

Eighth session

The Hague

18-26 November 2009

**Report of the Bureau on Legal Aid (Defence):
Alternate Methods for the Assessment of Indigence**

Note by the Secretariat

Pursuant to paragraph 16 of resolution ICC-ASP/7/Res.3, of 21 November 2008, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on Legal Aid (Defence): Alternate Methods for the Assessment of Indigence. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court.

**Report of the Bureau on Legal Aid (Defence):
Alternate Methods for the Assessment of Indigence**

A. Introduction

1. The present report is submitted by the Hague Working Group at its 20th meeting of 7 October 2009, pursuant to the mandate given to the facilitator, Ms Marie-Charlotte McKenna (Australia), on the issue of legal aid for the defence, and in particular in relation to the methodology utilised by the International Criminal Court ('the Court') to assess the indigence of applicants for legal aid.

2. In the report on the work of its eleventh session, the Committee on Budget and Finance ('the Committee') expressed concern at the system utilised for determining the indigence of defendants, insofar as the Court had given examples showing that individuals with extensive assets could be determined to be indigent. The Committee agreed it was appropriate for the indigence test to take account of the high costs of an adequate defence, but did not believe it was reasonable for individuals with extensive assets to receive legal assistance from the budget of the Court.¹

3. The Committee suggested that alternatives to the methodology utilised by the Court be considered and discussed, including the desirability of establishing absolute thresholds of asset holdings above which legal aid would not be provided. The Committee further expressed the opinion that it was not unreasonable to expect an individual holding property and assets worth several millions of euros to be required to liquidate some assets to fund their defence".²

4. In its report on the different mechanisms for legal aid existing before international criminal jurisdictions, the Bureau of the Assembly of States Parties ('the Bureau') noted that "as observed by the Committee in the report on the work of its eleventh session...it would be useful for the Court to...consider and discuss alternative methods for calculating indigence".³

5. In light of the Committee's and the Bureau's reports, at its seventh session, the Assembly of States Parties ('the Assembly'), by resolution ICC-ASP/7/Res.3 of 21 November 2008, invited the Court to provide a report to the eighth session of the Assembly "considering alternatives to the formula currently used by the Court for calculating indigence".⁴

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. II, part B.2, paragraph 128.

² *Ibid.*

³ Report of the Bureau on the different mechanisms for legal aid existing before international criminal jurisdictions (ICC-ASP/7/31), paragraph 8.

⁴ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. I, part III, resolution ICC-ASP/7/Res.3, paragraph 16.

B. Organization of work

6. The facilitator conducted discussions between States Parties and the Court on the Court's report 'Legal Aid: Alternate Models for the Assessment of Indigence' (and the draft/interim reports) in accordance with her discussion paper dated 2 April 2009 at meetings of The Hague Working Group held on 6 April, 20 May and 9 August 2009 and at an informal meeting of the Working Group on 15 July 2009.

7. A number of meetings and informal discussions were also held with Court officials and representatives of non-government organizations, further to which the International Bar Association was invited to brief an informal meeting of The Hague Working Group on 15 July 2009 on its views on issues raised in the Court's report.

C. Approaching the issue of indigence determination

8. In conducting discussions with the Court on its report, the facilitator and the Working Group have sought to support the Court in its work and in addressing the mandate given by the Assembly, while at all times remaining fully cognizant that the drafting responsibility for the report properly lies with the Court itself.

9. The Working Group is grateful to the Court for this constructive dialogue and for the Court's receptiveness and responsiveness to the views and concerns raised by delegations in the course of discussions on issues pertaining to the indigence assessment process. The Court's final report⁵ provides a thorough review of the indigence assessment process, including in relation to the following key elements:

- a) The current methodology utilised by the Court to assess the indigence of an applicant for legal aid and the principles underlying that methodology;
- b) Considerations on the preliminary assessment of indigence and structuring the indigence assessment process so as to allow for review, where the results of the financial investigation or changes in the applicant's circumstances so require;
- c) Factors to be taken into account in giving consideration to the option of establishing absolute thresholds of asset holdings beyond which legal aid would not be provided;
- d) Considerations relating to the treatment of assets belonging to dependants of an applicant for legal aid;
- e) The estimated duration of legal proceedings and the time period utilised for calculating indigence;
- f) The manner of treating the principal residence of the applicant for legal aid;
- g) The manner of treating other assets belonging to the applicant for legal aid, including motor vehicles; and
- h) A comparison of the methodology utilised by the Court in assessing indigence with that utilised by other international criminal jurisdictions.

10. Based on its experience to date, on the practices of other jurisdictions, and on its dialogue with the Working Group, the Court has formulated a number of recommendations in relation to the above key elements, which are contained in its report.

⁵ ICC-ASP/8/24.

D. Conclusions

11. The Working Group's unanimous view is that the Court's final report to the Assembly, and the recommendations contained therein, provide a sound basis for further refining the Court's indigence assessment process and for continuing to monitor this issue in light of the evolving practice of the Court and other relevant developments.

12. However, while the Court has indicated that it considers it premature to introduce a policy of absolute thresholds of asset holdings at this time, and before the completion of a full judicial cycle, the Court recognised that this issue remained pertinent and indicated that it would continue to actively monitor the development of proceedings with a view to determining (i) which threshold amounts would be appropriate and (ii) which threshold amounts would correspond to the length and cost of proceedings before the Court.

13. In view of the above, and of the Committee's earlier recommendation that consideration be given to introducing absolute thresholds of asset holdings, the Working Group proposes that the Assembly consider inclusion of the language annexed to this report in the text of its resolution on Strengthening the International Criminal Court and the Assembly of States Parties ('the omnibus resolution').

14. This would enable the Court and the Assembly to continue their dialogue on the question of absolute thresholds of asset holdings, further to the completion of a full judicial cycle, and to further evaluation and analysis by the Court of associated considerations.

Annex

Recommendation for inclusion in the resolution on Strengthening the International Criminal Court and the Assembly of States Parties ('the omnibus resolution')

The Assembly of States Parties

Mindful that a full judicial cycle is yet to be completed and that the development of the Court's policy towards assessing the indigence of defendants before the Court is ongoing;

Welcomes the report, 'Legal Aid: Alternate Methods for the Assessment of Indigence', submitted by the Court to the Assembly of States Parties; *endorses* the recommendations contained therein; and *invites* the Court to report to the Assembly at its tenth session on the desirability of introducing absolute thresholds of asset holdings beyond which legal aid would not be provided.

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