

Eighth session

The Hague

18-26 November 2009

**Report of the Court on legal aid:
Alternative models for assessment of indigence*****A. Introduction**

1. The Assembly of States Parties, in resolution ICC-ASP/7/Res.3, “[i]nvites the Court, taking into account the comments of the Committee on Budget and Finance, to present to the Assembly at its eighth session an updated report on the legal and financial aspects for funding victims’ legal representation before the Court, *together with a further report considering alternatives to the formula currently used by the Court for calculating indigence*, to include, inter alia, the consideration of the desirability of establishing absolute thresholds of asset holdings above which legal aid would not be provided, and invites the Court to engage in constructive dialogue with States Parties on this issue in a timely manner, allowing for a proper review by the Committee on Budget and Finance at its twelfth and thirteenth sessions”.¹ (Emphasis added.) The present report examines alternatives to the formula used at the Court to calculate indigence.²

2. The following options and considerations have been prepared for discussion by the Assembly. Annex I provides further particulars of the current system, while annex II sets out in tabular form the Court’s recommendations to States Parties, together with their advantages and disadvantages. Annex III provides a tabular comparison of the models used in other courts, and annex IV summarizes the models used in other national legal aid systems.

* Previously issued as ICC-ASP/8/CBF.2/8. Re-issued with some modifications, as ICC-ASP/8/24.

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. I, part III, resolution ICC-ASP/7/Res.3, para. 16.

² During the months of December 2008 and January 2009, the Court prepared an action plan to address the request of the Assembly, and developed a tailored questionnaire containing the questions deemed most relevant for the preparation of this report. On 15 January 2009, the Court sent a note verbale to all States Parties to the Rome Statute and other selected States enclosing the questionnaire. As at 6 July 2009, 29 replies had been received.

B. Basic principles for the assessment of indigence

3. The basic principles of the legal aid system as proposed in 2005 in the Indigence Report are essentially as follows.³ They must:

- a) be based on objective criteria;
- b) allow applicants to honour their obligations to dependants;
- c) be flexible enough to allow consideration of changes in applicants' financial status; and
- d) be simple enough to implement, and to be understood by end-users.

4. In particular, the determination of the indigence of applicants requesting legal assistance paid for by the Court needs to correspond to the actual legal cost of the proceedings. The Committee on Budget and Finance supported this principle as being founded on "a sound structure".⁴

5. Amongst the inherent guarantees in the system, the principle of continuity plays a significant role in ensuring that legal aid funds are spent in conformity with the actual workload required by the proceedings. The Registry closely monitors the development of different cases in which legal aid funds are used, and is ready to take any necessary action to guarantee that the principles of continuity and economy strike the right balance.

C. The current system for the determination of indigence

6. The applicable formula, procedures and rules for the calculation of indigence for legal assistance purposes are specified in the Court's reports to the Assembly, in particular, the Indigence Report⁵ and annex I to the Legal Aid Amendment Report.⁶

7. The basic principles for the calculation of indigence for legal assistance purposes as set out in these reports are as follows. The calculation of the financial means of a person claiming indigence before the Court is assessed at each stage of the proceedings: pre-trial, trial and appeal. Thus, once a determination of indigence has been made, for example at the pre-trial phase, the Court will reassess that determination once the case proceeds to the trial phase and later to the appeal phase.

8. The formula for the determination of indigence can be summarized as follows. It requires the calculation of two sums: the monthly value of assets owned by an applicant, and the amount of the monthly obligations of an applicant to his or her dependants. At the relevant time, an applicant's residence, the furnishings of his or her principal family home and up to two motor vehicles can be excluded from the calculation of his or her assets, provided that their value was not excessive in light of the needs of that applicant's dependants.⁷

³ ICC-ASP/6/INF.1, Report on the principles and criteria for the determination of indigence for the purposes of legal aid (pursuant to paragraph 116 of the Report of the Committee on Budget and Finance of 13 August 2004), paras. 8-11.

⁴ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. II.B.1, para. 80.

⁵ ICC-ASP/6/INF.1.

⁶ ICC-ASP/6/4, Report on the operation of the Court's legal aid system and proposals for its amendment.

⁷ ICC-ASP/6/INF.1, paras. 13-14. Further details are provided in annex I, section 1, to the present report: "Consideration of assets in the determination of indigence".

9. The monthly disposable means (MDM) of an applicant are calculated by subtracting the monthly family obligations of the person claiming indigence from his or her total monthly assets.⁸ The amount of the MDM is, as a rule, put towards the cost of legal assistance. If the MDM is greater than the estimated monthly cost of a legal team acting at the *relevant stage of proceedings* (pre-trial, trial or appeals phase), a person is not indigent. Where the MDM is insufficient to satisfy this cost, the person will pay the MDM to the defence team on a monthly basis and the Court will contribute the rest; that is termed partial indigence.

10. The manner in which the Registry of the Court determines whether or not a person seeking legal aid is indigent, as explained in annex I, is always guided by the core principles upon which the system is based, which are outlined in the following section of this report.

Comparison of legal aid systems

11. A comparative study of indigence in national legal aid systems was undertaken, facilitated by the information provided by States Parties in response to a questionnaire circulated by the Court. This revealed that several different approaches to legal aid exist among the different countries surveyed. The variations are set out in annex IV to this report.

12. It must be reiterated that international criminal proceedings before the Court are *sui generis*, being lengthy, multidimensional (i.e. including the involvement of victims in the proceedings), highly complex, and requiring a team to represent each defendant. Therefore, while a reference to domestic systems can be made to extract ideas with the aim of enhancing the Court's indigence determination, a wholesale comparison or adoption of characteristics of domestic legal aid systems may not be useful, as the latter operate in a very different environment.

D. Preliminary assessment of indigence

13. The preliminary assessment of an applicant's indigence deserves careful consideration. In accordance with regulation 85 (1) of the Regulations of the Court, the Registrar is obliged to make a *final* determination of indigence of a person within one month of the submission of an application for legal aid, and once the Registrar is satisfied that all requisite material and information on the applicant's financial situation have been received.⁹ Regulation 85 (2) of the Regulations of the Court empowers the Registrar to revisit his or her *final* decision if the financial situation of the person receiving legal aid is later found to be different from that indicated in the application, or "if the financial situation of the person has changed since the application was submitted".

14. In practice, experience to date has demonstrated that the Registry can usually only make a *preliminary* assessment of indigence within the time limit stipulated by the legal texts of the Court by, for example, verifying the accuracy of the statements made by the person seeking legal aid and the alleged standard of living of his/her family. Without being in possession of a full investigative report and assessment on the financial means of the applicant, which will usually take longer than one month, the Registrar is not in a position to make a *final* determination.

15. It is thus proposed that the *prima facie* assessment of the Registrar based on the information before him or her, be considered as a preliminary, and not final, decision of the Registrar on the indigence of the person seeking legal aid. This decision will be finalized once the financial investigation is complete. This approach would also be in keeping with regulation 132 (3) of the Regulations of the Registry.

⁸ *Ibid.*, para. 18.

⁹ See regulation 131 (2) and regulation 132 (3) of the Regulations of the Registry.

Recommendation 1:

16. A *preliminary* assessment of indigence will be prepared on the basis of all prima facie information available to the Registrar, and will be valid while the financial investigation is ongoing pending a *final* determination of indigence.

E. Establishment of a threshold

17. Some national legal aid systems establish a threshold for the allocation of legal aid which is set in view, inter alia, of the average income of families and the average cost of the basic needs of a person or household. The threshold concept varies, however, depending on the jurisdiction: while in some systems the threshold aims at excluding the lowest income earners from a detailed indigence test,¹⁰ others use it as an upper limit above which no legal aid would be allocated.¹¹ In most cases, where a threshold is in use, the average is calculated at the local or national level. Therefore, if the Court were to adopt the same approach it would need to take into account the cost of living in all the countries where potential applicants or their dependants reside, as it would be difficult to establish a reasonable threshold which could be universally applied to applicants from other countries.

18. Establishing a threshold system would thus run the risk of setting arbitrary thresholds, and might create an unreasonable outcome where a person who would otherwise be entitled to legal assistance paid by the Court, as guaranteed by the Rome Statute, would be barred from exercising this fundamental due-process safeguard.

19. Finally, at this point in the Court's development, there is a limited number of cases before it, and the resultant experience simply does not permit an objective and appropriate upper limit to be set.

Recommendation 2:

20. Based on the foregoing, it is recommended that the application of the system for the determination of indigence be maintained, without introducing a threshold component for the allocation of legal aid. The Court is very much conscious of the fact that the establishment of a suitable threshold in the determination of indigence remains an issue of importance to the States Parties. The Court will continue actively to monitor the development of the proceedings with a view to determining what threshold amount (i) would be appropriate and (ii) corresponds to the reality of the length and costs of legal proceedings before the Court.

F. Assets of members of the applicant's household

21. The research and comparative review carried out among several national systems reveal that the Court's legal aid system is amongst the most exigent with regard to the inclusion of assets of applicants for the purpose of computation of available resources. For example, while the Registry takes into consideration all assets and income of the applicant, in various other systems the calculation of indigence is based solely on the annual income of the applicant and in some cases members of his or her household,¹² or, where assets are included, they are computed only if they have a value above a certain threshold.^{13 14}

¹⁰ Canada (Ontario).

¹¹ Australia, Finland, Greece, Italy, Japan, Lithuania, Malaysia (see sections 15, paragraph 2, and 16 of the Legal Aid Act [Act 26]), Portugal, Slovenia, Sweden (see chapter 31, section 1.3 3 of the Code of Judicial Procedure, and section 23 of the Legal Aid Act).

¹² An example is the situation in Italy, where the standard threshold of indigence is set at €9,723 annual taxable income, and earnings obtained from fraudulent means can also be taken into account. See

22. Legal aid systems which include the possibility of partial indigence¹⁵ provide for applicants to contribute a part of their disposable means to their legal assistance. In this regard, the Court's system is also stricter since it requires the contribution of all disposable means in the case of partial indigence.

23. Conversely, other systems take into consideration the assets of all members of the applicant's household, which is not the case with the Court's system, except in order to reduce the obligations of the applicant vis-à-vis his or her dependants. It bears noting that at the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), since the policy changes implemented in 2004, "[t]he Tribunal takes into account assets and incomes of people with whom the applicant habitually resides, i.e. individuals who usually live with the applicant or who would live with the applicant if he/she were not in custody, and with whom the applicant is financially co-dependent; meaning that there is evidence of a pooling of financial resources such that the applicant and the individual constitute one financial unit."¹⁶

24. A possibility for the Court, therefore, is to include such assets among the available resources for the purposes of assessment of indigence. However, it is reasonable to assume that any such decision taken by the Registry would be likely to become the subject of a request for review before the Presidency. At the ICTY, where a similar policy as the one being suggested is in place, since the adoption of the policy in 2004 five challenges have been brought before the ICTY judges on the practice. This number constitutes 23 per cent of all applicants that have been found partially indigent by the Tribunal. It must be equally noted however that all such challenges were struck down by the Chambers of the Tribunal, upholding the ICTY Registrar's specific findings in the cases and the principle that assets of household members can be taken into account if there is evidence of pooling of resources.¹⁷

25. The Court's current approach ensures that its determination of indigence brings into computation all relevant assets, as listed in regulation 84 (2) of the Regulations of the Court,¹⁸ which have a direct link to the applicant, while remaining sensitive to the obligations of the latter to his or her dependants. In this context, the existing system takes into consideration the assets held by dependants in order to determine the obligations of the applicants towards them, if any.¹⁹ The system's rationale is that except where those assets had been fraudulently transferred to the dependants for the purpose of concealment, it would be an unfair burden on the finances of such dependants to include them as funds which might serve to ensure the representation of the applicant.

Recommendation 3:

26. The Court recommends that as a general rule the assets of dependants ought not to be included in the computation of the means of the applicant, unless they constitute a financial unit (pooling of resources) with the applicant.

Monica Gazzola, *Presentation on the Italian Legal Aid System* (presented at the Court's expert meeting on legal aid, The Hague, Netherlands, 12 November 2008; see transcripts of presentation at pp. 30-31).

¹³ In Sweden, for example, this threshold is set at SEK 50,000. *Les documents de travail du Sénat, Série législation comparée: L'aide juridique* (juillet 2004), <http://www.senat.fr/lc/lc137/lc137.html> (last consulted on 6 February 2009).

¹⁴ In Slovenia it is set at €13,302, excluding the family residence and vehicle. See reply from the District Court of Ljubljana, Slovenia, received on 9 February 2009.

¹⁵ Such as Canada, Germany, the Netherlands or Sweden.

¹⁶ See annex III (a). See also Articles 8 and 10 of the ICTY *Directive on Assignment of Defence Counsel*, (Directive No. 1/94) (IT/73/Rev.10).

¹⁷ The five ICTY decisions mentioned are confidential ex parte, and their exact details are not available to the Court.

¹⁸ These assets include: "direct income, bank accounts, real or personal property, pensions, stocks, bonds or other assets held, but excluding any family or social benefits to which he or she may be entitled".

¹⁹ ICC-ASP/6/INF.1, para. 15.

G. Change of calculation period for the purpose of indigence

27. The current system divides by 60 the total value of assets other than real estate for the purpose of calculating the monthly disposable means of the person seeking legal aid.²⁰ Sixty months represents a conservative estimate for the purposes of depreciation of the assets, as well as corresponding to the likely length of proceedings before the Court.

28. The current length of proceedings in the case of every defendant who has appointed counsel is set out in table 1.

Table 1: Length of proceedings for defendants appointing counsel

Defendant	Current stage	Months since 1 st appearance (date of 1 st appearance)
Lubanga	Trial	40 (20 March 2006)
Katanga	Trial preparation	21 (22 October 2007)
Ngudjolo	Trial preparation	17 (11 February 2008)
Bemba	Trial preparation	13 (4 July 2008)

29. Mr. Lubanga, the first person to receive legal assistance paid by the Court, waited 35 months to see his trial open, and it is estimated, according to the Court Capacity Model, that the duration of the trial will be 26 months,²¹ meaning that the total duration of the proceedings in the Lubanga case will have been 61 months.

30. Other cases have progressed relatively faster, but the practice of the Court still seems far from the forecast projected in the Court Capacity Model (see table 2).

Table 2: Practice of the Court vis-à-vis the Court Capacity Model forecast

Stage	CCM* forecast	Lubanga	Katanga/Ngudjolo	Bemba
<i>Confirmation of charges</i>	3 months	10 months	11 months	11 months
<i>Disclosure and preparation for trial</i>	6 months	25 months		
<i>Trial</i>	15 months			
<i>Final appeals</i>	9 months			
Total	33 months			

*Court Capacity Model

31. It is fair to assume that with the passage of time and as more preliminary legal matters are settled by the Chambers, the expected length of Court proceedings will become shorter. Further, the Court is working actively to bring its practice closer in line with the Court Capacity Model forecast. Notwithstanding, experience to date has demonstrated a gap between the ideal length of proceedings as projected in the Court Capacity Model and the length of proceedings in practice. The Court considers that it has not yet arrived at a stage where it can establish a precise standard length of proceedings before it. The Court will continue to monitor the duration of the proceedings as more cases are litigated before it, and draw the appropriate conclusions including a reassessment of the proposed divisor in the future.

²⁰ Ibid., para. 14 (b).

²¹ ICC-ASP/5/10, Report on the Court Capacity Model, para. 23.

32. Where the length of the proceedings differs substantially from 60 months, or any other period chosen as reference, the Registrar may reassess the financial situation of the applicant and, where necessary, recover some or all of any excess sums paid by the Court. As regards the modalities of recovering monies overpaid, there are various mechanisms at the disposal of the Court for this purpose, which can be employed depending on the circumstances at hand. Examples include the ability of the Registrar to seek an order from the Chamber certifying monies owed to the Court, which can then be enforced against the applicant's assets at the national level through State cooperation. Further, if certain payments due under a previous indigence determination in the case are still outstanding, the Registrar may cancel such payments and retain the funds in view of the new indigence decision.

33. The Court may consider introducing an amendment to regulation 85 (4) of the Regulations of the Court²² to codify the right to recover moneys paid under the Court's legal aid system where the length of the proceedings in any given case is substantially shorter than the set divisor.

Recommendation 4:

34. The length of proceedings before the Court should be monitored in order to ensure that the divisor applied to the assets of applicants for legal assistance paid by the Court corresponds to the average length of cases.

H. Change of calculation method for real estate assets

35. The Court calculates the estimated monthly rent (EMR) of all real estate owned by the person claiming indigence.²³ This calculation is based on the value of the applicant's equity in the properties, and also takes account of any rights or obligations relating to them. In many countries, the value of properties is significantly higher than the equivalent of 60 months' rental value. Table 3 shows an approximate rental value calculation for a property in The Hague.

Table 3: Approximate rental value calculation for a property in The Hague

Capital value of property value	Estimated monthly rental	Capital value / 60	Monthly difference
€180,000	€1,300	€3,000	€1,700

36. Including the capital value of real estate owned by an applicant in the total of his or her assets, and thereafter dividing by 60, would increase the monthly disposable means of that applicant in relation to the method currently employed. The amount of such an increase would be proportional to the equity of the applicant in the property in question.

37. This approach would also facilitate the task of indigence determination, as real estate assets would receive the same treatment as other assets, namely division by 60.

Recommendation 5:

38. The valuation method for real estate should be changed, the EMR calculation being abandoned in favour of the total capital value, which would thereafter be divided by 60.

²² Regulation 85 (4) of the Regulations of the Court currently reads: "[s]ubject to rule 21, sub-rule 5, where legal assistance has been paid by the Court and it is subsequently established that the information provided to the Registrar on the applicant's means was inaccurate, the Registrar may seek an order from the Presidency for recovery of the funds paid from the person who received legal assistance paid by the Court. The Registrar may seek the assistance of the relevant States Parties to enforce that order."

²³ ICC-ASP/6/INF.1, para. 14 (a).

I. Other assets of the applicant

39. Reference needs to be made to “luxury items of extraordinary value, including but not limited to art and antique collections” which, as the Court has repeatedly stressed,²⁴ are never excluded from the assets of an applicant for legal assistance paid by the Court.²⁵

40. In respect of the applicant’s vehicles, up to two vehicles are excluded from the applicant’s assets for the purposes of calculating indigence, so long as these are not of a lavish or ostentatious nature. This is to allow the applicant’s dependants to meet their transport needs. Having reviewed this matter, it is proposed that the Registrar adopt a rebuttable presumption in favour of including vehicles as assets in the assessment of the applicant’s indigence.

41. Under the proposed approach, vehicles may be excluded from the calculation of indigence depending on several factors, including whether the available national statistics include the average cost of transportation for a person or household, the actual needs of the household and the value of the vehicles. In respect of the latter factor, as explained in the Indigence Report,²⁶ “[t]he value of vehicles considered as disposable means will be estimated according to any available official scale, or with the help of a certified expert”, and the Registrar will take this into account at the time of establishing the assets of the applicant. Only where the value of the vehicle is minimal compared with the average value of vehicles in the area and, where available, with the average cost of transportation in the place where the household members live – all of them determined with the help of national statistics where available – might the Registrar decide to exclude from the calculation such vehicles as deemed appropriate.

Recommendation 6:

42. It is recommended that, as a rule, the Registrar includes the value of all vehicles in the calculation of the assets of the applicant unless he or she deems that it is not reasonable to do so considering all the circumstances in any given case.

J. Conclusion

43. The funds allocated to the Court by States Parties for the implementation of its legal aid system are managed in strict conformity with the founding principles of the system (equality of arms, objectivity, transparency, continuity and economy).

44. Careful monitoring of the performance of the Court’s legal aid system in its entirety – including the determination of indigence process and the eligibility of applicants to receive legal assistance paid by the Court as well as the outcome of the financial investigations – will continue to ensure that the system provides effective and efficient legal representation.

45. The Court takes this opportunity to express its appreciation to the States that kindly provided their responses to the Registry’s questionnaire prepared for the purpose of drafting this report. The information received was of great use in reviewing and assessing the system in place for the determination of indigence.

²⁴ See, e.g., ICC-ASP/6/4, annex I.

²⁵ ICC-ASP/6/INF.1, para. 13 (b).

²⁶ Ibid., para. 13 (c).

Annex I

Further particulars of the calculation of indigence under the current system

[EMR: *Estimated Monthly Rent*]

- EMR is determined by the relevant housing authority of the place where the residence is located, or by an independent valuer.

[MSA: *Monthly Subsistence Allowance*]

- MSA = Monthly obligations to dependants of the person claiming indigence, based on cost-of-living statistics (CLS) made available by any official authority of the relevant country.

$$\frac{\text{MSA} = \text{CLS} \times 365 \text{ days}}{12 \text{ months}}$$

[MDM: *Monthly Disposable Means*]

- MDM will be calculated by subtracting the obligations of the person claiming indigence from the monthly value of assets, calculated as explained above. It will be used to determine indigence for the purpose of according legal aid to be paid by the Court.

$$\text{MDM} = \text{monthly value of assets of the person} - \text{MSA}$$

1. Consideration of assets in the determination of indigence

Included among the person's disposable means

The general rule is that all assets, including real estate, owned by the person claiming indigence are taken into account, as well as assets transferred to another person for the purpose of concealment, including stocks, bonds or bank accounts.

** [Source: ICC-ASP/6/INF.1, para. 13]*

Excluded during the determination of indigence

a) Residence:

- i) Residence belonging to the applicant: the estimated rental value would be deducted from the estimated needs of the dependants living there; if the rent was higher than the needs of those persons, the difference would be treated as a disposable asset of the applicant; and
- ii) Residence belonging to a dependant: the estimated rental value would be deducted from the estimated needs of the person in question (and, if necessary, those of other dependants living with the latter) up to the estimated value of those needs.

Note: *Any property found to have been fraudulently conveyed will be included in the calculation of the applicant's assets.*

** [Source: ICC-ASP/6/4, annex I]*

- b) Furnishings: essential items in main family home only – except for luxury items of extraordinary value, including but not limited to art and antique collections.
** [Source: ICC-ASP/6/INF.1, para. 13]*
- c) Motor vehicles: which are the property of the person claiming indigence – up to a maximum of two. However no vehicle of a lavish or ostentatious nature will be excluded (i.e. luxury vehicles will be included in the computation of the applicant's assets).
** [Source: ICC-ASP/6/4, annex I]*
- d) Family or social benefits: to which the person claiming indigence may be entitled are excluded.
** [Source: ICC-ASP/6/INF.1, para. 9]*
- e) Assets owned by the dependants: all are excluded pursuant to regulation 84 (2) of the Regulations of the Court.
** [Source: ICC-ASP/7/23, para. 60]*

2. Indigence determination

If the MDM is > monthly cost of the defence, applicant is not indigent.

If the MDM is < 0, indigence will be recognized to the full extent.

** [Source: ICC-ASP/6/INF.1, para. 18]*

Partial indigence determination

Indigence is determined for each phase.

- a) Pre-trial phase:
- i) Investigation to initial appearance
 - ii) Initial appearance to confirmation of charges.
- b) Trial phase:
- iii) Confirmation of charges to closing arguments
 - iv) Closing arguments to delivery of decisions.
- c) Appeals phase.

In addition, during the first 12 months of the procedure one twelfth of the sum allocated for investigations will be included in the cost of the defence.

- Where the MDM is sufficient to meet the cost of representation during one or more of these stages, indigence will not be recognized for the stage or stages concerned.
- Where the MDM is insufficient to satisfy this cost, the person will pay the MDM to the defence team on a monthly basis and the Court will contribute the rest.

** [Source: ICC-ASP/6/INF.1, paras. 19-32]*

Annex II

Recommendations

Recommendations	Advantages	Disadvantages
1. The first assessment of indigence will be prepared on the basis of whatever prima facie information is available to the Registrar, and will be valid while the financial investigation is ongoing.	<ul style="list-style-type: none"> – Preventing a gap in legal representation, ensuring that persons in need of legal representation receive this vital service. – Prevents delay in the proceedings caused by lack of legal representation. – Finding of non-indigence where there are credible reasons to believe that the person is not indigent and assets are not fully disclosed and/or hidden. – Possible financial savings. 	<ul style="list-style-type: none"> – Adoption of decisions without confirmed information. – Payment to persons who are potentially non-indigent. – Increase in requests for review by the Presidency, without any guarantee of success. – Possibility of having to reimburse all costs where the Presidency’s review finds in favour of the applicant.
2. Include assets and income of members of the household among the applicant’s available assets.	<ul style="list-style-type: none"> – Increase in assets pooled for the purposes of computation of means and determination of indigence. – Possible financial savings. 	<ul style="list-style-type: none"> – Unfair financial impact on innocent persons associated with persons implicated in proceedings before the Court. – Increase of requests for review before the Presidency, without any guarantee of success. – Possibility of having to reimburse all costs where the Presidency’s review finds in favour of the applicant.
3. Change the method for valuing real estate, abandoning the EMR calculation in favour of the net capital value, which would then be divided by 60.	<ul style="list-style-type: none"> – Increase in monthly value of real estate when considered for the purpose of assessment of indigence. 	<ul style="list-style-type: none"> – If proceedings last longer than the predicted 60 months, person will have been deprived of all his or her assets, and will then qualify for legal aid.

Recommendations	Advantages	Disadvantages
4. Monitor the length of proceedings before the Court in order to ensure that the divisor applied to the assets of applicants for legal assistance paid by the Court corresponds to the average length of the cases.	<ul style="list-style-type: none"> – Increased economy as the length of proceedings gets closer to the Court Capacity Model. – Allocation of reasonably necessary means is ensured. 	– Possible perception of lack of consistency or lack of respect for acquired rights.
5. The Registrar might exclude the value of cars of non-lavish or ostentatious nature from the calculation of the assets of the applicant in light of all local circumstances.	– More realistic assessment of applicant’s circumstances (value of cars, needs of family).	– Lack of predetermined rules, scope for Registrar’s discretion.

Annex III

Evaluation of indigence by the different international criminal jurisdictions surveyed¹

a) Assets

The following table outlines the treatment of assets in the computation of the disposable means of the legal aid applicant.
Yes: This means that the particular asset is included in the calculation of the applicant's indigence.

<i>Assets</i>	<i>ICTR</i>	<i>ICTY</i>	<i>SCSL</i>	<i>ECCC</i>
Residence	Yes	Yes: The principal place of residence of an applicant, his spouse or persons with whom he habitually resides; usually where the applicant would reside if he were not in custody is included in the computation. However, the Tribunal takes into account only the equity in the principal family home that exceeds the reasonable needs of the applicant, his spouse and the persons with whom he habitually resides. The principal family home will exceed the reasonable needs of the applicant, his spouse and the persons with whom he habitually resides if it is of greater value than the average family home in the region in which it is located.	Yes	Principal residence is not included.
Furnishings	Yes	No: Furnishings contained in the principal family home and owned by the applicant, his spouse or the persons with whom he habitually resides that are reasonably necessary for the applicant, his spouse and the persons with whom he habitually resides are excluded from the calculation, unless they can be considered as luxury items of extraordinary value, including but not limited to art collections, antique collections, etc.	Yes	Not included.

¹ Previously submitted as annex VI to document ICC-ASP/7/23.

<i>Assets</i>	<i>ICTR</i>	<i>ICTY</i>	<i>SCSL</i>	<i>ECCC</i>
Motor vehicles	Yes	Yes: The Tribunal takes into account only the equity in the applicant's principal family vehicle(s) that exceed(s) the reasonable needs of the applicant, his spouse and persons with whom he habitually resides. The principal family vehicle(s) will exceed the reasonable needs of the applicant, his spouse and the persons with whom he habitually resides if their combined value is greater than the value of one average automobile in the State in which the applicant's family resides.	Yes, provided they belong to the applicant.	Principal vehicle not included.
Other assets	Yes	Yes: The Tribunal takes into account all other immovable assets (second and third houses, apartments, land) or movable assets (stocks, bonds or bank accounts owned by the applicant, his spouse and persons with whom he habitually resides) and incomes (salaries, wages and commissions; business income after deducting reasonable expenses; investment income; government pensions; government allowances other than welfare payments; workers' compensation payments; alimony, separation and maintenance payments owed to the applicant; regular payments received under any annuity; pension or insurance scheme; regular payments received from a mortgage, agreement of sale or loan agreement; royalties).	Yes. Valuable assets like cash, income, movable and fixed assets.	Spousal assets, tools of the trade, non-disposable assets are not included.
Assets owned by dependants	Yes	Yes: The Tribunal takes into account assets and incomes of people with whom the applicant habitually resides, i.e. individuals who usually live with the applicant or who would live with the applicant if he/she were not in custody, and with whom the applicant is financially co-dependent; meaning that there is evidence of a pooling of financial resources such that the applicant and the individual constitute one financial unit.	The question that is posed is whether the applicant has any dependants; if yes, whether the dependants are working for a private or public institution at national/international level.	The assets of dependants not part of the 'household' are not included.

b) Obligations

<i>Obligations</i>	<i>ICTR</i>	<i>ICTY</i>	<i>SCSL</i>	<i>ECCC</i>
Calculation basis	The current threshold for a determination of indigence is USD 10,000.	All established liabilities are excluded from the applicant's disposable means (mortgages, loans, debts, insurances, taxes) including estimated living expenses for the applicant – the living costs likely to be incurred by the applicant, his spouse, his dependants and the persons with whom he habitually resides during the estimated period in which the applicant will require presentation before the International Tribunal.	Calculated on the basis of the suspect/accused's assets/income divided by the average monthly expenditure of the accused/suspect's household including accommodation and living expenses multiplied by the time the Principal Defender issues her decision on the extent to which an applicant is able to remunerate counsel. This time is estimated as the period in which the applicant will require representation before the Special Court for Sierra Leone at the pre-trial, trial or appeals stage. The amount which remains at the end of these calculations is what the Principal Defender uses to determine whether the accused/suspect is in a position to remunerate counsel until the conclusion of the estimated period within which the applicant will require legal representation before the Special Court for Sierra Leone.	Calculated for the estimated period of the trial.
Persons concerned	Suspects/accused persons	Suspects/accused persons	Suspects/accused persons	Suspects/accused persons

c) **Determination of indigence**

<i>Determination</i>	<i>ICTR</i>	<i>ICTY</i>	<i>SCSL</i>	<i>ECCC</i>
Formula used	The threshold is USD 10,000.	<p>From the established pool of income and assets, the Registry calculates the applicant’s disposable means. From the pool of assets as described under the “assets” table above, certain categories of assets are excluded. They are as follows:</p> <p>(a) the equity in the principal family home to the extent that is reasonably necessary for the applicant, his spouse and the persons with whom he habitually resides;</p> <p>(b) the equity in the applicant’s principal family vehicle to the extent that the principal family vehicle is reasonably necessary for the applicant, his spouse and persons with whom he habitually resides;</p> <p>(c) the equity in assets owned by the applicant, his spouse and the persons with whom he habitually resides that are not readily disposable;</p> <p>(d) the furnishings contained in the principal family home, except for luxury items of extraordinary value;</p> <p>(e) the equity in the tools of the trade owned by the applicant, his spouse and persons with whom he habitually resides that are reasonably necessary to the livelihood of the applicant, his spouse, his dependants or the persons with whom he habitually resides;</p> <p>(f) government welfare payments;</p> <p>(g) earnings of the applicant’s children; and</p> <p>(h) alimony, separation, or maintenance payments owed to the applicant’s spouse, his dependants or persons with whom he habitually resides.</p>	<p>The formula used to calculate the suspect’s/accused’s disposable income is: assets minus the estimated living expenses of the applicant’s dependants who habitually reside with/depend on him during the period beginning when the Principal Defender issues his/her decision until the end of the estimated period within which the applicant will require legal representation.</p>	<p>Estimate of the total cost of the trial, estimate of the assets and earnings of the charged person during the same period. Assessment of whether the accused is able to pay the entire cost of the trial.</p>

<i>Determination</i>	<i>ICTR</i>	<i>ICTY</i>	<i>SCSL</i>	<i>ECCC</i>
		From the disposable means, the Registry deducts the estimated liabilities and living expenses of the applicant's family and dependants during the estimated period in which the applicant will require representation before the International Tribunal. The amount remaining is the contribution to be made by the applicant to his defence.		
Partial indigence formula, if any	None actually applied due to difficulties encountered in gathering information on accused persons' assets, especially from member States.	As explained above. The balance of the applicant's pool of assets and income, minus those assets and income which are excluded from the asset base, minus the average expenditure of the applicant and his household members over the period for which he requires Tribunal-paid counsel.	The Principal Defender determines the threshold to be applied stating the minimum amount by an accused/suspect for that applicant to be considered partially/fully indigent. In situations in which an accused/suspect can afford to pay part of the cost of his defence but cannot meet the entire cost of his trial the presumption is that he is partially indigent. He is thus required to make a contribution towards his legal fees whilst the Special Court makes good the difference. It is worth noting that although the Principal Defender has declared one of the accused persons partially indigent, no actual contribution has been received by the Court from this individual as of now. The disposable means of the accused is tabulated against the threshold level and prorated with the cost of the trial, e.g. the disposable means of income minus the threshold of the total trial cost which is considered equal to the accused/suspect applicant's percentage.	If partially indigent, the full fees are paid by the ECCC, with the court able to order a payment of costs at the conclusion of the trial, in the event that the accused is convicted.

Annex IV

Models of legal aid systems

The comparative study of legal aid systems, based on the responses to the questionnaires sent out to States Parties, showed the following variations in national legal aid systems:

- a) Legal aid is automatically granted, without regard to the financial situation of the person receiving legal assistance, in certain circumstances such as: offences subject to imprisonment exceeding six months,¹ three years,² five years³ or for any offence for which counsel is required by law to participate in the proceedings;⁴
- b) Legal aid is automatically granted, but in certain circumstances its cost may be recovered at the end of the proceedings;⁵
- c) Where the State maintains a registry of indigent persons or families, inscription in such registry is an entitlement to receive legal aid;⁶
- d) Official welfare offices can also certify the indigence of applicants in some cases;⁷
- e) The decision on indigence is taken on the basis of the income and the assets of the applicant;⁸
- f) The basis for calculation is solely the income of the applicant;⁹
- g) The decision on indigence is taken on the basis of the income and the assets of the applicant and his or her family;¹⁰
- h) The basis for calculation is only the income of the applicant and members of his or her household;¹¹ or
- i) Judges seized of the case can make a decision on the basis of their own assessment and views.¹²

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¹ Norway.

² Japan.

³ Romania.

⁴ Estonia, Latvia.

⁵ Argentina, Poland, Sweden.

⁶ Georgia.

⁷ Cyprus, Malaysia, Mongolia.

⁸ Australia, Austria, Brazil, Ireland, Jamaica, Lithuania, Switzerland.

⁹ Finland, Sweden.

¹⁰ Argentina, Australia, Finland, Georgia, Luxembourg, Mongolia, Portugal, Slovenia, the Netherlands.

¹¹ Greece, Italy; in the latter case, assets are only taken into account if and as far as they produce actual income.

¹² Poland.