



PROPOSED ADJUSTMENT TO THE LEGAL AID SYSTEM

I. INTRODUCTION

The Registry has implemented the system of legal aid paid by the Court (ICC-ASP/3/16, updated by ICC-ASP/5/INF.1) (“the Current System”) through:

- the Chamber appointing counsel to represent the general interests of the Defence under article 56(2)(d) (“*ad hoc* counsel”),
- assisting persons under article 55(2) – although no trial has been held to date – when (a) persons were questioned by the Prosecutor (“duty counsel”) and (b) in the case of a person transferred to the Court, Mr. Thomas Lubanga Dyilo, and
- representing a victim under article 68(3), for the confirmation hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06).

1) *Ad hoc* counsel

The competent Chambers, or the Registrar acting on their instructions, appointed four (4) *ad hoc* counsel – two (2) for the situation in the Democratic Republic of the Congo, one (1) for the case of *The Prosecutor v. Kony et al* and one (1) for the situation in Darfur.

Payment of *ad hoc* counsel has been guaranteed by the legal aid scheme funds by applying the same rate as applied for the duty counsel (see below).

2) Assistance to persons under article 55(2)

a. Duty counsel

The Registry appointed four (4) duty counsel in 2005 and twelve (12) in 2006, in order to provide the appropriate assistance to persons questioned by the Prosecutor who wished to exercise their right to assistance by counsel. Experience has shown that the frequency of requests for assistance is unpredictable and intermittent, and appropriate provisions have been made relating to the administrative organisation of the assistance.

As far as the financial aspect is concerned, the Registry paid for counsel’s travel (transportation + daily subsistence allowance) and fees according to the table below:

FEEES TO BE PAID TO DUTY OR *AD HOC* COUNSEL

- € 100 per hour, up to a maximum of
- € 700 per day, up to a maximum of
- € 8,864 per month

+ compensation of charges determined on a case-by-case basis, up to a maximum of 40 %

* The hourly rate applies when counsel work in their place of residence; when they are on mission outside of their country of residence, the daily amount is applied.

b. Assistance to Mr Thomas Lubanga Dyilo

As soon as Mr Lubanga was transferred to the detention centre, the Registry provided him with a list of duty counsel who had confirmed their availability to assist him at his first appearance before the Chamber. Following his first appearance, and after studying the entire list of counsel admitted to appear before the Court, he appointed Mr Jean Flamme (Belgium) as his counsel.

Mr Flamme appointed a Legal Assistant (G5), in accordance with the Court's legal aid scheme, a Case Manager and a Resource Person for investigative activities, as authorised by the Registrar in his letter of 31 August 2006. Following the Chamber's decision of 22 September 2006,¹ an additional Legal Assistant (P2) was appointed within the Defence team. Mr Flamme has also received substantial assistance from the Office of Public Counsel for the Defence and several interns working *pro bono* or as part of a Court internship programme.

3) Legal representation of victim a/0105/06

Following the decision of Pre-Trial Chamber I to grant the status of victim in the case of *The Prosecutor v. Thomas Lubanga Dyilo* to applicant a/0105/06, the victim submitted a request for legal aid to the Registry. The Registrar decided to temporarily consider the victim completely indigent and to assume the costs of the services of a single counsel, Ms Carine Bapita, for the purposes of the confirmation hearing.

¹ ICC-01/04-01/06-460.

II. EVALUATION OF THE IMPLEMENTATION OF THE CURRENT SCHEME

After just over two years of its operation, around twenty counsel have been appointed in various capacities under the Current System. It seemed necessary for the Registry to conduct a critical assessment of the Current System.

The assessment covered the assistance provided to duty and *ad hoc* counsel and also to counsel acting in a case to assist a person applying for legal aid paid by the Court.

As far as duty and *ad hoc* counsel are concerned, experience shows that the Current System has not posed any particular problems to date and could be continued as is, except for a review of the need for automatic payment to reimburse expenses.

In matters concerning the work of counsel providing substantive representation to persons applying for legal aid paid by the Court, experience has shown that the Current System, based on the reality of proceedings conducted before the Court to date, more specifically in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, has highlighted the need for the Court to respond to the impact of the following factors relating to the ability of those appearing before the Court and their teams to conduct an appropriate defence:

1) Procedural time limits

The procedural time limits for submitting interlocutory appeals² and filing responses are short. In principle, time limits for interlocutory appeals are five days to file the notice of appeal and 21 days to file the document in support of the appeal. The time limits for responding to a document filed by a participant are 21 days, and replies must be filed within 10 days.³ The time limits for submitting observations⁴ on the applications for victims' participation have generally been 15 days, except for those relating to the application for participation of VPRS 1 to VPRS 6, which were set at 10 days.⁵ It should be noted that the brevity of the time limits for appeal is not specific to proceedings before the Court and can be found in all national systems. Furthermore, the same short time limits apply to all participants in the proceedings.

2) Participation of victims in the proceedings

In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, seventy-four (74) applicants have filed applications for participation, to which the Defence has had to submit observations within a time

² See the combined provisions of rules 154 and 155 of the Rules of Procedure and Evidence and regulation 64 of the Regulations of the Court.

³ See regulation 34 of the Regulations of the Court.

⁴ Decisions granting the filing of observations relating to victims' applications for participation in a case have generally set a time limit of 15 days. See ICC-01/04-01/06-107 of 18 May 2006, ICC-01/04-01/06-270 of 4 August 2006 and ICC-01/04-01/06-494 of 29 September 2006.

⁵ See ICC-01/04-01/06-58 of 28 March 2006.

limit of 10 to 15 days. The time devoted to preparing such observations is an additional burden on the Defence, which also has to deal with other time limits for different types of issues.

3) The electronic system for disclosing evidence amongst participants

Because it is new, the eCourt system set up by the Court seems to have affected counsel's preparation. The Court set up a system providing the necessary applications to help counsel to familiarise themselves with the eCourt environment. However, the electronic system requires not only team members to undergo specific training in data management programmes or software, but also trained staff within the teams who can download and manage all the documents disclosed between the parties in the proceedings.

The impact of all these factors may be reduced in the future because the procedures and, more specifically, the electronic system are being broken in during the first case before the Court and will undoubtedly be more adapted in the future.

It should be stated that the experience gained to date is mainly restricted to the pre-trial stage of one case brought before the Court and three situations. Obviously, more exhaustive information must still be acquired once the Court has dealt with one or more cases from the investigation stage through to the final decision on appeal. Such information may call for a revision of the Current System in a timely manner, leading, if necessary, to amendments to particular provisions of the Rules of Procedure and Evidence, the Regulations of the Court and/or the Regulations of the Registry.

For now, at issue is a targeted, restricted adjustment of the Current System which does not involve any modifications of a legal nature, while duly taking account of the principle of equality of arms, objectivity, transparency, flexibility, and cost containment.

The adjustment aims to respond to difficulties which have arisen. The pre-trial phase of the case of *The Prosecutor v. Thomas Lubanga Dyilo* showed that the teams' needs may change as the proceedings develop. To be able to respond appropriately to any such developments by adopting objective criteria which prevent arbitrary judgements from any of the parties, the proposal is to adapt the Current System in relation to the composition of teams, investigations budget, work of expert witnesses, salary determination for each member of the teams of counsel and the payment arrangements.

III. PROPOSED ADJUSTMENTS

Note on the salary amounts: Before the final document is presented to the CBF, the exact amounts will be updated, therefore the figures stated may change as a result. In the same vein, the amounts corresponding to each level are not stated.

When identifying the proposed adjustments, the Registry took into account: the contributions from counsel who submitted observations on the functioning of the system, in particular, Mr Jean Flamme; documents drawn up for various reasons by lawyers' associations, such as the *International Bar Association* and the *International Criminal Bar*; the experience of the *ad hoc* tribunals and the lessons learned from Registry staff members' missions to London and Madrid, where they were able to gain a deeper understanding of national legal aid systems.

A] ADJUSTMENTS SPECIFIC TO THE DEFENCE

1) Composition of teams

The presentation of teams as established in the Current System will be simplified. Instead of describing the composition of the team in great detail at each stage of the proceedings, the proposal envisages a core team, which will be active throughout the proceedings, with the exception of the two periods in which counsel acts alone. The core team will be supported by additional resources during the trial phase.

The work of the P2 assistant in the core team during the pre-trial phase will further simplify the composition of the teams by also responding to the needs that have become apparent in practice.

The core team is supported in the trial stage by automatic modular additional resources according to particular parameters which might affect counsel's workload.

a) *Periods where counsel acts alone (Cf. Annexe 1: Stages 1 and 4 in the proceedings):*

- Before the client is transferred to the Court's authority (including duty counsel)
- *Ad hoc* counsel
- Between the end of the closing arguments and the issuance of the judgement

It should be stated that during these periods, counsel may also benefit from the assistance of the Offices of Public Counsel.

b) *Core team (Cf. Annexe 1: Stages 2, 3 and 5 in the proceedings)*

- 1 P5 Counsel
- 1 P2 Assistant (in the current configuration, this is planned only for the trial and appeal stages)
- 1 G5 Case Manager (in the current configuration, "Assistant")

c) *Automatic additional resource during the trial stage (Cf. Annexe 1: Stage 3 in the proceedings)*

- 1 P4 Associate Counsel (in the current configuration, "Legal Adviser")

It is envisaged that counsel would choose whether to use the P4 Legal Adviser resources to instead hire one P2 Assistant and one G5 Assistant, or two P1s. Although this option would not involve any additional expense, the current configuration (recruitment of an Associate Counsel) seems to be the most appropriate because of the need to ensure the quality of representation for the person receiving legal aid and to guarantee continuity in that representation, should counsel withdraw while proceedings are ongoing.

d) Modular additional resources (Cf. Annexe 1: Stages 1, 2, 3 and 5 in Proceedings and Annexe 2)

Because it is impossible to forecast definitively the needs the team will face throughout the entire proceedings of a case, due mainly to the participation of victims, it is recommended that a formula be established which would allow a modular arrangement of additional resources made available to the teams in accordance with the sometimes considerable fluctuations which may occur in a case.

The Registry has assessed and quantified particular parameters in order to establish an equivalence which would enable counsel to hire additional assistants whose payment would be covered by the Court's contingency fund; the unit used in the formula is the full-time equivalent, or FTE, which represents the work that one team member can accomplish in a sustained manner:

- (i) For every count set out by the Prosecutor: 0.025 FTE (1 FTE = 40 charges)
- (ii) For every victim who files an application for participation: 0.005 FTE (1 FTE = 200 victims)
- (iii) For every victim or group of victims whose application for participation in the case is accepted by the Chamber: 0.02 FTE (1 FTE = 50 victims)
- (iv) For every 3000 pages submitted into the record by other participants: 0.1 FTE (1 FTE = 30,000 pages)
- (v) For every 3000 pages disclosed by the Prosecutor: 0.1 FTE (1 FTE = 30,000 pages)

Accumulation of FTE would give a team the right to recruit additional staff as follows:

- For every FTE: one P2 Assistant
- For every three FTE: one P4 Associate Counsel

Counsel will be able to choose how the total amount of accumulated FTE is distributed in terms of the composition of his or her team.

The choice of the FTE as the unit of work enabling the modulated recruitment of additional team members is consistent with the approach generally adopted by the Court in its *Capacity Model* (ICC-ASP/5/10). This gives the system the necessary flexibility to respond to the needs which emerge during the proceedings, whilst guaranteeing the necessary objectivity.

However, an excessive increase in the number of team members as a result of accumulated FTE could make the financial burden disproportionate to real needs, by creating team management problems, as well as pressure on the programme's budget. Consequently, it is anticipated that

there will be a restriction on the modular additional resources which can be allocated, taking into account the limited resources available to the programme for legal aid paid by the Court.

Moreover, the principle of modularity of additional resources according to the above parameters means that these resources must be reviewed when the parameters decrease or when they cease to affect the Defence's work at a particular stage in proceedings.

So in the case of the "count" parameter, if a warrant of arrest comprising several charges which justified a certain amount of FTE is amended during the proceedings in amounts equal to or greater than one FTE, the additional modular resource(s) initially allocated will be revised downwards.

In the same way, as regards the "Victim filing an application for participation" parameter, the modular additional resources allocated under this parameter will be reviewed as soon as the Chamber's decision on the applications for participation has been delivered.

The additional modular resources allocated under other parameters will be retained until the closing arguments before the Trial Chamber.

The additional modular resources are not automatically granted. Counsel must make a specific application for them, justifying their necessity for the appropriate representation of the client.

Where necessary, counsel could in any case submit an application under regulation 83(3) of the Regulations of the Court.

2) The budget for investigations

Given the need for the Defence to do investigation work in preparation for the confirmation hearing, it seems appropriate to review the budget for this in the Current System and to also include the remuneration of the resource person provided for by regulation 139 of the Regulations of the Registry. Considering the tasks that this person should carry out and the fact that he or she is not intended to be a replacement for the professional investigator, the applicable level of remuneration has been judged to be equivalent to that of G-5 in the Office of the Prosecutor.

- ❑ *Proposal 1:* An increase in the budget for investigations of € 55,315 in the Current System for 90 days of investigation anticipated at € 77,640. This budget takes into account the need to carry out investigations during the pre-trial phase and covers the salary of a P4 investigator for 110 days (€ 26,345), DSA for 110 days (€ 25,630), travel (€ 13,000) and the salary of a G5 Resource Person for 110 days (€ 12,665). The decisive factor is the overall amount allocated for investigations and not the total amount allocated for the actual days of investigation work performed.
- ❑ *Proposal 2: Modular additional resources.* The Current System's budget is considered to be a basic budget for an average of (25/30) Prosecution witnesses. Moreover, the allocation for

fees and DSA would be increased in the following cases and under the following conditions:

- For every additional witness called by another participant: 0.5 days of investigation work;

Travel would be increased as follows:

- For every 10 days of investigation work: one national or regional trip;
- For every 30 days of investigation work: one intercontinental trip.

Unlike the modular additional resources for team members, a maximum will be set only as a result of the implementation of the parameter applicable to the additional days of investigation work.

3) Missions carried out by team members (other than investigators and resource persons)

The Registry has carefully studied the possibility of increasing the budget for the teams' expenses. It has been maintained that during the trial phase, the travel expenses and DSA which are currently provided for, would be insufficient for the teams' needs.

Nevertheless, taking into account the setting up of computerised systems which allow the said members to access their independent network from their place of residence and to exchange documents and commentaries in complete security, it seems unnecessary to plan for such an increase.

4) Expert witnesses

The system in its current state does not provide a specific budget to pay the fees and expenses of any expert witnesses who might be called.

Proposal : to incorporate such a budget consisting of:

- a maximum of one month of fees at P-4 level (€ 7,184)
- one intercontinental trip for the requirements of the hearing
- 7 days of DSA

B] ADJUSTMENTS SPECIFIC TO VICTIMS

To date, only one decision granting legal aid has been made by the Registrar.⁶ The experience of the situation in the DRC and the case of *The Prosecutor v. Thomas Lubanga Dyilo* has shown that although victim participation is accepted at the pre-trial stage, it is limited in terms of

⁶ Decision of the Registry of 3 November 2006 (ICC-01/04-01/06-650 [only available in French])

modalities.⁷ Future decisions by the Court's Chambers on arrangements for participation will affect both the resources which should be made available to the teams of the victims' legal representatives and the requirements of the investigation prior to and during the reparations phase.

Moreover, the Chamber or the Registrar, may, at any time, render *ad hoc* decisions on the legal representation of victims depending on the circumstances of the case. The legal aid system must therefore be in a position to respond effectively to these needs.

It should be borne in mind that legal aid paid by the Court for the victims will take place in the context of common legal representation.

Accordingly, in the absence, on the one hand of established and repeated jurisprudence on the arrangements for the participation of victims seeking legal aid paid by the Court, and on the other, reliable parameters on the subject, it seems more appropriate for the time being, not to put in place a legal aid system specifically designed for victims at the pre-trial phase and the trial phase prior to the verdict. For these phases of the proceedings, it is recommended that one be guided by the system put in place for the Defence by leaving it to the Registrar to determine the scope of legal aid for groups of victims according to the arrangements for participation effectively decided upon by the Chambers.

However, for the reparations phase, it is recommended that provision be made for a **core team** which can be reinforced by additional resources at the Registrar's discretion.

1) **Core team for the reparations phase**

- one P-5 Lead Counsel
- one P2 Assistant
- one G5 Case Manager ("Assistant" in the current configuration)

The option to add additional resources to the legal representation team could be envisaged, particularly in the following cases: when the number of victims in the group exceeds 50, when reparations proceedings involve the need to request all the protective measures under article 93(1) of the Rome Statute, in the event that the Chamber decides to establish the extent of the damage.

2) **Budget for investigations**

In the Current System, there is no budget for investigations. Yet it seems necessary, particularly in relation to all reparations issues, to envisage the creation of such an expenditure item. A budget of €55,315 is recommended for investigations in the Current System for 90 days of investigation

⁷ Decisions of Pre-Trial Chamber I of 17 January 2006 (ICC-01/04-101-tEN), of 22 September 2006 (ICC-01/04-01/06-4620-tEN) and 20 October 2006 (ICC-01/04-01/06-601-tEN)

for the entire proceedings including the reparations phase as provided for in the Current System for the Defence.

C] ADJUSTMENTS APPLICABLE TO BOTH THE DEFENCE AND THE VICTIMS

1) Determination of the amounts to be paid

The remuneration of all the team members is set by applying the amount corresponding to a staff member at the appropriate level, at step 5.

2) Methods of payment

The practice which is in principle accepted by the Registry, consisting of paying 60% of each member's fees following submission of the relevant statement of hours worked and paying the outstanding 40% at the end of each phase or every six months, has been strongly challenged by Mr Lubanga's Defence Counsel.

This practice is not followed by the ICTR and it differs from that of the ICTY in that team members receive 80% at the end of each month. Nevertheless this option has also been challenged by Counsel, who is demanding treatment similar to that of the members of the Office of the Prosecutor, who receive their salary in full every month.

Although this argument is simplistic, it is submitted that as the actual percentage is the lowest of all the international criminal courts, it would be relevant to change this practice.

It is therefore proposed to reconsider the percentage foreseen in the current system. 70 % of the fees will be paid upon receipt of a statement of hours worked, to be followed by the remaining percentage at the end of each phase or every six months.

Comments:

The payment of the full sum due will, at the very least, make it very difficult, if not impossible for the Registry to control the use of the funds paid to the legal teams, and to recover sums which might have been erroneously paid to members or the case record in the event that Counsel is withdrawn.

In any case, the Current System allows for the intervention of legal aid commissioners whose participation will provide the system with the appropriate safeguards in relation to verification of the necessity for, and the reasonableness and effectiveness of activity undertaken by counsel and for which payments are made within a publicly funded programme.

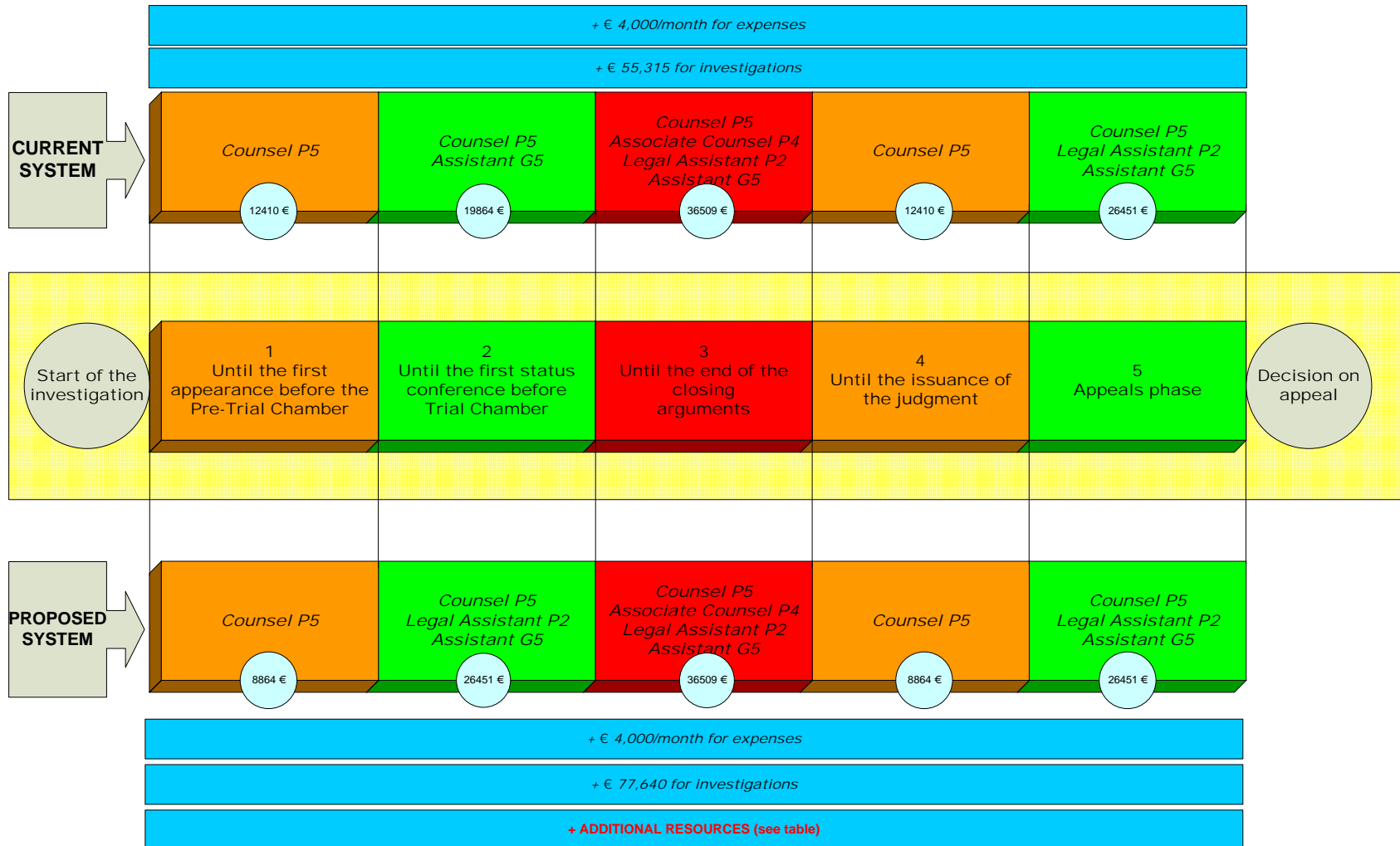
3) Compensation of charges

Such compensation will only be paid to counsel during the trial stage of proceedings or during the pre-trial or appeals phase if the constraints of the scheduling of judicial activities justify the

presence of counsel at the seat of the Court for a period of more than fifteen (15) days. Only counsel or members of their team managing a professional office, on an individual basis or in partnership, are eligible for payment of compensation of professional charges upon submission of information and supporting documentation enabling the Registry to determine the amount.



ANNEX I





ANNEX II

**MODULAR ADDITIONAL RESOURCES:
Additional members of the team**

