



**Office of Internal Oversight Services
Internal Audit Division II**

AUD: AA-ICTY (001/06)

8 March 2006

TO: Mr. Hans Holthuis, Registrar
International Criminal Tribunal for the former Yugoslavia
(ICTY)

FROM: Corazon C. Chavez, Officer-in-Charge
Internal Audit Division II
Office of Internal Oversight Services (OIOS)

SUBJECT: **Audit of ICTY Legal Aid Programme (AA2005/270/05)**

1. I am pleased to submit the final report on the audit of ICTY Legal Aid Programme, which was conducted between August and November 2005 in The Hague by Mr. Bharat B. Manocha and Ms Anna Nyaoro. A draft of the Audit Report was shared with the Deputy Registrar in December 2005, whose comments, which were received on 10 February 2006, are reflected in the attached final report, in italics.
2. I am pleased to note that most of the audit recommendations contained in this final report have been accepted and that the Office of Legal Aid and Detention Matters (OLAD) has initiated their implementation. The table in paragraph 112 of the report identifies those recommendations, which require further action to be closed. I wish to draw your attention to recommendations 02, 03, 05, 10, 12 13 and 15, which OIOS considers to be of critical importance.
3. I would appreciate if you could provide Mr Manocha with an update on the status of implementation of the audit recommendations not later than 31 May 2006. This will facilitate the preparation of the twice-yearly report to the Secretary-General on the implementation of recommendations, required by General Assembly resolution 48/218B.
4. Please note that OIOS is assessing the overall quality of its audit process. I therefore kindly request that you consult with your managers who dealt directly with the auditors, complete the attached client satisfaction survey form and return it to me.
5. I would like to take this opportunity to thank you and your staff for the assistance and cooperation extended to the audit team.

Attachment: final Audit Report and client satisfaction survey form

Cc: Mr. C. Burnham Under-Secretary-General for Management (by e-mail)
Mr. J. Hocking, Deputy Registrar, ICTY (by email)
Mr. S. Goolsarran, Executive Secretary, UN Board of Auditors (by e-mail)
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**Office of Internal Oversight Services
Internal Audit Division II**

Audit Report

**Audit of ICTY Legal Aid Programme
(AA 2005/270/05)**

Report date: 8 March 2006

**Auditors: Bharat B. Manocha
Anna Nyaoro**



**Office of Internal Oversight Services
Internal Audit Division II**

AUDIT OF ICTY LEGAL AID PROGRAMME
(AA2005/270/05)

EXECUTIVE SUMMARY

Between August and November 2005, OIOS conducted an audit of ICTY Legal Aid Program. The total legal aid costs were approximately US\$28 million in 2002-2003. The audit covered activities with a total expenditure of approximately US\$22 million during the period January 2004 to November 2005.

OIOS is of the opinion that overall OLAD had established adequate procedures and controls to provide legal aid to the accused and suspects in compliance with its mandate. However, OIOS noted there was scope to improve the efficiency and effectiveness of current arrangements. OIOS is pleased to note that most of the recommendations discussed below have been accepted by OLAD and action has been initiated.

Governance, Planning and Monitoring

OIOS was pleased to note that adequate arrangements were in place for governance, work planning and monitoring of OLAD activities. However, monitoring could be improved by establishing procedures for reporting of total fees and travel costs for each defence team and, the information and the rationale for additional allotments made to already determined lump sum payments and ceiling hours.

Establishment of indigency

Whilst existing procedures and controls were found to be working well they need to be further enhanced to cater for the following situations. An accused was assigned temporary legal aid while indigence was being established, but current arrangements were not clear on whether amounts paid to the counsel could be recovered when it was later established that he was completely not indigent. The same accused raised over US\$1 million in funds, which was sufficient to cover the cost of legal aid as assessed by ICTY. However, the current policy did not cater for the situation when he decided to exhaust most of these funds on the pre-trial and then again seek assistance from ICTY to pay for the trial phase. OIOS recommended strengthening of controls to deal with such situations.

Assignment of defence counsel

Adequate arrangements for empanelment of counsel and assignment of counsel to accused were found to be in place and OIOS was satisfied that ICTY had taken steps to minimize fee splitting. OIOS suggested and OLAD agreed to strengthen current administrative and financial arrangements such as liaising with ICTR to ensure the assignment of counsel at both Tribunals did not delay trial proceedings, requiring counsel to submit documentation in a standard format as well as ensuring that counsel continue to be in good standing before assignment.

Financial Management

As the Head of OLAD (P-4) approves expenses of US\$30 million per biennium, this places substantive responsibilities on one individual, OIOS has therefore recommended that the Registrar, ICTY should establish a delegation of authority that includes the amount that can be approved by the Head of OLAD, the Deputy Registrar and that which should be approved on the basis of advice rendered by a committee.

OIOS was pleased to note that OLAD implemented the Financial Tracking System that records fees paid to all defence team members and generates useful reports that assist decision-making.

Adequate procedures for review, approving and recording invoices were in place, which needed to be strengthened in the following areas: (i) amendments to the payment policies should clearly provide for the effective date of application of the revised policy (ii) guidelines to explain how court recess should be treated when determining the lump sum payment and (iii) retention of all supporting documentation underlying the calculation of the trial duration.

OIOS was concerned that if the lead counsel retained part of the support staff costs stipulated in the lump sum payment policy, current safeguards may not be sufficient to ensure the rights of the accused to fair trial. OIOS therefore recommended that such cases should be reported to Chambers and OLAD should review the appropriateness of the complexity level.

Travel expenses of defence counsel

OIOS recommended that OLAD should establish detailed guidelines for travel of defence counsel that include additional procedures to enable regular monitoring of total travel costs of each defence team, comparison of travel requests for similar cases and justification for defence counsel to stay at The Hague during court adjournments.

Human Resource Management

OIOS recommended that the job description of Head of OLAD should be reclassified to reflect current responsibilities.

Other Issues

OIOS is of the opinion that the consultations with the Association of Defence Counsel on issues with direct financial impact should be conducted by a team led by Administration with the active involvement of OLAD representatives, to avoid any conflict of interest.

March 2006

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I. INTRODUCTION

1. This report discusses the results of an OIOS audit of ICTY Legal Aid Programme. The audit was carried out between August and November 2005, in accordance with the International Standards for the Professional Practice of Internal Auditing.

2. The Office of Legal Aid and Detention Matters (OLAD) is a section under ICTY Registry's Judicial Support Services Department. It is primarily responsible, for ensuring that the rights of the suspects and accused to appropriate legal assistance are fully respected. The responsibility is exercised within the UN budgetary and procedural parameters while upholding the principles of UN system. This includes:

- a) Keeping a list of qualified counsel willing to be assigned as defence counsel for accused,
- b) Inquiring into the financial status of accused claiming to be indigent, assigning a defence counsel to them if found indigent,
- c) Managing the financial aspects of the legal assistance programme and dealing with the Association of Defence Counsel practicing before ICTY (ADC-ICTY).
- d) Additionally, OLAD manages some detention related issues.

3. The Head of OLAD (P-4) reports directly to the Deputy Registrar and has ten staff [six Professional (P) and four General Service (GS)]. A total of 49 accused during 2004 and 66 accused during 2005 benefited from legal aid assigned and paid by ICTY.

4. The Tribunal has modified its payment policy for defence counsel several times since its inception. OLAD introduced the ceiling payment system in 2001 that provides for maximum allocation of billable hours. In view of limitations of the ceiling system, OLAD introduced the lump sum payment system for the trial stage in August 2003 and for the Pre-trial stage in December 2004. The number of cases under each payment policy at the end of October 2005 is shown in the table below;

Payment policy	Number of cases
Ceiling system Pre-trial	16
Ceiling system Appeal	10
Lump sum Trial stage	6
Lump sum Pre-trial stage	26
Total	58

Source: Information provided by OLAD

5. The Board of Auditors, in its management letter of May 2004, stated that the Tribunal had implemented most of the recommendations made by it to reform its legal aid system. There were no outstanding recommendations according to their management letter dated 12 August 2005. Investigations Division of OIOS had also made recommendations to establish additional controls to prevent abuse of the legal aid system. The recommendations were considered when conducting this audit.

6. A draft of this report was shared with the Deputy Registrar, ICTY on 29 December 2005 whose comments received on 10 February 2006, as appropriate have been reflected in this final report, in italics.

7. OLAD has accepted most of the recommendations made and has provided target dates for their implementation.

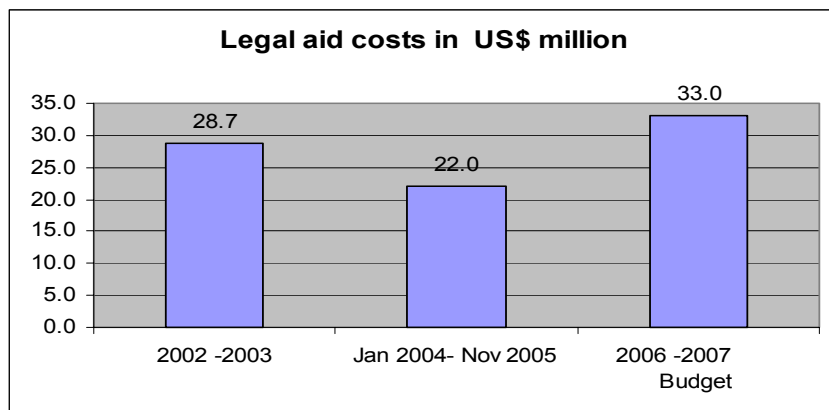
II. AUDIT OBJECTIVES

8. The overall objective of the audit was to advise the Registrar, ICTY, on the adequacy of arrangements implemented by OLAD for the provision of the legal aid services accorded to the accused and suspects. This included:

- (a) Evaluating if adequate guidance and procedures were in place;
- (b) Determining the reliability and integrity of the data available from the present systems;
- (c) Determining whether legal assistance to the accused and suspects was in accordance with the applicable United Nations Regulations and Rules, Administrative Instructions and relevant ICTY directive and policies; and,
- (d) Evaluating the economical, efficient and effective management of resources by OLAD with a special emphasis on the expenses incurred for legal assistance to the accused and suspects.

III. AUDIT SCOPE AND METHODOLOGY

9. The audit focused on the legal aid services provided by ICTY from January 2004 to August 2005. The total legal aid costs including staff costs are shown in the figure below:



10. The audit activities included interviewing staff, reviewing available documentation, assessing control procedures where documentation was available and computer analysis of data. The audit did not review the detention related responsibilities of the OLAD.

IV. AUDIT FINDINGS AND RECOMMENDATIONS

A. Governance and Mandate

11. Adequate arrangements for governance and a clear mandate were in place. The legal aid programme is governed by Article 21 of the ICTY Statute, which was established by the Security Council to guarantee a fair trial to the accused. Responsibility for implementing

Article 21 lies with the Judges and the Registry. The rules, procedures and policy adopted by the Registry for the legal aid system are proposed by the Registry in consultation with concerned parties and are approved by the Judges. Current rules and directive were approved as shown below:

- a) The Statute of the Tribunal was last updated in April 2004,
- b) The Rules of the Procedure and Evidence last amended in July 2005,
- c) The Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal was last amended in July 2002;
- d) The Directive on Assignment of Counsel were last revised in July 2004;
- e) Defence Counsel Payment Scheme for the Pre-Trial stage, was last revised in April 2005
- f) The Defence Counsel Payment Scheme for the Trial stage was last revised in April 2005.

12. The General Assembly (GA) has reviewed the legal aid system. The Tribunal submitted, through the Secretary General, a comprehensive report A/58/288 in August 2003 as well as a report A/59/547 in November 2004 on the progress made in reforming the legal aid system. ICTY also present annual performance reports to GA and Security Council through the President. In addition, OLAD's budget submissions contain comprehensive overviews of the system changes effected.

B. Planning

(a) Work Plans

13. Satisfactory arrangements for creation of an OLAD work plan were in place. OLAD had developed an annual work plan for 2005, which categorized its activities into 12 sub-headings related to the services provided. The Deputy Registrar, ICTY, approves the work plan.

C. Monitoring and reporting

(a) Internal monitoring

14. Adequate arrangements for monitoring the work of OLAD were in place, which included weekly meetings between the Deputy Registrar and Head of OLAD to discuss main issues and the submission of monthly statistics of the total number of defence counsel assigned, percentage of indigency, the fees and travel costs paid during the month for the defence teams to senior management¹. The statistics were found to be accurate, and produced in a timely manner each month. However, the costs of air travel were not included in the travel costs. Current arrangements could be enhanced by collection and monitoring of:

- a) Total costs for each defence team (including fees and travel); and,
- b) Information and the rationale for additional allotments made to already determined lump sum payments and ceiling hours.

¹ Figures reported in Tableau de Bord

Recommendation:

- To ensure effective monitoring of ICTY legal aid costs, Office of Legal Aid and Detention Matters should establish procedures for reporting of total fees and travel costs for each defence team and, the information and the rationale for additional allotments made to already determined lump sum payments and ceiling hours (Rec. 01).

15. *ICTY accepted the recommendation, target for implementation: summer of 2006.* OIOS thanks ICTY and will close the recommendation upon receipt and review of evidence of the establishment of a mechanism for reporting of (i) total fees and travel costs for each defence team and (ii) the information and rationale for additional allotments made to already determined lump sum payments.

(b) External reporting

16. Adequate arrangements for reporting the work of OLAD were in place. Performance of OLAD is reported to the General Assembly as referred to in paragraph 12 above. OLAD had included the number of additional allotments (of counsel and staff hours per accused) to be authorized as the performance measure in the previous budgets as shown in the table below:

Year	Target for additional allotments during the year
2002 -2003	8
2004-2005	2

Source: OLAD Budget submission for 2006 -2007

17. OIOS agrees with OLAD that this is a not a useful performance measure considering the number of variables outside its control that may lead to additional allotments to defence teams. OLAD has requested other indicators of achievement to be selected such as “diminished total expenditure on defence costs taking into account the total number of cases”. However, ICTY Budget Section informed OLAD that the existing indicators of achievement should normally be maintained and the proposed new indicators should preferably not replace existing ones but rather be added to the list of existing indicators. *ICTY commented that in the light of the observations made during the audit concerning the inadequacy of the existing indicator relating to "additional allotments per year", the Tribunal will be writing to the Budget Division formally requesting the exclusion of this indicator from the logical framework established for the ICTY budget.* As ICTY will be addressing the issue, OIOS is making no recommendation.

D. Establishment of Indigency

(a) Adequacy of arrangements

18. Adequate arrangements for establishing indigence were in place. Under Article 21 of the Statute, accused are only entitled to legal aid if they are unable to pay for their defence. In May 2004, the Registry reformulated its policy so that an accused with limited means would contribute less to the costs of his defence while a wealthier accused would contribute more. The policy provides details to determine the indigence or partial indigence, including how the

amount to be contributed by the accused is to be determined. However, the Registrar’s decision on how far the accused lacks means to remunerate counsel can be challenged by the accused who can seek a review of the decision by the Trial Chambers.

(b) Investigations

19. During 2004 – 2005, OLAD had investigated requests from 42 accused for indigency and the progress made is shown in the Table below:

	Number of accused	Amount to be contributed by accused
Registrar’s decisions issued	17	US\$1.79 million
Investigations completed – Registrar’s decision being finalized	14	US\$1.43 million
Investigations yet to be completed	11	Yet to be determined

Source: Information provided by OLAD Investigator

20. OLAD plans to complete the remaining investigations into indigence request by December 2005. Further requests for indigency may be limited since only six accused are yet to be apprehended. OIOS is therefore of the opinion that current staff resources should be sufficient to meet the remaining needs of the ICTY.

21. OLAD conducted intensive investigations to determine the financial status of the accused that included making enquiries from member states and site visits to the region. OIOS test-checks revealed that the contribution had been adjusted from the amount payable to the defence team for legal aid. OIOS is therefore of the opinion that OLAD has adequate procedures and controls for establishing and approval of indigency except for the case discussed below.

22. One accused (Mr. F.L.) initially requested for legal aid claiming indigency on 03 March 2003. The Tribunal assigned a temporary counsel (Mr. K.K) to the accused on 04 March 2003 to secure the right of the accused while verifying the declaration of indigency. In the course of OLAD’s inquiry, the accused informed them that subsequent to his application for legal aid, his family had established a fund to raise money for his defence. *OLAD informed OIOS that upon request, the accused provided additional information about the fundraising activities.* The fund had raised US\$291,504 by October 2003 that exceeded the estimated cost of the legal representation of US\$211,200 as assessed by OLAD. Accordingly, on 30 October 2003, OLAD determined that the accused had sufficient means to pay for his defence for the pre trial stage, and withdrew the counsel assigned.

23. The fund continued to raise money after the Registry decision. *OLAD explained that since the accused was no longer seeking legal aid from the tribunal and had indicated he wished to retain defence counsel himself because he wanted “to hire the best lawyers possible,” the Registry did not monitor the fundraising campaign. OLAD stated that it had no legal basis to do so.* The accused privately retained and was represented by Mr. M.M. and Mr. K.K during the pre-trial stage.

24. As the fund had raised sufficient funds for the legal aid, OLAD should have endeavored to recover the amount already paid to the defence counsel as provided in the Rule 45 (E). However, OIOS noted that though Article 18 of the Directive addresses the issue of withdrawal of counsel in such cases, it does not clarify if the amount paid to the counsel can

be recovered. This issue needs to be addressed, because it may encourage accused that are completely not indigent to request for legal aid. The existing provision enables them to benefit from legal aid paid for by ICTY until the investigation into their indigence is completed, even though they are non-indigent.

Recommendation:

- To discourage the misuse of legal aid, the ICTY Registrar should consider including a provision in the Directive on Assignment of Counsel that enables the Office of Legal Aid and Detention Matters to recover fees paid to defence counsel assigned by it in cases where the accused is determined to be completely not indigent (Rec. 02).

25. *ICTY commented that a provision allowing the Registrar to seek recovery of legal aid funds paid to an accused's defence team where the accused is found not indigent already exists in the Rules of Procedure and Evidence ("Rules"). Rule 45(E) reads as follows: "Where a person is assigned counsel and is subsequently found not to be lacking the means to remunerate counsel, the Chamber may, on application by the Registrar, make an order of contribution to recover the cost of providing counsel." Including a separate similar provision in the Directive on the Assignment of Defence Counsel ("Directive") is, therefore, considered unnecessary.*

26. *However, OLAD explained that the existing legal provision is intended to cover situations other than that cited in the Draft Report as a reason for the recommendation. As for the situation cited, as a matter of law and policy, the Registry cannot and should not seek recovery of funds paid to counsel assigned temporarily. Article 11(B) of the Directive provides the basis for the Registry's obligation to uphold the accused's fundamental right to counsel as enshrined in Article 21(d) of the Statute. Assignment of counsel made under this Article is not linked to the accused's financial status. The provision guarantees the right to access to justice and its purpose is to encourage an accused who considers that s/he does not have sufficient means to remunerate counsel to seek legal aid. A similar guarantee is contained in Rule 62(B) of the Rules and Article 16(F) of the Directive related to the assignment of duty counsel for the purpose of the initial appearance, again irrespective of the financial status of the accused. It is unlikely that an application by the Registry to seek recovery of funds paid to counsel assigned pursuant to Articles 11(B) or 16(F) of the Directive would be granted by a Judge or a Chamber. Furthermore, such an application risks creating unwanted practical consequences: litigation of the matter in court (resulting in a waste of Tribunal judicial time and resources), potential withdrawal of counsel and thereby delay of proceedings, difficulties related to the enforcement of the Judge's/Chamber's decision if one is eventually issued. Therefore, given the legal nature of the temporary assignments, the legal and practical difficulties associated with recovering these relatively small amounts, and the potential additional costs which the Tribunal might incur, ICTY submits that the advice to pursue recovery of legal aid funds paid to counsel temporarily assigned should not be followed. It is suggested that the current Registry practice in such situations should prevail.*

27. *Two (non-exhaustive) examples of situations in which the existing provision in the Rules may be put to use are:*

- a) *Where the Registry, subsequent to a finding of (partial) indigency and the permanent assignment of counsel, obtains information revealing that an accused does in fact*

- have the means to remunerate counsel and, had that information been available, would not have found an accused (partially) indigent in the first place;*
- b) *Where an accused has been found partially indigent but refuses to pay his contribution and the Tribunal decides to, in the interest of justice, proceed with the assignment of counsel but recover the funds at a later stage.²*

28. OIOS thanks ICTY for the additional information, which in its opinion does not alter the need to address the issue raised by the recommendation for the following reasons. Article 11 B of the Directive provide for temporary assignment of counsel specifically to enable Registry to determine the declaration of means submitted by the accused. However, the Rules of Procedure and Evidence (Rules) provide that Chamber may make an order to recover the cost of providing counsel. Further the Rules do not differentiate between counsel assigned on a temporary and regular basis. Since the Rules take precedence over the Directive, it is not clear why Registry cannot seek recovery of funds paid to counsel assigned temporarily.

29. While OIOS appreciates the right of accused to legal aid enshrined in the Article 21 of the Statute, neither the Rules nor the Directive provide for the right of accused, determined as completely indigent, to be assigned counsel temporarily at organization's expense. Further contrary to OLAD assertion that amounts involved are relatively small, the amounts actually paid are substantial. ICTY paid approximately US\$90,000 to the counsel assigned temporarily for F.L. which was not recovered.

30. Given the above, ICTY should seek a review of legal provisions and establish effective controls so that unnecessary litigation can be avoided. OIOS will therefore keep the recommendation open pending clarification whether ICTY intends to revise the existing provisions or outline what other measures are proposed to address the risk of misuse of legal aid in cases where the suspect is subsequently found to be completely not indigent.

31. The accused re-applied for legal aid prior to the start of the trial on 27 June 2004 for the Trial stage and this led to a re-assessment of his means to remunerate counsel. *ICTY explained that they opened a new inquiry into the financial status of the accused as of the date of his renewed application. It required the accused to provide the complete financial record of the fundraising campaign. Based on the documents and further to its own inquiries, the Registry was able to determine the Fund had raised Euro 1,117,669.*

32. The accused entered into an agreement on 27 October 2003 with Mr. M.M and Mr. K.K to represent him as his counsel for pre-trial stage for a lump sum amount of Euro 1,000,000. The agreement also stated that the accused would pay a further fee of Euro 500,000 prior to the Trial and in any event by May 2004. In the event such funds were not available, the two counsels agreed to continue to represent the accused until the end of the trial as assigned counsel funded by the Registry. *According to ICTY, the trial payment stated in the agreement was however never made as the fund had not raised that amount. The accused then requested legal aid because he no longer had sufficient means to pay his counsel for the trial phase. In assessing the accused's eligibility for legal aid, OLAD determined the actual financial situation of the accused as of the date of his request for legal aid. OLAD noted that an amount of Euro 557,000 was paid to Mr. M.M and Euro 443,000 to Mr. K.K in November 2003.*

² This is a possibility presently being considered by the Registry in coordination with the Judges to overcome problems caused by non-contributing accused such as time consuming litigation, delays in proceedings, negative consequences for defence resources, and the risk of an appearance of injustice.

33. OLAD's investigation determined that a balance of US\$155,706 from the fund was still available to the accused. Since the total estimated cost of the trial phase was US\$339,176, the Registry agreed to bear the additional expenses of US\$183,470 (339,176 – 155,706) in counsel and support staff fee plus the travel expenses.

34. OIOS is of the opinion that the agreement of 27 October 2003 between the accused and the two counsel retained by him were not binding upon the Registry. Further, the total amount raised by the fund for defence of the accused was more than that required for legal aid as assessed by OLAD. OIOS is hence of the opinion that OLAD should not have agreed to bear the additional costs for the accused as stipulated in the agreement.

35. *ICTY commented that both legally and factually, the Registry proceeded in a proper manner. The agreement between counsel and the accused F.L. was not taken into account when it made its decision. Rather, the Registry assessed the factual situation at the time the (second) request for legal aid was made. In making its decision, the Registry managed to fulfil its duty to uphold the statutory right to legal assistance of an accused who did not or no longer had sufficient means whilst balancing this with its duty to ensure that public funds are spent properly and proportionately, taking into account the necessity for a fair and expeditious trial for three accused (F.L. was tried jointly with two other accused).*

36. *When the Registry denied legal aid to FL in October 2003, it had established that the accused had sufficient funds to remunerate counsel (at Tribunal rates) for the pre-trial stage only. The Registry had not made a determination on his eligibility for legal aid for the entire duration of the proceedings. The purpose of the Tribunal's legal aid system (as with domestic legal aid systems) is to provide counsel to those accused who do not have sufficient means to retain counsel privately. This is mandated by Article 21(d) of the Tribunal's Statute. The question of whether or not the accused has the means to remunerate counsel is answered as of the date of his application for legal aid. Except in situations where bad faith or fraud on the part of the accused can be proven, the Registrar has no authority to refuse legal aid to someone who may once have had but no longer has money to remunerate counsel.³ Rather, the Registrar must ensure that an accused's right to legal assistance is upheld. It is submitted that had the Registrar denied legal aid to F.L. on the basis that he should have used the €1 million to pay his counsel for the entirety of the proceedings, it would have violated the right of an accused not requesting legal aid to choose counsel in dereliction of its obligations under Article 21 of the Statute.*

37. OIOS appreciates that the Registry's decision to provide legal aid to accused involved striking a sensitive balance between the rights of the accused to counsel and safeguarding the organizations financial resources. OIOS also very much appreciates the additional information explaining the reasoning behind the provision of legal aid in the example used in this report. The issue for OIOS is the fact that there is no provision in the Directive to cover such cases and the absence of such a provision can be exploited by accused and defence counsel and could lead to fee splitting.

³ The examples provided to OIOS, annexed to this commentary, show, however, that where there is a reasonable suspicion that an accused seeking legal aid has disposed of his means in order to conceal the true ownership of these means or in order to avoid his obligations under the legal aid regime, the Registry examines the accused's past financial situation in order to determine his financial status as of the date of his declaration of means.

Recommendation:

- To reduce the risk of possible misuse of legal aid by accused and the defence counsel, the ICTY Registrar should consider including a provision in the Directive that prevent accused that are determined to be non indigent to revert back to ICTY for legal aid if they exhaust their resources in order to avoid their obligations under the legal aid system (Rec. 03).

38. *ICTY commented that they interpret this recommendation to mean that there is a need for a mechanism which ensures that an accused who has been found totally non-indigent by the Registry, i.e. to have sufficient means to pay for his defence before the Tribunal, cannot subsequently revert to the Tribunal to seek legal aid at a later stage if he has exhausted his resources in order to avoid the payment of his legal expenses. If this is indeed the meaning of the recommendation, the ICTY agrees with it. The result is achievable (and has been achieved) within the current legal framework. OLAD has provided OIOS with examples which show that the current system works effectively and that there are sufficient controls and guarantees in place against misuse of legal aid funds.*

39. *ICTY further commented that the factual circumstances of F. L.'s application for legal aid – the case which has prompted Recommendation 3 – do not fall in the category of cases apparently targeted by the Recommendation. OIOS found that “this case illustrates a flaw in the legal aid policy that enables an accused that has been determined to be non-indigent to revert to the Tribunal for legal aid if he exhausts his resources by any means”. ICTY does not endorse this finding and submits the following clarification regarding the factual and legal context in which the decision on F.L.'s application for legal aid was made (these have already been incorporated in the paragraphs 22, 23, 31, and 32 above).*

40. As mentioned above, OIOS appreciates the additional information provided to explain the rationale behind the payment in this particular case. OIOS was reviewing this case with the aim of determining what lessons might be learned for the future. In the opinion of OIOS, ICTY has inadequate controls to cover situations where an accused who has sufficient means to pay for his complete defence before the tribunal decides to exhaust the funds and then later reapply for legal aid from the Tribunal. OIOS will close the recommendation upon receipt and review of evidence that the Directive has been amended or other controls put in place to mitigate this risk.

(c) Other issues in application of indigency

41. While application of the indigency formula has resulted in significant savings for defence counsel fees, the system has its limitations: accused found partially indigent often refuse to pay their counsel. This may result in disruption of the proceedings. Additionally accused may not cooperate with OLAD in assessing their financial means. OLAD advised that one accused who applied for legal aid, refused to provide information regarding assets that he had previously owned and had recently transferred to family members of close associates - apparently for no consideration. Accordingly, the Registrar issued a decision denying legal aid as he had failed to discharge his burden of proof. The accused requested judicial review of this decision before the Trial Chamber, which upheld the Registry's decision. *OLAD informed OIOS that it is in the process of developing a comprehensive approach to address the matter of partially indigent accused who refuse to pay their*

contributions for which it will seek the consent of the Judges. As OLAD is addressing these complex issues, OIOS has no recommendation to make.

E. Assignment of defence counsel

(a) Right of accused to defence counsel

42. Shortly after transfer of the accused and prior to the initial appearance, an OLAD representative, generally an Associate Legal Officer (ALO) meets with the accused to explain the legal aid system and inquire whether counsel needs to be assigned. OLAD also assigns a duty counsel to represent the accused at the initial appearance in accordance with Rule 45 (C) of the Rules. OIOS reviewed the mechanisms in place and the information given to accused on arrest and was satisfied that they were properly informed of their rights to defence counsel.

(b) Establishment of a roster

43. The provisions governing the appointment, qualifications, duties and assignment of counsel are stipulated in Rules 44 and 45 of the Rules of Procedure and Evidence (Rules) and Articles 13 and 14 of the Directive on the Assignment of Defence Counsel (Directive). These provisions were amended in July 2004 by setting higher qualification requirements for the counsel practicing before ICTY, as well as a more rigorous vetting of candidates for admission to the list of qualified counsel (“Rule 45 list”). OIOS was pleased to note that OLAD requested all counsel whose names were on the Rule 45 list⁴, to apply for re-admission and a new list had been prepared in November 2004. At the time of audit, there were 73 counsel on the roster.

44. OIOS suggested and OLAD agreed, that current administrative arrangement for entry onto the roster could be further strengthened by documenting the background checks made, requiring counsel to submit their application and certificates of good standing in a standard format as well as maintaining a database of all applications received, with details if the application was rejected or accepted.

(c) Document management

45. OIOS noted that some counsel included in Rule 45 list had not provided current and relevant information. For instance in one case there was no evidence for admission to practice; in two cases the practicing certificates were not valid after 31 January 2005 even though the counsel were admitted to the list in February 2005; there was no evidence to confirm the counsel did not have disciplinary cases against them in four cases. OLAD explained that some of the documents had not been filed properly and as they agreed to establish a mechanism to ensure that all applications would only be considered if the application and the documents attached were current, original and complete, OIOS is making no further recommendation.

⁴ Counsel already assigned to accused were requested to apply if they wished to be considered for fresh assignment to other accused

(d) Eligibility to remain on the Rule 45 list

46. The defence counsel are required to notify ICTY of changes in their status that would affect their continued eligibility to remain on the Rule 45 list. OIOS noted that one lead counsel did not apprise OLAD of the disciplinary proceedings against him and was forced to withdraw from an ICTY case in May 2003 as he was suspended from the practice of law in his home country. ICTY had to appoint a new counsel that not only delayed the trial of the accused (and therefore his right to prompt trial) but also involved significant additional expenditure to ICTY.

47. In view of the above OIOS suggested, before assigning the counsel to an accused, the counsel should be requested to confirm that there is no change in the status and that (s)he continues to be in good standing. As OLAD agreed to obtain an undertaking from the counsel and a current certificate to that effect, OIOS is making no recommendation.

(e) Assignment of counsel

48. Adequate arrangements for assignment of Counsel were in place. Normally the accused's preferred counsel is assigned unless, in the opinion of OLAD, there is some conflict of interest, or for other reasons the preferred counsel cannot be appointed. The existing jurisprudence of the Tribunal has recognized that the rights of indigent accused to choose counsel are not unlimited. In addition to the initial check conducted at the time of empanelment, OLAD also consults Office of the Prosecutor (OTP) to determine if there would be any conflict of interest in the proposed assignment. Further, the counsel are bound by the Code of Professional Conduct (Article 14) that provides that they exercise all care to ensure that no conflict of interest arises and prevents fee splitting.

(f) Change of counsel

49. OIOS reviewed four out of fifteen requests for change in counsel in 2004 – 2005 and concluded that adequate arrangements were in place for determining the circumstances under which defence counsel was changed. OLAD considers requests to withdraw or change counsel only in exceptional cases and if a withdrawal is not seen to be in the interests of justice, the Registrar has the discretion to refuse to withdraw counsel.

(g) Appointment of defence team

50. The lead counsel can request the Registrar to approve the appointment of co-counsel, legal assistants and investigators. While the qualifications and experience for the co-counsel are prescribed in the Rules, there were no specific qualifications or experience for the legal assistants and investigators. The lead counsel submits the detailed Curriculum Vitae to enable OLAD to assess if the support staff are qualified. OLAD verifies with OTP before assigning the co-counsel and other support staff.

51. The support staff are required to sign an undertaking that they will be bound by the Statute and Rules of Procedure and Evidence of the ICTY, and the Code of Professional Conduct. This did not provide that they will not engage in any fee splitting arrangement with the accused or relative/friend/associate and will treat information made available to them as confidential, which OIOS considers as important to minimize the risk of fee splitting.

52. OIOS noted that some support staff, who had already been assigned, had not signed the undertaking. As OLAD informed OIOS that they had requested the support staff to sign

the undertaking, OIOS is not proposing any further action.

Recommendation:

- To ensure compliance with the Statute and Rules of Procedure and Evidence of the ICTY, Directive on Assignment of Counsel and the Code of Professional Conduct, Office of Legal Aid and Detention Matters should request all support staff of the defence team to sign an undertaking that includes that they will treat information as confidential and will not engage in any fee splitting arrangement with the accused or relative/friend/associate of the same (Rec. 04).

53. *ICTY accepted the recommendation. Target date for implementation: 1 April 2006.* OIOS thanks ICTY and will close the recommendation upon review of evidence that (i) all support staff have signed the undertaking and (ii) that a mechanism has been put in place for the support staff to sign such an undertaking when they are assigned to a defence team.

(h) Fee splitting

54. ICTY has a number of initiatives in place to minimize the risk of fee splitting. These included:

- a) OLAD conducts a conflict of interest check before assigning the defence team;
- b) the defence team is bound by the Code of Professional Conduct (Article 14) that provides that they exercise all care to ensure that no conflict of interest arises and prevents fee splitting;
- c) OLAD has implemented the Lump sum payment policy for Pre-trial and Trial stage in which the amount payable is determined in consultation with the Chambers and OLAD is not overtly concerned with the distribution; and
- d) OLAD conducts investigations in to alleged cases of misuse of legal aid⁵.

55. OIOS was satisfied with the controls instituted to avoid fee splitting and appreciates that it was very difficult to identify cases of fee-splitting, as parties are unwilling to admit to any participation in this activity.

F. Financial Management

(a) Approval of Lump sum allotments

56. The Head of OLAD makes decisions on fee and expense claims of defence counsel amounting to US\$30 million per biennium. This places substantive responsibilities on the Head of OLAD, considering the amount involved, and the fact that administering the legal aid programme involves striking a sensitive balance between the conflicting objectives of maintaining the equality of arms between prosecution and the defence, and assuring the

⁵ Refer paragraph 99

accused of a competent defence and a fair trial within the constraints of United Nations Financial Regulations and Rules. In other areas such as procurement, significant financial decisions are only taken after seeking the advice of a Committee. For instance, the procurement of goods and services exceeding US\$70,000 and US\$200,000 at ICTY is made on the basis of advice rendered by Local Committee on Contracts and Headquarters Committee on Contracts respectively. Therefore, OIOS is of the opinion that to assist the Head of OLAD a structured delegation of financial authority should be considered so that lump sum allotments exceeding a financial ceiling should be approved only on the basis of advice rendered by a committee.

Recommendation:

- To bring controls over approval of lump sum and ceiling allotments to defence counsel in line with those used for procurement of other ICTY goods and services, the Registrar, ICTY should establish a delegation of authority that includes the amount that can be approved by the Head of OLAD, the Deputy Registrar and that which should be approved on the basis of advice rendered by a committee (Rec. 05).

57. *ICTY commented that they understand the concerns that prompted this recommendation and they appreciate the need for proper control of expenditures. However, the Directive and the Registry payment policies for Defence counsel create the legal framework within which decisions on maximum allotments of hours/lump sum payments are made. The Directive and the policies contain guidelines as to when additional hours and adjustments of the lump sums are justified. Furthermore, the process of approving additional defence expenditures involves several levels of approval – OLAD’s Associate Legal Officers, Head of OLAD and, for assignment decisions and findings of partial indigence, the Deputy Registrar. Approval by a further committee risks decreasing efficiency, which may well have a negative impact on the ability of an accused to prepare his defence in a timely manner. The Tribunal will consider the involvement of the Registrar or Deputy Registrar (on the recommendation of the Head of OLAD) in connection with: a) future decisions classifying level 3 lump sum allotments; and b) adjustments to approved allotments exceeding a certain threshold. Target date for implementation: summer 2006.*

58. OIOS thanks ICTY for the response and agrees that the directive and policies provide the legal framework and guidelines within which decisions are made. However the decisions concerning the duration of the trial and the level of difficulty are key in determining the total allotment for each case. OIOS has already noted some concerns regarding the establishment of duration and complexity (refer paragraphs 59 to 66). Furthermore, while OIOS appreciates that OLAD Associate Legal Officer reviews and Head OLAD approves the lump sum, OIOS is of the opinion that this level of check is not adequate given the substantial amounts involved (even in level one cases the amount exceeds US\$200,000) and does not involve any review independent of OLAD. To be effective, the internal controls established should be commensurate with the amounts involved. It is for this reason that the United Nations Financial Regulations and Rules and Procurement Manual provide that the procurement exceeding a threshold be made on the basis of independent advice rendered by a committee. Furthermore, since only high-level cases are expected to be referred to the committee, the number of such cases will be limited. OIOS will close the recommendation upon receipt and review of evidence of establishment of a structured delegation of authority showing the amounts that can be approved by Head of OLAD, The Deputy Registrar and that which

should be approved on the basis of advice rendered by a committee.

(b) Retroactive application of policy

59. The lump sum payment policy for the Trial stage introduced in August 2003 was amended in 2004 and 2005. Though revisions of the lump sum system contained no reference on retroactive application, OIOS noted that approximately US\$68,000 (three percent of the total sum) was added to the lump sum as retroactive adjustments in five cases. OIOS suggested, and OLAD agreed, that any amendments to the payment policy in future clearly provide the effective date of application of the revised policy. No recommendation is therefore raised.

(c) Court recess period

60. Current guidance is not clear on whether court recess should be included in estimating trial duration for determining lump sum payment to counsel. OIOS noted that the periods for recess may be up to six weeks or more in some cases⁶, and a few counsel have contested the decision to adjust for recess period.

Recommendation:

- To clarify when and in what circumstances court recess can be included as part of the payment calculation to ICTY defence counsel, Office of Legal Aid and Detention Matters should amend existing guidelines to explain how court recess should be treated when determining the lump sum payment (Rec. 06).

61. *ICTY agreed with the recommendation. Target date for implementation summer 2006.* OIOS thanks ICTY and will close the recommendation upon receipt and review of the amended guidelines showing the circumstances in which court recess can be included to determine the fees to defence counsel.

(d) Documentation of estimated duration

62. As the estimated duration of the prosecution and defence phases determine the total lump sum payable to the defence team, it is important that there is adequate documentation on how the estimated duration was determined. While OLAD consults Trial Chambers to determine the estimated duration, OIOS is of the opinion that the documentation could be improved. For example in one case⁷, documentation was unclear on how two additional months approved for Rule 98bis (motion of acquittal) ruling was determined. In another case⁸, the estimate was agreed in a meeting between the Trial Chambers and OLAD legal officers. However, there were neither details of the meeting nor supporting documentation on file. Further, it was not always clear from the documentation who in the Chambers was consulted.

⁶ 3 weeks summer and 3 weeks Christmas recess

⁷ IT-01-47

⁸ IT-03-66

Recommendation:

- To ensure consistency and transparency in the calculation of the trial duration in ICTY, Office of Legal Aid and Detention Matters should document and maintain complete details of all supporting documentation underlying the calculation that includes evidence of confirmation by Chamber's senior legal officer or the Judge (Rec. 07).

63. *ICTY agreed with the recommendation. Target date for implementation 1 April 2006.* OIOS thanks ICTY and will close the recommendation upon receipt and review of evidence that the procedures for documenting and maintaining details of the trial duration calculations have been amended that includes the evidence of confirmation by Chamber's senior legal officer or the Judge.

(f) Guidelines for determining the workload

64. The lump sum policy provides that if the Trial Chamber, has modified the duration of either the prosecution or defence phase before its completion, the Registrar will decide to adjust the lump sum, unless the Registrar finds, after consulting the Trial Chamber, that the increase or decrease in time does not result in an increase or decrease of work.

65. OIOS review of estimated duration with the actual duration for nine lump sum allotments in 2003 and 2004 suggested the need for additional guidelines to establish the duration. In one case⁹ where the actual duration was longer than that estimated, the increase in number of witnesses by six was one of the main reasons for allowing an additional two months payment. However in another case¹⁰ where the actual duration was six weeks less than that estimated, no adjustment was made to the lump sum as OLAD determined, considering all factors, that there was no reduction in overall workload – though the Chamber's legal officer opined that the reduction of ten witnesses might have resulted in a couple of weeks decrease in the duration.

66. OIOS also suggested that OLAD review if the office expenses portion of the lump sum amounting to approximately US\$18,000 were required to be paid for the reduced duration. OLAD explained that *in working efficiently, the defence team had ensured that there were a number of supplementary benefits for the Tribunal as a whole such as saving court time and Chamber staff's time. Therefore, it would not be appropriate to penalize the defence team for their efficiency.*

Recommendation:

- To avoid the risk of inconsistency in decisions relating to adjustments to the estimated duration of the prosecution or defence phases of a trial, ICTY Office of Legal Aid and Detention Matters should review the cases decided so far and consider developing detailed guidelines on how the increase or decrease in workload would be determined (Rec. 08).

⁹ IT-01-47 OTP

¹⁰ IT-03-66

67. *ICTY agreed with this recommendation in principle but noted that it would be difficult to implement in practice. They explained that the, general guidelines are contained in the pre-trial and trial lump sum payment policies. Often, these guidelines cannot be more specific as the decision to adjust or not the lump sum depends on the specific circumstances of the case and the Tribunal's interest (for example, to speed-up the pre-trial preparation in order to go to trial earlier than initially anticipated in order to comply with the completion strategy). This is certainly true for increases in the defence workload. The situation is more complex when it comes to a decrease in the defence workload, which is almost impossible to assess in abstracto. Sometimes, the trial will be shorter because of efficient work by the defence, sometimes because of a change in defence strategy, sometimes through a combination of the two. The Tribunal may realize significant savings of both resources and judicial time as a consequence. Arguably, defence counsel have an incentive to work efficiently and to conclude the trial in as short a period of time as possible. They may lose this incentive if the Registry is to decrease the lump sum in all cases where the trial lasts a shorter period than initially estimated. In addition, it may be improper for the ICTY to introduce a standard decrease of the lump sum if this would have a negative impact on the flexibility of the defence to alter the defence strategy. In conclusion, the Registry will consider ways of further specifying the workload indicators for defence counsel but notes that it is difficult to find objective criteria and, hence, to set a deadline for the implementation of this recommendation.*

68. OIOS thanks ICTY for the response and appreciates the concerns raised. OIOS also thanks ICTY for the additional information outlining its initial thinking on how to tackle the recommendation. The reasons outlined are why OIOS suggested in its recommendation that ICTY should review existing cases as a first step, to determine if there are any common factors, which could be developed into guidelines. If every situation is unique then the guidelines may need to just focus on the documentation required to justify the increase/decrease in workload. OIOS will close the recommendation upon receipt and review of the guidelines explaining how the increase or decrease in workload would be handled.

g) Advance payment

69. Ten percent of the lump sum for the trial phase was paid in advance without any caveat on recovery in case counsel was unable to perform the work.

Recommendation:

- To safeguard ICTY organizational resources and avoid disputes, Office of Legal Aid and Detention Matters should consider including a caveat, in the letters approving advance payment to the counsel on the circumstances that could lead to recovery of the advance payment (Rec. 09).

70. *ICTY agreed with the recommendation. Target date for implementation: 1 April 2006.* OIOS thanks ICTY and will close the recommendation upon receipt of copy of letters to defence counsel that include a caveat on advance payment.

(h) Distribution of the lump sum

71. There are three levels of lump sum payable, dependent on the complexity of the case. The main difference in the amount authorised is reimbursement for the additional number of support staff entitled for level two and level three cases. Whilst appreciating the principle of

the lump sum payment, OIOS is concerned that current safeguards may not be sufficient to ensure the right of the accused to a fair trial, if the lead counsel decides to retain portion of the support staff costs. In one joint case¹¹ while one lead counsel distributed the entire support costs to staff recruited, however the other lead counsel¹² retained sixty five percent (US\$108,000 out of US\$169,000) of the support staff allotment. OLAD explained that *they regularly monitor the performance of the defence teams by reviewing the filings made and discussing their performance with Chambers.*

Recommendation:

- If the lead counsel retains part of the support staff costs stipulated in the ICTY lump sum payment policy, Office of Legal Aid and Detention Matters should consider additional mitigating controls such as (i) report to the Trial Chambers to enable them to assess if the right of the accused is affected and (ii) trigger a review of the complexity level of the case (Rec. 10).

72. *ICTY agreed with the recommendation. Target date for implementation: Summer 2006. ICTY also commented that OLAD approves each payment and monitors the distribution of the lump-sum closely. In case of a suspicion that the rights of the accused may be jeopardized or that counsel is not utilising the legal aid funds properly, OLAD can refuse to authorise a particular payment. Indeed, OLAD has addressed counsel on a case-by-case basis where there has been information that support staff fees have been allocated to counsel. OLAD and the Registry will nevertheless consider developing additional mechanisms.*

73. OIOS thanks ICTY for the response and will close the recommendation upon receipt and review of details of the controls put in place to deal with the situation where the lead counsel retains part of the support staff costs.

(i) Processing of the invoices

74. Adequate procedures for reviewing, approving and recording the invoices were in place as the Directive and lump sum payment policy stipulate the procedures and the legal costs that may be paid by ICTY. OLAD reviewed invoices to establish they were correct and reasonable, and the invoices were certified for payment by the Chief of Budget who is the certifying officer for payment of fees to the counsel.

(j) The Financial Tracking System (FTS)

75. OLAD and the Budget Section introduced FTS in 2004, which records fees paid to each member of the defence teams and generates a number of reports that can be used by both OLAD and Budget Section for forecasting as well as a basis for decision-making. The usefulness of the system could be further enhanced by consideration of the following:

- a) FTS could have given complete details of costs for cases started before 2004, had backlogs of pre 2004 invoices been recorded in the system.

¹¹ IT-02-60

¹² B team

- b) Travel costs of defence teams should have been recorded in the system; and,
- c) The Miscellaneous Obligating Document balances in the financial accounting system (SUN Accounts) need to be reconciled regularly to the FTS.

Recommendation:

- To ensure incorrect or unauthorized payments to ICTY defence teams are identified promptly, Office of Legal Aid and Detention Matters should request the ICTY Finance Section to provide it with relevant information from the SUN Accounts System so that it can reconcile the Miscellaneous Obligating Document balances in the SUN Account and Financial Tracking System regularly (Rec. 11).

76. *ICTY agreed with the recommendation and informed that OLAD had already contacted the Finance Section and would work with it to draw data from the SUN System on a regular basis to reconcile figures with that in the Financial Tracking System. OIOS is pleased to note the action taken and will close the recommendation upon receipt of evidence of mechanisms put in place for the regular reconciliation.*

(k) Overlapping activities of defence counsel

77. OIOS noted that at least one defence counsel represented accused at both ICTY and ICTR and was paid approximately US\$44,000 and US\$89,000 by ICTY and ICTR respectively during 2004. The counsel claimed fees for the following hours from ICTY and ICTR for the same day as shown in Table below:

	ICTY	ICTR	Total hours claimed
16 January 2004	5.5	11.25	16.75
17 January 2004	4	8.5	12.5
08 March 2004	8	7.5	15.5
28 June 2004	8.5	9	17.5
29 June 2004	11.5	9.5	20

Source: Claims submitted by H. M, defence counsel to ICTY and ICTR

78. In the opinion of OIOS, there is a risk that assignment of the same counsel by the two Tribunals could result in double payment for the same work, delay trial proceedings and impact quality of work, which could compromise the right of the accused to a fair trial. While records show that the overlapping assignment was reduced from 2004 onwards, and both ICTR and ICTY do coordinate, the existing mechanisms require strengthening to prevent the above risks.

Recommendation:

- To strengthen controls over defence counsel simultaneously undertaking assignments at both ICTY and ICTR, ICTY Office of Legal Aid and Detention Matters should establish procedures to liaise with ICTR to ensure assignment of same defence counsel to accused at both Tribunals do not lead to

double payment or impact the trial proceedings and the quality of work. This might involve, as part of the procedures for assignment a requirement to declare whether they have also accepted work at the ICTR (Rec. 12).

79. *ICTY accepted the recommendation. Target date for implementation summer 2006.* OIOS thanks ICTY and will close the recommendation upon receipt of evidence of the procedures established for liaising with ICTR on cases where counsel simultaneously undertake assignments at both ICTR and ICTY.

G. Travel expenses of defence counsel

(a) Monitoring of travel

80. The defence counsel are entitled to travel for purposes such as client consultation, examination of witnesses, and for court hearings. Travel related expenses totalled approximately US\$4 million during January 2004 to November 2005 (being 15 percent of the total defence costs).

81. While OLAD reviews the individual travel requests and monitors the total monthly travel expenses incurred for the defence counsel, there was limited monitoring of cumulative travel expenses incurred for each defence team. OIOS estimated that travel costs of one defence team¹³ during the pre-trial and trial phase exceeded US\$300,000. Considering the substantial travel costs, OIOS is of the opinion that current arrangement for monitoring of defence team travel should be further strengthened. This is addressed in recommendation 13 below.

(b) Guidelines for travel of defence counsel

82. While the current travel policy is clear for activities such as court hearings, it does not provide adequate guidelines on other activities and their corresponding duration. For instance, the basis on which travel days will be approved for the following was not clear: meeting and interviewing potential witnesses during the pre-trial and trial phase, drafting the final brief for defence, and organizing files at the end of the Trial for handover. As a result, OIOS noted wide variation in the travel days approved for defence teams. In one joint trial of two accused¹⁴ the co counsel for the two accused were authorized significantly different travel days as can be seen from the Table below:

Number of days Daily Subsistence Allowance (DSA) authorized for travel of co counsel

Period	Stage	S. B (1)	R. D (2)	Difference 3 (1-2)
Jan to Nov 2003	Pre trial	142 days	38 days	104 days
Dec 2003 to July 2005	Trial	494 days	411 days	83 days

Source: PT8 and DSA approved for the counsel

83. Further, in another joint case¹⁵, involving two accused, the lead counsel for one accused was approved 70 days of stay at The Hague for drafting the final brief and attending the court hearing, while the lead counsel for the other accused was authorized only 34 days for the purpose. After the trial ended on 01 October 2004, the first counsel was authorized to

¹³ IT-01-47

¹⁴ (IT-01-47)

¹⁵ IT-02-60

stay for eight additional days while the other counsel was authorized to stay only one additional day. OLAD stated that *the simple comparison of numbers is not indicative of inconsistency since the workload of the defence teams may differ depending on the nature and number of counts, hierarchical position, etc. and the composition of the defence team – who lives where and how often they need to travel to the region, to The Hague or elsewhere.* While OIOS appreciates the response, its point is not about inconsistency but about transparency and accountability and, the need for guidelines to support the reasons for variations.

84. OIOS was pleased to note that, at the time of issuing this report, OLAD was in the process of developing a travel policy. OLAD also provided a copy of the Defence Counsel Travel and DSA Policy proposed by the ADC-ICTY. OIOS suggests OLAD consider the following when developing the policy:

- a) Analysis of the travel days actually approved by ICTY to defence counsel in the previous cases to establish travel norms for all three stages of the trial proceedings; and,
- b) ICTR travel policy established for the defence counsel. For example, at ICTR, DSA rate is lowered by 20 percent at the end of an initial period of 60 days; and by 40 percent at the end of a period of 120 days¹⁶ while at ICTY, the DSA rate is adjusted once, by 25 percent, after the first 60 days.

Recommendation:

- To ensure efficient and effective utilization of organizational funds and to improve transparency and accountability over its use, ICTY Office of Legal Aid and Detention Matters should ensure that its travel policy contains detailed guidelines on determining and monitoring all case related to travel activities. This should include who should travel, and why, when travel resources should be spent and procedures that enable regular monitoring of the total travel costs of each defence team and enable comparison of travel requests and costs for similar and / or joint cases (Rec. 13).

85. *ICTY accepted the recommendation. Target date for implementation: Summer 2006.* OIOS thanks ICTY and will close the recommendation upon receipt and review of the travel policy established.

(c) Documentation of reasons for travel

86. In one out of five cases examined there was inadequate documentation to explain why counsel remained in The Hague when the trial was adjourned. For example, one counsel¹⁷ was paid DSA¹⁸ amounting to approximately US\$68,000 during 2004, when the court was adjourned for long periods as shown below.

¹⁶ Article 22 of the ICTR Directive on assignment of counsel

¹⁷ IT-00-39, C.L

¹⁸ including terminals

Court adjourned from	No of days adjourned
28 Feb to 13 April 2004	44
23 April to 24 May 2004	30
31 July to 29 August 2004	30
07 to 19 September 2004	12

Source: F10 claims submitted by counsel and court schedule

87. OLAD explained that *they considered it reasonable to pay DSA for those days spent in The Hague (28 Feb to 13 April 2004) which are work-related but not spent in the courtroom itself. This is always considered on a case-by-case basis and checked against Chambers' orders or clearly apparent workload (e.g. preparation for final brief-period).* OIOS appreciates the OLAD clarification for the period 28 Feb to 13 April 2004, but notes that there was no documented justification for the counsel to stay at The Hague during the adjournments including the court recess. It was therefore not clear to OIOS if OLAD was required to pay DSA for all these adjournments, especially since the counsel made personal visits to other countries during these adjournments that were paid for by ICTY in lieu of DSA (OLAD approved ticket costs limited to the DSA payable had the counsel continued to stay at Hague). The need for documentation is dealt with in recommendation 14 below.

(d) Reimbursement of air tickets in lieu of DSA

88. If OLAD determines that it is more economical for defence counsel to remain in The Hague during court adjournments and court recess, instead of sending them back, they are authorized to receive DSA. During this period, some counsel opted to travel outside The Hague to other countries and OLAD agreed to pay for their travel costs limited to the DSA entitlement if the counsel continued to stay at The Hague. If OLAD requires counsel to stay at The Hague, it is reasonable to pay DSA to compensate them for their stay. However, OIOS is of the opinion that if the counsel were to leave The Hague for personal work or holiday, then the OLAD obligation would cease to exist since the counsel would no longer be in The Hague.

89. OIOS also noted that there is no mechanism in place to ensure that the defence counsel were actually in The Hague when the defence counsel are authorized to stay during the court adjournments and court recess.

Recommendation:

- To ensure effective monitoring of ICTY defence counsel travel costs, Office of Legal Aid and Detention Matters (OLAD) should establish procedures that (i) require review of justification for defence counsel to stay at The Hague in case of court adjournments exceeding five days or a threshold to be determined by OLAD and (ii) requires defence counsel to inform OLAD if they leave The Hague for personal reasons, and no costs should be reimbursed for such periods (Rec. 14).

90. *ICTY accepted the recommendation. Target date for implementation summer 2006.* OIOS thanks ICTY and will close the recommendation upon receipt of evidence that OLAD has established procedures to deal with issues concerning defence counsel's stay in The Hague during court adjournments and defence counsel leaving The Hague for personal

reasons.

(e) Other issues

91. OIOS observed that the defence counsel do not submit a mission report on their travel activities. In the absence of such a report, there is no assurance if the defence counsel were able to fulfill the mission objectives.

92. *OLAD explained that the introduction of mission reports would impose an unnecessary burden on defence team members and on OLAD. Controls currently in place are sufficient to ensure the proper and reasonable expenditure of travel resources. All case-related travel of all defence team members has to be outlined in the defence work plan, in the regular progress reports or in a separate mission plan. Further, prior to undertaking any of the travel listed in these documents, the traveling defence team member has to seek authorisation from OLAD. Afterwards, documents such as boarding passes and hotel tickets need to be submitted. OLAD is therefore of the opinion that sufficient controls are in place to address the concerns raised by the internal auditors. OIOS notes the response and in light of the controls outlined is not proposing any additional action.*

H. Human Resource Management

(a) Work load statistics and performance indicators

93. There is a need for adequate evidence of performance indicators and workload statistics to support current staffing of 11 against an approved staffing of seven posts. OIOS noted that the Deputy Registrar, recognizing the need for additional staff, transferred staff from other sections to assist OLAD. Further, OLAD was assigned an additional temporary post to assist the OLAD Investigator for six months to take care of the additional workload involved due to the arrivals of 22 new accused since November 2004.

94. OLAD responsibilities have increased since 2002 considering the number of detainees, number of defence team members assigned, etc. however some responsibilities may have decreased with the implementation of lump sum payment policy for Trials and Pre-trial and as well as the Financial Tracking system. OIOS is of the opinion that OLAD should establish objective and measurable criteria to justify staff requirements.

Recommendation:

- To assist in monitoring how efficiently its resources are being utilised, the ICTY Office of Legal Aid and Detention Matters should create workload statistics with indicators designed to measure efficiency and performance against planned work and objectives. These indicators could be a mix of historical performance criteria such as number of detainees, defence team members assigned, indigency evaluations completed, number of OLAD decisions challenged by accused, invoices reviewed, or travel requests (Rec. 15).

95. *ICTY commented that it agreed with the recommendation in principle. However it explained, that the Judicial Management Information System compiled monthly by the Registry as well as the logical framework of the budget document already contain indicators*

reflecting the workload/performance of OLAD. OLAD will nevertheless undertake a review of the existing indicators with a view to determining their relevance in terms of performance measures against planned work and objectives. Target date for implementation: Summer 2006. OIOS notes the response and will close the recommendation upon receipt and review of results of the results of the review undertaken to enhance workload statistics through the creation of performance.

(b) Reporting lines

96. The current OLAD organization chart does not reflect the current reporting lines. For instance, the organization chart reflects that each GS staff reports to one Associate Legal Officer (ALO) or Deputy Head or Investigator. However, OIOS found that each GS reports to two or more professional staff. *ICTY commented that OLAD will develop and provide new organigram displaying the actual reporting lines. Due to the size of OLAD, the recommendation on direct reporting of one GS staff to one professional does not provide the necessary flexibility for the efficient use of resources and is not advisable.* OIOS thanks ICTY for its response and proposes no further action.

(c) Job classification

97. OIOS reviewed five out of the authorised seven OLAD job descriptions and found that two of the job descriptions did not reflect current responsibilities. While the job description of Head, OLAD was recently classified in 2005, the classification was based on the duties, responsibilities and work relationships prevailing in July 2000¹⁹. Hence, this job classification did not reflect current responsibilities that included financial investigations into the financial status of the accused and abuse of legal aid provided by ICTY, transfer of convicted persons to enforcing states and the increased OLAD workload. As the number of detainees has increased significantly, OLAD now manages a defence team exceeding 400 as compared to 135 in 2000. Further, Head OLAD now supervises a team of ten as against five staff in 2000.

Recommendation:

- To ensure that the job classifications of Office of Legal Aid and Detention Matters (OLAD) staff reflect current responsibilities, ICTY should review, update and classify the job descriptions for the posts of Head, OLAD and Associate Legal Officer (Rec. 16).

98. *ICTY agreed with the recommendation. Target date for implementation: Summer 2006.* OIOS thanks ICTY for the response and will close the recommendation upon receipt of documentation that the post have been re-classified.

I. Other issues

(a) Investigations into professional misconduct

99. During 2004 – 2005, OLAD investigated five cases of alleged financial misconduct of defence counsel. OIOS reviewed two of the cases and found that OLAD filed a disciplinary

¹⁹ The Section A & B attached are signed off on 07 July 2000.

complaint in one case, which include claims for recovery of funds (US\$416,000) to the Tribunal. The second case related to invoicing irregularities by four defence counsel. Considering the evidence available, professional competence of the counsel and that filing a complaint, against the counsel, before the Disciplinary Panel would adversely affect the defence of the four current accused – OLAD confronted the counsel with the findings of the investigation and gave them an opportunity to repay the sum misappropriated from the Tribunal’s legal aid fund. In exchange for the payment, counsel were informed that no formal disciplinary proceedings would be initiated against them. The Tribunal had already recovered US\$170,000 from the counsel. However, one counsel is yet to pay the balance amount of approximately US\$11,000. OLAD also apprised the President of the Tribunal of the case who was satisfied that Registry had acted properly. As OLAD is pursuing the recovery with the counsel OIOS is making no recommendation.

(b) The Association of Defence Counsel (ADC-ICTY)

100. ICTY has recognized ADC-ICTY as the Defence Counsel organization recognized by the Registrar pursuant to Rule 44 of the ICTY Rules of Procedure and Evidence. OIOS noted that during 2004 – 2005 ADC-ICTY has taken a pro-active role to promote the rights of the defence counsel. ADC-ICTY submitted a list of 32 issues affecting their work, which need to be addressed by ICTY. ADC-ICTY and OLAD regularly met to discuss these issues during 2004 - 2005. OLAD informed us that ADC-ICTY is currently urgently pressing them for a decision relating to the following three issues:

- (i) Increase in the hourly rates for counsel used in the ceiling payment policy since the rates established few years ago have not been revised since then;
- (ii) Adjustment for the exchange rate fluctuations since the defence counsel fees are denominated in dollars; and,
- (iii) Change of system of enforcement of partial indigency.

101. The OLAD and Budget Section consulted us for our views on the first two issues which are discussed below:

(i) Hourly rates for ceiling system

102. While OIOS appreciates the rates were established some time ago – it is of the opinion that there be sound justification for any increase bearing in mind that the rates in the lump sum and ceiling system should be consistent and that any changes could impact ICTR as both ICTY and ICTR pay the same hourly rates.

103. OIOS’ review revealed that the current hourly rates for counsel ranging US\$80 to US\$110 are consistent with the current United Nations salary scales for P4 and P5. Further OLAD and ADC-ICTY agreed in April 2005 to a remuneration of US\$16,698 per month for the lead counsel based on the gross salary of a P5 Step VII staff member plus a 40 percent component for office costs. Using this as the basis the hourly rate work outs to US\$95²⁰ per hour, which is less than the US\$110 already being paid to the counsel.

104. Therefore, OIOS considers, there is inadequate justification for an increase in the hourly rates established. Further OLAD should bear in mind that any deviation, should not disturb the balance of equality of arms between the prosecution and the defence counsel. *ICTY commented that the hourly rates have not changed since 1994. Yet, during that period the*

²⁰ US\$16698/175 hours

base salary rate for the professional category (P4/P5 level) was increased effective 1 January 2003. The Tribunal, in consultation with the ICTR is currently considering whether such increase would warrant a consequential adjustment to the hourly rate. While OIOS appreciates the ICTY comment it notes that the reason adduced for rationalizing the increase, that the P4/P5 salary scale was increased, does not support the justification for any increase since the existing hourly rates are already higher than the revised scales.

(ii) Exchange Rate adjustment

105. OIOS is of the opinion that adjustment of exchange rate fluctuations should be considered based on the following:

- a) Rule 45 list includes defence counsel from all over the world and is not limited to the Euro region.
- b) The defence counsel are expected to work from their respective places of work and not necessarily from The Hague and are paid DSA for all days that they are expected to work outside their place of residence. As, the DSA takes into consideration the cost of living in The Hague, OLAD should consider whether any adjustments made for exchange rate fluctuations for defence counsel fees may result in double compensation.
- c) The lump sum policy for the pre trial and trial phase was recently agreed to between the OLAD and ADC-ICTY in December 2004 and April 2005 respectively.

(c) Procurement of services

106. Under the normal UN procurement rules and procedures, the requisitioner is involved in establishing the requirements and the specifications for services, but the rates for services are negotiated by the Procurement Section. Therefore, in the view of OIOS there could be a conflict of interest if OLAD were to negotiate directly with the ADC-ICTY for issues that have direct significant financial impact to the organization.

107. OIOS noted that both the pre trial lump sum policy and the current version of the trial lump sum policy were agreed after a series of consultations between OLAD and ADC-ICTY. While the Chief of ICTY, Budget Section was informed of the consultations between OLAD and ADC-ICTY he was not asked to review the revised policies before they were finalized. OLAD informed that *the Deputy Registrar and the Registrar were kept informed of the consultations and the policies were approved only with their consent.* OIOS is pleased to note OLAD now consults with Budget Section. While OLAD input for the discussion is critical, however to avoid any conflict of interest, consideration should be given to the consultations being led by ICTY Administration.

Recommendation:

- To avoid any possible conflict of interest with respect to procurement of services involving legal aid, the ICTY Registrar should consider if consultations with the Association of Defence Counsel, that have substantial financial impact, should be conducted by a team led by ICTY Administration with the active involvement of Office of Legal Aid and Detention Matters representatives (Rec.17).

108. *ICTY responded that it has strong reservations to the suggestion that Registry officials such as OLAD staff have or may have a conflict of interest in their consultations with the ADC-ICTY. Where OLAD and other Registry staff engage in such consultations, they represent and protect the interests of the ICTY. Furthermore, the Registry does not negotiate with the ADC-ICTY on any of the issues described in the Draft Report. The Registry consults with the ADC-ICTY on Registry policies and practices prior to their adoption as a gesture of good will, because the policies concern the ADC-ICTY's members. However, it is the Registrar and the Deputy Registrar who make the final decision as to whether or not a certain policy is to be approved.*

109. *The recommendation appears to be based on perceived past practices and does not take into account current procedures and policies by which the Administration is fully involved in the consultations with the ADC. In fact, any decision on changes to the terms and remuneration system for the ADC must be approved by the Registrar. Any consultations and recommendations made in this regard are first fully discussed with OLAD representatives, the Deputy Registrar, the Chief of Budget, CAO and the appropriate counterparts at ICTR. It is submitted that this approach provides a strong basis for sound decision-making and avoids any perception of conflict of interest.*

110. OIOS thanks ICTY for the comments and would like to clarify that there is an inherent risk if the requisitioner is directly involved in procurement. It is for this reason the United Nations Procurement Manual provide for the segregation of duties between the requisitioner and procurement entity to minimize any conflict of interest.

111. OIOS also reiterates that its recommendation was not based on past practices but on the current prevailing practice in November/December 2005. It is for this reason that OIOS recorded “that OLAD now consults with the Budget Section” (refer paragraph 107 above). Further while ICTY adduces “*that the OIOS recommendation does not take into account current procedures and policies by which Administration is fully involved in consultations with the ADC*”, OLAD did not provide any such documented policies or procedures to OIOS during the regular discussions/correspondence that took place during the course of audit. OIOS will therefore keep the recommendation open and will close the recommendation upon receipt and review of policies and procedures established.

V. FURTHER ACTIONS REQUIRED ON RECOMMENDATIONS

112. OIOS monitors the implementation of its audit recommendations for reporting to the Secretary-General and to the General Assembly. The responses received on the audit recommendations contained in the draft report have been recorded in our recommendations database. In order to record full implementation, the actions described in the following table are required:

Recommendation	Action Required
Rec. 01	Receipt and review of evidence of the establishment of a mechanism for reporting of total fees and travel costs for each defence team and, the information and rationale for additional allotments.
Rec. 02	Clarification whether ICTY intends to revise the existing provisions or outline what other measures are proposed to address the risk of misuse of legal aid in cases where the suspect is subsequently found to be completely not indigent.
Rec. 03	Receipt and review of evidence that the Directive has been amended or other controls put in place to mitigate the risk.
Rec. 04	Receipt and review of evidence that (i) all support staff have signed the undertaking and (ii) that a mechanism has been put in place for the support staff to sign such an undertaking when they are assigned to a defence team.
Rec. 05	Receipt and review of evidence of establishment of a structured delegation of authority showing the amounts that can be approved by Head of OLAD, The Deputy Registrar and that which should be approved on the basis of advice rendered by a committee.
Rec. 06	Receipt and review of the amended guidelines showing the circumstances in which the court recess can be included to determine the fees to defence counsel.
Rec. 07	Receipt and review of evidence that the procedures for documenting and maintaining details of the trial duration calculations have been amended that includes the evidence of confirmation by Chamber's senior legal officer or the Judge.
Rec. 08	Receipt and review of the guidelines explaining how the increase or decrease in workload would be handled
Rec. 09	Receipt of copies of letter to defence counsel that include a caveat on advance payment.
Rec. 10	Receipt and review of details of the controls put in place to deal with the situation where the lead counsel retains part of the support staff costs.
Rec. 11	Receipt of evidence that OLAD has put in place a mechanism for regular reconciliation of the Miscellaneous Obligor Document balances in the Sun system and Financial Tracking System.
Rec. 12	Receipt of documentary evidence of the procedures established for liaising with ICTR on counsel simultaneously undertaking assignments at both ICTR and ICTY.
Rec. 13	Receipt and review of the travel policy established
Rec. 14	Receipt of evidence that OLAD has established procedures to deal with issues concerning defence counsel's stay in The Hague during court adjournments and defence counsel leaving The Hague for personal reasons.
Rec. 15	Receipt and review of the results of the review undertaken to enhance workload statistics through the creation of performance.
Rec. 16	Receipt of documentation that the posts have been re-classified.
Rec. 17	Receipt and review of policies and procedures established.

VI. ACKNOWLEDGEMENT

113. I wish to express my appreciation for the assistance and cooperation extended to the audit team by staff of OLAD, Budget Section, Finance Section and ITSS.

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