stipend.<sup>3</sup> The maximum amount to which the Defence may be entitled for a full month of recess is a regular monthly stipend.

### III. Office costs

- 30) Should the actual duration of the phase exceed the revised duration due to periods in which the court was in recess, and the Registrar is not satisfied that the Defence performed work reasonable and necessary for the preparation and presentation of the case, or the Defence does not claim any payment for work done or elects to receive office costs as opposed to submitting invoices for work done during such recess, the Defence team will be entitled to a *pro rata* amount of the office costs component of their allotment (40% of the Counsel and Co-Counsel allotment). As of May 2008, this amounts to €10,295 for a full month.

## E. ASSESSMENT OF THE COMPLEXITY OF A CASE

- 31) The complexity of a phase will be determined by the Registrar after consulting with representatives of the Chamber, the Prosecution, and Defence at a meeting taking place no later than 5 days after the last Rule 65*ter* conference for the Prosecution phase, and no later than 5 days after the issuance of the Rule 98*bis* decision for the Defence phase, and will be based on, *inter alia*, the following factors:

- the position of the accused within the political/military hierarchy;
- the number and nature of counts in the indictment;
- whether the case raises any novel issues;
- whether the case involves multiple municipalities (geographical scope of case);
- the complexity of legal and factual arguments involved; and
- the number and type of witnesses and documents involved.

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<sup>3</sup> For instance, where a scheduled recess period lasts three weeks, the Defence team would be eligible to receive up to 75% of a regular monthly stipend. For the purpose of determining the percentage of the monthly stipend to which the Defence would be entitled, the Registrar assumes that a full working month comprises 160 working hours for counsel and 150 hours for support staff. Therefore, a full three-week working period for counsel would be 120 hours and 112.5 hours for support staff. Thus, if Lead Counsel worked 120 hours during a three-week recess period, he or she would be entitled to a maximum of €10,569.75, or 75% of Lead Counsel's component of the monthly stipend. A similar calculation is performed for each member of the Defence team who has worked during the recess, and the amounts are added to determine the total recess payment the Defence team is entitled to receive. Lead Counsel should advise the Registry how to distribute this amount among the members of the team.



- 32) With the consent of Lead Counsel, the above determination may also be made following consultation in writing with representatives of the Chamber, the Prosecution and Defence, in lieu of a meeting.
- 33) The complexity of a case is not necessarily correlated with the estimated duration of a case. It is possible to have a case in which the Trial Chamber permits many witnesses to testify because there are multiple defendants, which is neither factually nor legally complex, since the accused may be lowly ranked and there may be few counts in each respective indictment.
- 34) A case may be ranked differently during the different phases, or from the pre-trial stage to the trial stage, since the ranking reflects the complexity of legal and factual issues raised during a particular stage or phase, and not during the case in general. Accordingly, the Registrar will issue separate determinations of the complexity for the Prosecution and Defence phases respectively.
- 35) In view of the fact that the Chamber seized of the case is familiar with the aforementioned criteria, and is thus in the best position to render an objective determination of the complexity of the phase, the Registrar will give due consideration to the Chamber's recommendation of the complexity of the phase. The Registrar shall therefore invite comments from the Presiding Judge sitting in the trial and, for the Prosecution phase, the Pre-Trial Judge.
- 36) On the basis of the above factors, the Registrar will rank the cases as being either Level 1 (difficult), Level 2 (very difficult), or Level 3 (extremely difficult/leadership).

#### F. CALCULATION OF THE LUMP SUM

- 37) The lump sum for each case is calculated by multiplying the following allotments by the estimated number of months of the duration of the case.

<b>Difficulty</b>	<b>Monthly Allotment</b>	<b>Monthly allotment for interpretation and translation</b>
1 (Difficult)	€25,738 + €3,000 = <b>€28,738</b>	€1000 maximum
2 (Very Difficult)	€25,738 + €9,000 = <b>€34,738</b>	€1000 maximum
3 (Extremely Difficult / Leadership)	€25,738 + €15,000 = <b>€40,738</b>	€1000 maximum

- 38) These allotments are calculated on the basis of three components:

- a) the gross salary of a P5 Step VII staff member plus a component for office costs amounting to 40% of the corresponding amount, or, at the March 2006 United Nations exchange rate, a total of €14,093 (for Lead Counsel);

- b) the gross salary of a P4 Step VII staff member plus a component for office costs amounting to 40% of the corresponding amount, or, at the March 2006 United Nations exchange rate, a total of €11,645 (for Co-Counsel); and
- c) a support staff component which varies according to the complexity of the case (as set out in the table below) (for one (level 1), three (level 2) or five (level 3) support staff members).

Support Staff Allotment per Level (A)

<b>Difficulty</b>	<b>Support Allotment</b>
1 (Difficult)	€3,000.00
2 (Very Difficult)	€9,000.00
3 (Extremely Difficult / Leadership)	€15,000.00

- 39) The different amounts of which the lump sum is composed are not binding upon Lead Counsel who is free to decide on the number of support staff and the distribution of the lump sum among the assigned Defence team members in the best interest of the defence of his/her client.<sup>4</sup>
- 40) The amounts set out in this policy will be adjusted by reference to the movement of the Consumer Price Index (“CPI”) used by the International Civil Service Commission (“ICSC”) to adjust the Post Adjustment Index of UN Professional staff based in The Hague. Such adjustment will be effective as of 1 January of each year and will be based upon the movement of the CPI index during the twelve month period from November of the preceding year. The adjustment due in 2007 will be effective on 1 January 2007, and will be based on the movement of the CPI from March 2006 to November 2006.

**G. FINAL PROVISIONS**

- 41) The Registrar may, at any time during the proceedings, request information and perform checks into the work performed by any and all members of the Defence team. Defence Counsel shall, for this purpose, retain all Defence files for a period of, at least, five years after the end of the proceedings.

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<sup>4</sup> In other words, just because a case is ranked at Level 3 does not mean that Counsel must have 5 support staff (no more or less) and that each must be paid €3,000.