



**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

Arusha International Conference Centre

P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzania

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**The Registrar  
Le Greffier**

13 February 2004

Ref : ICTR/RO/02/04/43

**Subject : Defence Counsel Management and Detention Section's Guidelines  
for taxing Defence Costs.**

Dear Counsel,

On 5 and 6 February 2004 a meeting was held between representatives of Counsel present in Arusha and the Registry to discuss the grievances of the former. During the said meeting chaired by Honorable Judges L. Williams and P. Dolenc, the Registry undertook to provide Counsel with the Guidelines used for taxing Defence Costs under the Legal Aid Programme of the Tribunal.

Attached herewith please find the English and French versions of the said Guidelines for your information and attention.

I would be grateful if you could avail yourselves for a follow-up meeting on Wednesday 18 February 2004 at 17:30 PM in the conference room located at the third floor Serengeti wing.

Regards.

Adama Dieng  
Registrar

**Mr. Kennedy Ogetto, Defence Counsel, President of ADAD  
Mrs. Nicole Bergevin, Defence Counsel, Vice President of ADAD  
Mr. Raphael Constant, Defence Counsel, Deputy General Secretary of ADAD  
Mr. Hamuli Rety, Defence Counsel, Treasurer of ADAD  
Mr. Peter Erlinder, Defence Counsel  
Mr. Paul Skolnik, Defence Counsel  
Mr. Guy Poupart, Defence Counsel**

**CC: Honorable Judge Erik Møse, President, ICTR  
Honorable Judge Lloyd G. Williams  
Honorable Judge Pavel Dolenc  
Mr. Lovemore Green Munlo, Deputy Registrar**

**Encl. 1**



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**DEFENCE COUNSEL MANAGEMENT AND DETENTION  
SECTION'S GUIDELINES FOR TAXING DEFENCE COSTS**

## 1. Introduction

- 1.1. The purpose of these guidelines is to explain the main principles for the determination of Defence costs that is used by the Defence Counsel and Detention Management Section [DCDMS] staff under the ICTR Legal Aid Programme in accordance with the law as it stands at present. The guidelines are used in such a way that each case is treated on its own merits, and should not be interpreted as fixing maximum amount that can be obtained for a piece of work.
- 1.2. The purpose of the taxation of Defence costs is to determine what is reasonable remuneration for work actually and reasonably done under the Legal Aid Programme. Article 11 of the Code of Professional Conduct for Defence Counsel reads: "Counsel should account in good faith for the time spent in working in a case and maintain and preserve a detailed records of time spent. Counsel is under a duty to set his bills and fees with moderation"
- 1.3. In every case DCDMS Staff involved in taxing Defence costs take into consideration, in relation to all Defence Team Members, the following factors:
  - The importance of the case;
  - The complexity of the matter;
  - The skill, labour, specialized knowledge and responsibility involved;
  - The number of documents prepared or perused with due regard to difficulty, length and relevance;
  - The time expended, and
  - All other relevant circumstances, including the stage of the trial and adjournments of the proceedings, where appropriate.
- 1.4. The compilation of these guidelines has been based upon the experience of assessing costs in some of the most sophisticated Legal Aid systems in the world.

## 2. DCDMS' role when assessing claims

- 2.1. When assessing the claims of various members of the defence team, it is important to understand the role of DCDMS Staff and why the assessment is taking place. DCDMS Staff put themselves in the same position as a 'reasonable' private paying client, i.e. if they were paying the fees for this case for their own defence, would they want the work that has been done to be carried out? They should remember that they are protecting the purse for the United Nations Member States and accounting for the way in which those funds are being spent.

2.2. Hence, it is necessary for them to constantly question the need for work to be undertaken and the need for lengthy periods of time to be spent on the different tasks. The tasks to be carried out cannot be exhaustively underlined here but examples of questions to be asked are:

- Is the work something which can properly be remunerated?
- Is the task necessary for the preparation of the defence case?
- If the task is necessary, should it have been undertaken at this stage?
- Who is the most appropriate and cost effective member of the defence team to carry out such work?
- How many hours are reasonable to undertake the work?

### **3. Is the work properly chargeable to a legal aid fund?**

3.1. In general DCDMS would not consider it appropriate to remunerate defence teams for any of the following type of tasks e.g.:

- Social/pastoral care of the client, including speaking to relatives on personal rather than case related issues.
- Secretarial and administrative work e.g. typing, making appointments, setting up billing systems, photocopying, filing, indexing, etc.
- We would not consider it reasonable for counsel to charge for any time spent with DCDMS staff in order to justify their claims at a face-to-face meeting or with CMS Staff. Nor would we consider it reasonable for counsel or any member of the defence team to charge for collating or providing any further written information in support of their claim for fees
- We would not consider it reasonable for counsel to charge for time spent drafting a justification of his/her fees for the consideration of any appeals proceedings.

Only in exceptional circumstances would we consider payment of the following:

- Legal Research – Most of the Legal Aid systems in the world would not normally pay for research into case law as it is considered that Counsel should keep themselves informed of current developments in the law as part of their ongoing professional training (compare the example of a doctor who has to keep him/herself abreast of all the latest medical developments). However, in exceptional circumstances, it is reasonable to pay if the Counsel can demonstrate that the research done is into a very new area of law or an area of law in which the lawyers do not hold themselves out as conversant in. The underlying principle used is that Counsel is expected to be fully

conversant with the substantive and procedural International Criminal Law used in the Ad Hoc Tribunals. In so far as expense is made in adding to or replenishing this stock in trade knowledge, it is an overhead expense and not something which can be charged to either a privately paying client or to a legal aid fund. **Counsel are expected to know the law in the field they hold themselves out as being an expert.** Only where research was required into an area of the law which was so far beyond the usual ambit of the crime alleged, would we consider making payment for legal research.

- Sorting files, indexing of information etc. Although on the face of it appears to be strictly administrative and non-claimable, in exceptionally large cases where large quantities of material is disclosed, it is not always organized in a way that can be used by the defence, or indexed/paginated. This is not the case in ICTR. However, if DCDMS' Staff are convinced that it will help with the preparation of the case and save time later, they would consider it reasonable to pay a Legal Assistant to put the papers in a useable order for the defence team. The amount of time to be agreed would be dependant upon the volume of material.

#### 4. Is the task necessary?

4.1. When making an assessment of fees to be paid, DCDMS should always question whether the task is necessary for the preparation of the defence case. The interviewing of potential defence witnesses is an area where this principle is particularly important to remember. Points to note here are:

- How will this particular witness assist the defence case?
- What area of the prosecution case will this witness statement seek to bring into doubt?
- Have a number of other witness statements already been taken from other potential defence witnesses who deal with the same points and issues?
- What is the number of Prosecution witnesses compared to the number of potential Defence witnesses already met and interviewed by the Defence team. Additionally, it is important to ascertain as well the likely number of Defence Witnesses that may actually be called to testify.

#### 5. Timing of the task

5.1. It is important to remember that some tasks are necessary to the case but should not be completed until at a later stage. Commencing work at too early a stage in proceedings may lead to unnecessary duplication as it is likely that the work will have to be performed again at a later date if there

are significant changes to the Prosecution case. Equally in very long cases such as those in the ICTR, although some re-reading and refreshing of the memory will be required, if work has been done too early it may lead to a huge amount of work having to be duplicated during or close to the trial stage. Specific examples to look out for are:

- 5.1.1. Viewing unused material - Unused material is defined as material which the Prosecution have chosen not to rely upon but have a duty to disclose. This material should not be viewed until the primary prosecution disclosure has been received and read. The client should also begin giving instructions on the prosecution case. It is only at this stage that the defence team can know what will be of relevance in any of the unused material.
- 5.1.2. Taking a client's instructions – In principle Counsel should minimise taking instructions until they have seen the full extent of the case against their client. This avoids the obviously difficult situation of the client changing their instructions as new documents become available from the Prosecution. This also prevents duplication of effort and going over the same material again and again with the client.
- 5.1.3. Preparing for cross-examination – Counsel should not begin this task until shortly before the trial or indeed shortly before that witness is about to be called. If Counsel proposes to commence this task earlier there must be a very compelling reason. In assessing the reasonable time to be paid for preparation of cross examination, DCDMS Staff take into consideration the total hours already remunerated for the preparation of each witness.
- 5.1.4. One final point to note on the timing of the task is when the work is actually carried out. The general principle is that it is accepted that Counsel will often work on cases at weekends or unusual times of the day and night during particularly intensive periods within a case. DCDMS Staff would not reduce a claim for work conducted on a Sunday for example where that work appeared to have been reasonably undertaken for example when the trial is going on. DCDMS Staff would however give overall consideration to the total number of hours being claimed for the same period taking into account breaks and the possibility that the Counsel might also be conducting work in their national jurisdiction during the same period. Whereas, for cases which are at the pre-trial stage, work that is performed on a Sunday, and sustained intensive work that is performed while the date for the commencement of the trial is not yet known would not be remunerated.

## 6. Which member of the defence team should carry out the work?

6.1. We wish to emphasize the fact that DCDMS has no intention of deciding which team member should perform which tasks. However, Lead counsel must be able to justify the need for him/her to conduct work that is not of a serious or complex nature. Generally, DCDMS would accept that the lead counsel who is the first responsible of the Defence Team is the most suitable member of the defence team to deal with the client on matters going to the heart of the case. However, given the size of cases at ICTR and the volume of material which will need to be discussed with the client, we would expect to see some division of labour certainly between Lead and Co-Counsel in relation to which aspects of the evidence each of them covers with their client.

6.2. With more peripheral issues such as reading and summary of jurisprudence, summary of witness statements, DCDMS would expect them to be very persuasive if she/he intends to conduct work which could easily be delegated to Co-Counsel or a more junior member of the defence team such as an Legal Assistant or and Investigator.

## 7. Tasks and hours

7.1. When assessing a claim submitted by the defence team and deciding on the number of hours in which it would be reasonable for the task to be conducted, DCDMS would take into consideration the following factors e.g.

- Is the task necessary?
- Is the work being conducted at the appropriate time?
- Is the appropriate member of the defence team performing the task?
- The volume of paperwork the task involves

7.2. The following provides a starting point only for determining the reasonableness of hours and moves up and down from these starting points depending on the nature of the material provided e.g.

7.2.1. *Witness Statements and transcripts of interviews* – There is a starting point of **2 minutes a page** for statements and transcripts which are to be used as evidence by the prosecution. The two minutes a page should be sufficient time to allow for reading and analysis of the documents and produce a brief summary of the pages or to annotate the notes as s/he reads. Factors that are likely to justify an increase from 2 minutes a page include the situation where the defence team members proposes to not only read and summarize the statements or transcripts of interviews but also to produce a chronology and schedules. DCDMS would need to be satisfied that

any summaries or chronologies produced would be useful to the defence team. For example, they may be produced to assist Counsel later in the proceedings as a means of quick reference or they may be used to speed up the taking of instructions from the client. DCDMS might also move up from 2 minutes per page if witness statements made reference to a large number of exhibits and it became necessary to constantly cross refer between the two documents. Factors that may reduce the time include very straightforward work such as no comment interviews and statements where only few exhibits are produced.

7.2.2. *Exhibits* – The general starting point for exhibits is **1 minute a page**, but again this multiple may go up or down. Factors that will increase the time will include complex data that needs to be examined and the need for cross-referencing to other material. In multiple defendant cases, it may also be reasonable for the Legal Assistant to skim through exhibits which are not relevant to their client e.g. DCDMS allows 15 seconds per page, to ensure that there is nothing of relevance in them. Before making the assessment of a reasonable allowance for the consideration of exhibits, it is worthwhile for DCDMS to consider a sample of this material and question what work would need to be done in relation to the exhibited material.

7.2.3. *Dairies/Daily schedules* – as a very general guide a starting point for perusal of schedules would be **2 minutes/page**. This can go up or down though and each case should be considered on its merits. Discussion should take place with the Lead Counsel or one of his team members as to the level of detail contained within the schedule, what information the Defence Team Member proposes to extract from the schedule. If a detailed analysis of this type of material is to be conducted, DCDMS would consider it reasonable for it to be carried out by a more junior member of the defence team with some guidance and supervision by leading counsel.

7.2.4. *Unused material* – In very large cases, there can be hundreds of thousands of pages of material which the prosecution have chosen not to rely on but which they still have a duty to disclose to the defence. Generally, DCDMS would agree to a period used for the perusal of unused material at around **0.5 minutes per page as a starting point** depending on whether the documents are being skimmed for relevancy or where it is found that the material is relevant to the defence case we would go up to **1 minute per page**. Although there may be thousands of pages of unused material, it is unlikely that more than 10-15% of it would be relevant to the defence case.



7.2.5. *Listening to tapes and cross-referencing with transcripts* – as a general rule DCDMS would allow **1.5 – 2 mins for every minute of tape time as a starting point**. This allows time for stopping and rewinding the tape at relevant points and noting any discrepancies. This is negotiable though and will depend on factors such as whether a no comment interview was made (reduce time down) or if there are a large number of discrepancies between the tape and the transcript (likely to need bit more time to note). Factors such as language and translation may also play a part in reaching agreement over reasonable hours.

7.2.6. *Coordination meetings* – During the trial stage 5 hours per week would be allowed as starting point for coordination meetings between the Defence Team members.

7.2.7. *Attending a meeting with the client at UNDF*. DCDMS Staff start by considering the amount of material upon which instructions are to be taken. Once counsel has started to read the papers for him/herself, they should be able to provide DCDMS Staff with an estimation of the volume of material which is to be covered with the client. In addition, they may also be able to provide information in relation to the relevancy of that material to their client's case. Consideration should also be given to the amount of time which has been spent in total in conference with the client by all defence team members before accepting that hours conducted in a recent claim are reasonable. As a very rough rule of thumb, an allowance of 1 minute per page of evidence should be sufficient time in which to see the client and take instructions on relevant documents. However, this is only a very rough indicator of a possible reasonable allowance and the total allowance could be affected by a number of factors.

7.2.7.1. The use of interpreters is likely to double the amount of time required to meet with the client and take instructions.

7.2.7.2. Client may be reluctant to co-operate fully with his/her defence team and may not want to address matters put before him/her by his/her lawyers.

7.2.7.3. Time might be taken initially to build up trust between client and defence team members thus resulting in delays in focussing on the key material in the case. It should be noted that such time, if not excessive, should be viewed as an investment which may produce time savings later.

7.2.7.4. Client may have learning difficulties which could slow down the process of taking instructions.

7.3. It is the DCDMS view that if the Lead Counsel or his team has spent a significant amount of time going through material with the client, this adds

to his/her own understanding of the papers and reinforces his/her knowledge of the detail of the case. In addition to any reading time allowed initially for counsel to read the papers, they have also spent time going through this material in detail with their client. This should be considered during the later stages of the case if and when counsel request time for refreshing their memory of the case papers.

7.4. Also DCDMS takes into consideration the fact that the client has a set of the statements, transcripts and exhibits to read in his/her own time, thereby reducing the conference time with the defence team. It is expected that the client is prepared to answer questions and has an understanding of the case against him/her before meeting with Counsel.

7.5. *Instructing experts* – The defence team may need to give the expert a large amount of detail in order for the expert to properly draft a report and give their professional opinion. In the first instance, DCDMS would agree **up to 3 hours as a starting** point for counsel to locate a number of potential experts within the field who might be appropriate to instruct as an expert in this particular instance. This would generally involve searching through professional directories to locate potential experts and discuss their availability and suitability to conduct the work.

7.5.1. In relation to time spent drafting instructions for the expert, this will depend very much on the level of detail entailed and the amount of documentation the expert will need to consider. It would be reasonable for leading counsel to draft such instructions but DCDMS would expect that if the instructions were to contain detailed enclosures such as prosecution material, the time spent collating this for inclusion in the instructions should be paid at the lower rate of Legal Assistant. Ten hours might be considered reasonable for the drafting of detailed instructions to an expert. A very rough rule of thumb would be that DCDMS Staff would expect each page of written material to take in the region of 20 minutes to draft. Therefore, if instructions to an expert amounted to 30 pages of drafted material by counsel plus enclosures, DCDMS Staff would expect something in the region of 10 hours to be reasonable for such work. Clearly this allowance would be affected if the drafting was not being done in the person's first language.

7.5.2. DCDMS Staff would not accept that it is necessary for counsel to meet with the expert for a significant amount of time. Written instructions should be sufficient to relate all the relevant information to the expert for his/her opinion. DCDMS Staff would allow two meetings with the expert, one to discuss the expert opinion being sought and another meeting once the report has been produced in order to assist with the interpretation and understanding of the report

produced by the expert. This should not be necessary in all cases and it should be noted that **the expert is paid to produce a report which gives his/her professional opinion on the facts presented to him/her. The expert is not paid to produce a report which simply states what Counsel wants him/her to state.**

## **8. Taking and drafting defence witness statements**

8.1. As a rule of thumb, DCDMS Staff would expect to see 1 page produced for every ½ hour of interview time, and for it to take 20 minutes to produce 1 written page of documentation. This is something which is taken into consideration when assessing claims for taking witness statements, drafting them following the meeting or drafting documents generally. If DCDMS Staff are allowed to obtain a redacted copy of the documents produced, the length of them may give them an indication as to whether the time taken was reasonable. Within this allowance for drafting DCDMS Staff are prepared to move up from this starting point, if for example, the document makes many references to other sources of material, footnotes, enclosures etc.

## **9. Counsel's trial preparation**

Counsel will usually start to increase the amount of work on a case shortly before the commencement of the trial. DCDMS Staff would consider first of all, the stage at which this is proposed to be done. It should be done fairly close to the start of trial when the Prosecution and Defence cases are fully known, so as to avoid Counsel having to re-visit e.g. cross-examination preparation or needing to refresh his/her memory, before the start of trial. It is expected that the preparation for cross examination should where possible be divided between Lead and Co-counsel so that both counsel are not preparing to cross examine each and every witness. Lead Counsel should focus on the more important witnesses.

## **10. Attending Court**

10.1. During the trial, DCDMS Staff would only consider it appropriate for Lead Counsel, Co-Counsel and the Legal Assistant to attend court sessions unless there were compelling reasons otherwise.

10.2. During the pre-trial stage DCDMS Staff will only allow the presence of one Counsel with the Legal Assistant for hearings of preliminary notions if any, and for pre-trial conferences. For status conferences during the pre-trial stage, DCDMS Staff will only allow the presence of one Counsel.

- 10.3. If counsel has not been in attendance and needs to read the daily transcript from court, we would accept that 2 minutes per page would be a reasonable allowance for this. If counsel has been in attendance and needs to read a specific transcript, DCDMS would allow one hour as a starting point for the reading of the transcript.

### **11. Drafting of motions/briefs**

For this task DCDMS Staff take into consideration *inter alia* the complexity of the issue at stake, the size of the number of team members involved in the drafting of motion/brief.

### **12. Prospecting and localization of Potential Defence Witnesses**

The limited resources of the Legal Aid Programme make it impossible for DCDMS to allow fishing missions to locate defence witnesses. DCDMS Staff expect from Counsel to have reliable information in relation to the localization of potential witnesses before undertaking a mission.

### **13. Duplication**

DCDMS Staff will carefully avoid payment for work which is merely a duplication of work already undertaken. This means

- 13.1. work which has been undertaken at an earlier stage of the case which will inevitably need to be re-done at a later stage in order to update the position and refresh the memory of the Defence Team Member.
- 13.2. work which is duplicated between different defence team members e.g. reading and analysing the same book, document or witness statement.

### **14. Witness statements, transcripts and exhibits**

Not all members of the defence team need to read these. Reading of the core Prosecution papers should be limited to counsel, except where counsel agrees that the material might not be relevant and instead of him/her reading all of it, he/she instructs his Legal Assistant to scan through the material to check for relevant. If it is argued that a Legal Assistant or investigator needs to read substantial parts of the prosecution papers which have already been read by counsel, this should be questioned. It should be possible for more junior members of the defence team to be directed to only those sections of the papers which it is necessary for them to read for the preparation of discreet areas of their work.