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

1. Resolution ICC-ASP/7/Res.3 of the Assembly of States Parties, in its paragraph 16, “[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;*” (emphasis added).

2. The present report addresses the second of these issues, which is the consideration of alternatives to the formula used at the Court to calculate indigence.

3. 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 20 March 2009, 26 replies have been received.

4. The following options and considerations have been put together for the deliberation of the Assembly. The annex sets out the recommendations made to States Parties by the Court, together with their advantages and disadvantages.

B. Principles applicable to the assessment of indigence

5. It is suggested that the basic principles of the system remain as those proposed in 2005,¹ which are mainly that the system should:

- a) Be based on objective criteria;

* Previously issued as ICC-ASP/8/CBF.1/3.

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), (ICC-ASP/6/INF.1), paras. 8-11.

- b) Allow applicants to honour their obligations to dependants;
- c) Be flexible in order to allow consideration of changes in their financial status; and,
- d) Be simple enough to implement and be understood by end-users.

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 system put in place, which the Committee on Budget and Finance (“the Committee”) supported as being founded on “a sound structure.”²

6. Amongst the inherent guarantees in the system, the principle of continuity applied in general to the legal aid regime plays a significant role in determining the need for legal aid funds being spent in conformity with the actual requirements of development of the proceedings. For example, in the case of the *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), the suspension of the trial could have resulted in a reduction of the funds allocated to the team had there not been an increase in their workload due to the existence of three simultaneous interlocutory appeals that required to be litigated and settled. 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 intervention of the Office of Public Counsel for the Defence in the proceedings

7. This same balance justifies the intervention, in limited cases, of the Office of Public Counsel for the Defence. This Office provides assistance to legal teams irrespective of whether or not they act within the framework of the legal aid system. The services of the Registry in charge of implementing the Court’s legal aid system and the independent Office of Public Counsel for the Defence are, and function as, separate offices at the Court and do not share any overlapping functions. As stated in previous reports, the Office of Public Counsel for the Defence comprises “staff” who are directly paid by the Court and who provide substantive legal assistance and advice to defence teams, as well as duty and ad hoc counsel. As with all other sections, it budgets in accordance with its mandate and specific needs under the umbrella of the Registry for this administrative purpose. As to the impact of the Office of Public Counsel for the Defence on the resources allocated to legal aid, the following should be borne in mind:

- a) The Court’s legal aid budget allocates resources to external counsel, and where applicable, to their team members, to ensure that applicants who are eligible benefit from effective and efficient legal representation in proceedings in conformity with the applicable legal texts (regulation 83 of the Regulations of the Court);
- b) In devising the 2007 adjustments and tabling suggestions for modifying the Court’s legal aid system, which were later supported by the Committee, the Registry took into account the services provided by the Office of Public Counsel for the Defence and its impact on the legal aid budget;
- c) As a general rule, when considering requests for additional resources pursuant to regulation 83, paragraph 3, of the Regulations of the Court, the Registrar takes into account the assistance provided by the Office of Public Counsel for

² *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, part B.1, para. 80.

the Defence to a team on a case-by-case basis to determine the extent to which additional resources, if any, are warranted in the circumstances;

- d) Pre-Trial Chamber I ruled that the Office of Public Counsel for the Defence would appoint ad hoc counsel for all future victim participation applications in the situations in the Democratic Republic of the Congo (“the DRC”) and Darfur.³ It has also appointed ad hoc counsel in the Uganda situation, and although the ultimate decision will be taken by the competent Chamber, similar appointments can be expected for the situation in the Central African Republic. Notwithstanding these appointments, the extent of assistance provided by the Office of Public Counsel for the Defence to defence teams is, and will be, limited by the need to avoid conflicts of interest which would prejudice its ability to furnish assistance to legal teams in accordance with its mandate. Examples include duty counsel appointments for persons being interviewed by the Office of the Prosecutor in accordance with article 55 of the Rome Statute, or appointments as defence counsel to represent persons in the custody of the Court for the duration of the proceedings. In these non-exhaustive circumstances, only external counsel have been appointed thus far, and it is likely to remain so, bearing in mind the circumstances of each appointment and the requirements of regulation 73 of the Regulations of the Court governing duty counsel appointments; and
- e) The Registry is considering the adoption of a formal policy to increase the involvement of external counsel in proceedings before the Court, in line with repeated declarations of the associations of lawyers consulted on this. This would mean that, as a rule, external counsel would be appointed in the framework of the Court’s legal aid payment scheme.

8. Although it does not have a direct bearing on the assessment of indigence, except in isolated cases where no one has been charged or brought before the Court (ad hoc counsel) or persons interviewed by the Prosecutor in the framework of article 55, paragraph 2, of the Statute, it is important to stress that there is also no duplication between the Office of Public Counsel for the Defence and the appointment of duty or ad hoc counsel. While it is evident that appointing the Office of Public Counsel for the Defence in such instances would suggest a reduction in legal aid expenses, it bears mentioning that the following appointments still make it necessary to foresee in the legal aid budget the necessity of such appointments, moreover where it is the power of the Chamber to appoint them:

- a) Appointments as duty counsel are relatively infrequent (one in nine in 2007, and none in 14 in 2008); and
- b) Appointments as ad hoc counsel being more frequent (four out of five in 2007, and four out of six in 2008)

D. Considerations on the first assessment of indigence

9. This is an issue not strictly related to the calculation of indigence but which, nevertheless, has a close link is the first assessment of an applicant’s indigence. It deserves careful consideration because of the potential risks it represents to the performance of the system by, inter alia, compelling the Court to pay for the legal assistance of persons who

³⁴⁴Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation”, 17 August 2007, ICC-01/04-374. This decision was subsequently approved in the Darfur situation: “Decision on the time limit to submit observations on applications for participation as victims: a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 and on the extension of page limit”, 22 August 2007, ICC-02/05-96.

might have hidden a part or all of their assets at the time of presenting the relevant declaration of resources to the Registry.

10. In accordance with regulation 85, paragraph 1, of the Regulations of the Court, the Registrar is obliged to decide on the indigence of a person within one month of the submission of an application for legal aid once he/she is satisfied that all requisite material and information on the applicant's financial situation have been received.⁴

11. In general, the Registry can make a first assessment in the delay authorized by the legal texts of the Court through, for instance, verifying the accuracy of the statements made by the person seeking legal aid and the alleged standard of living of his/her family. Whilst this approach will provide the Registry with an initial accurate appreciation of indigence in certain cases, practice has demonstrated that the period of one month allocated for a final decision to be rendered by the Registrar is insufficient in many cases to reach a truly comprehensive and accurate assessment on the financial situation of the person concerned. For example, where front-men are involved, or assets are placed in offshore financial or similar centres, it would be difficult to carry out a complete financial investigation in only one month. The same could be said where the family of the person seeking legal aid is not benefiting from, or aware of, part or all of the applicant's assets. At this early assessment phase, the lack of sufficient information available in most cases does not permit the Registrar to apply the full calculations required to arrive at a final determination of indigence.

12. In order to ensure there are no gaps in legal representation for persons implicated in Court proceedings and to prevent unnecessary delays, it is proposed, in the interest of justice, that this first assessment based on the initial information available to the Court be considered sufficient to validate a preliminary decision of the Registrar on the indigence of the person seeking legal aid. This decision will remain in force unless and until the Registrar receives additional information warranting a modification to the initial assessment. This approach would also be in keeping with regulation 132, paragraph 3, of the Regulations of the Registry.

13. This rule is subject to certain exceptions, e.g. when the Registry, based upon objective data, has grounds to believe that an applicant is not indigent, and public confidence in the Court would be irreparably damaged if a provisional finding of indigence is applied i.e. to a person who is known to be affluent, the Registry would apply a reverse policy in the initial assessment and would provisionally declare the person not indigent until the financial investigation into the means of the person has been finalized. Again, it is emphasized that this is the exception and not the norm. The Registry may introduce an amendment to regulation 84 of the Regulations of the Court to expressly provide for this exception.

Recommendation 1

14. 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. In this interim period, reviews by the Presidency of the Registrar's initial decision on indigence should take into account the specific circumstances of the impugned decision.

E. Considerations on the proposed establishment of a threshold

15. In many national legal aid systems, a threshold is established for the allocation of legal aid⁵ which is set in view of, inter alia, the average income of families and the average

⁴ See regulations 131, paragraph 2, and 132, paragraph 3, of the Regulations of the Registry.

⁵ See, for example, Australia, Belgium, Canada, Finland, France, Italy, Malaysia (see sections 15, paragraph 2, and 16 of the Legal Aid Act (Act 26)), Mongolia, Portugal, Slovenia, Lithuania, the

cost of the satisfaction of the basic needs of a person or household. Similarly, in some jurisdictions, persons who receive social assistance are, in principle, presumed indigent and hence eligible to receive legal aid funds when needed.⁶ In other jurisdictions surveyed,⁷ legal aid is an automatic entitlement in criminal cases, irrespective of the financial means of the accused person. Since in most cases where a threshold is in use the average is calculated at the local or national level, if the Court were to adopt the same approach it would need to take into account the cost of living in the country of the applicant himself, as it would be difficult to establish a reasonable threshold which could be universally applied to applicants from other countries.

16. More importantly, the need to enable adequate legal representation before the Court differs significantly from the need existing before national jurisdictions: the scope and complexity of the crimes under the Court's jurisdiction, the specificity of the law of the Court and the sheer number of documents both in the case file and disclosed by the Prosecutor, all combine to make representation before the Court both *sui generis* and demanding. Practical considerations such as the distance between the lawyer's domestic practice and the seat of the Court, the need to travel to and stay in The Hague for the purpose of hearings, contacts with the client and all other participants, investigation missions to the field to search for evidence and interview potential witnesses, inter alia, only add to the taxing reality of the legal practice before the Court. The existing indigence determination of the Court is specifically designed to be in tune with the specificities of the system and calculates the disposable means of an applicant taking into account the actual cost of legal assistance as required by each phase of the Court's proceedings. A threshold formula based strictly on the average income or obligations cannot be universally applied to applicants and, moreover, would not be responsive to the actual costs of legal representation in proceedings before the Court.

17. Further, the establishment of a reasonable and universally applicable threshold which is not arbitrary and adequately responds to the actual costs of legal representation before the Court would be a difficult challenge. While it would be possible to arrive at a general threshold, it is the position of the Court that such an approach would create an unbalanced assessment of applicants depending on the country in which they or their dependants resided. Moreover, the need to be accurate in the assessment of disposable resources would entail a major undertaking from the Court to survey and take into account the requisite data and information concerning the average standard of living of all countries in the world, many of which apply different standards in different regions of the country. Aside from the practical realities and human resources this study requires, it would also be an ephemeral exercise, since the established threshold would be subject to variations every few years. It bears noting that, in view of the practical difficulties outlined by the limited length of time during which the Registrar is required to render a decision on determination of indigence, a possible review and amendment to regulation 84 of the Regulations of the Court may be required in this regard, and implemented in the future.

18. Moreover, while the threshold, once established, may simplify the issuance of the Registrar's determination of indigence, it would in no way guarantee that the legal aid system stays true to one of its founding principles, that of "economy." The current system adequately ensures that persons in need of legal aid are provided such vital services commensurate with

Netherlands and Sweden (see Chapter 31, section 1.3.3 of the Code of Judicial Procedure and section 23 of the Legal Aid Act).

⁶ See, for example, the legal aid systems of Belgium, Canada, France, Georgia, Latvia, the Netherlands, Portugal and Switzerland.

⁷ The legal aid systems of the following States Parties: Estonia, Finland, and Norway, grant legal aid automatically to persons implicated in criminal proceedings. Until January 2009, Georgia, pursuant to article 23.4 of the Law of Georgia on Legal Aid, also automatically afforded legal aid to all suspects, accused, defendants and convicts implicated in criminal proceedings irrespective of their means. Since 1 January 2009, only indigent persons are entitled to receive legal aid.

their means and obligations to dependants, as well as the actual costs of legal representation of proceedings before the Court.

19. Based on the foregoing, it is therefore suggested that a threshold for the allocation of legal aid not be established and that the application of the current system be continued, with the introduction of curative measures where necessary.

20. The existing system has checks and balances in place to ensure that adequate legal assistance is provided to indigent persons, while remaining true to the principle of economy, which guides the Court's legal aid system and generally all functions of the institution. The Court's legal aid system as established can be considered to have an individualized threshold system, which more accurately assesses indigence by taking into consideration the standard of living in the regions where the dependants of the applicant reside and the actual costs of an effective and efficient legal representation in proceedings before the Court.

F. Assets of members of the applicant's household

21. The research and comparative review carried out thus far among several national systems illustrate 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, e.g. 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,⁸ or, where assets are included, they are computed only if they have a value higher than a certain threshold, e.g. in Sweden, this threshold is set at SEK50,000,⁹ and in Slovenia it is set at €13,302, excluding the family residence and vehicle.¹⁰

22. Legal aid systems which include the possibility of partial indigence, such as Canada, Germany, the Netherlands, or Sweden, establish that applicants shall contribute a part of their disposable means, i.e. after deducting their obligations, to their legal assistance. In this regard, the Court's system is also stricter since it foresees 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. The approach of the Court in this respect was based on the rationale that except where those assets had been fraudulently transferred to the dependant(s) for the purpose of concealment, it would be an unfair burden on the finances of such dependant(s) to include them as funds which might serve to ensure the representation of the applicant. An alternative possibility 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 likely become the subject of a request for review before the Presidency.

⁸. See 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).

⁹ *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).

¹⁰ Reply from the District Court of Ljubljana, Slovenia, received on 9 February 2009.

Recommendation 2

24. Assets and income of members of the applicant's household should be included among the available assets of the person seeking legal aid for the purpose of determining indigence.

G. Change of calculation period for the purpose of indigence

25. The current system, as presented to the Committee, divides by 60 the total value of assets other than real estate for the purpose of finding the monthly disposable means of the person seeking legal aid.¹¹ The reason advanced in 2005 was the consideration of a period of 60 months as a cautious approach for the purposes of depreciation of the assets. It was also adopted taking into account the possible length of proceedings before the Court in order to avoid, as far as was possible, the possibility that a longer period would have the effect of rendering the applicants indigent.

26. 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	36 (20 March 2006)
Katanga	Trial preparation	17 (22 October 2007)
Ngudjolo	Trial preparation	13 (11 February 2008)
Bemba	Pre-Trial	9 (4 July 2008)

27. Where the first person having received legal assistance paid by the Court has waited 35 months to see the trial open, and where the rest of the proceedings according to the Court Capacity Model would last 26 months,¹² the total duration of the proceedings in the Lubanga case would have been 59 months.

28. 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	
<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

¹¹ 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), (ICC-ASP/6/INF.1), para. 14(b).

¹² Report on the Court Capacity Model (ICC-ASP/5/10), para. 23.

29. It is important to note that the duration of the proceedings in the first cases before the Court is partly linked to the fact that, as initial cases, they have invoked countless novel issues of legal interpretation amongst other considerations and litigious matters that need to be settled by the Chambers. 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 progressively adapt to the Court Capacity Model forecast.

30. As the proceedings before the Court have no standard duration from which to make an average for all cases, the Court will continue monitoring it and will revert to the Committee when the cases currently before it have concluded to see if it is necessary to adjust the divisor for the calculation of indigence.

Recommendation 3

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

H. Change of calculation method for real estate assets

32. The proposal presented in 2005 suggested calculating the estimated monthly rent (EMR) of all real estate owned by the person claiming indigence.¹³

33. In many countries, the value of properties is sensibly higher than the value of 60 months of rent. Table 3 sets out an approximate appraisal of a property in The Hague.

Table 3: Approximate appraisal of a property in The Hague

Property value	Estimated rent value	Total value / 60	Monthly difference
€180,000	€1,300	€3,000	€1,700

34. Inclusion of the property value in the total of assets owned by an applicant, thereafter divided by 60, would increase the monthly disposable means of that applicant in relation to the method currently employed. Such an increase would be proportional to the real estate property of the applicant.

35. This approach would also simplify the task of the relevant services of the Court in the indigence determination as real estate assets would receive the same treatment as the rest of them, which is divided by 60.

Recommendation 4

36. The evaluation method of the real estate should be changed, abandoning the EMR calculation in favour of the total value, which would thereafter be divided by 60.

I. Conclusion

37. The funds allocated to the Court by States Parties for the implementation of its legal aid system, a service crucial to guaranteeing the integrity and rights of all participants in Court proceedings, are managed in strict conformity with the founding principles of the system (mainly equality of arms, objectivity, transparency, continuity and economy). The

¹³Report 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), (ICC-ASP/6/INF.1), para. 14 (a).

Court is cognizant of the fact that a prima facie review of its system for the determination of indigence may lead to the perception that it is overly generous to the onlooker. On closer inspection and scrutiny, however, it will become evident that the system has been established with great care to ensure that it strikes a reasonable balance between the need for economy and equality of arms, and always guided by objectivity criteria.

38. After a review and assessment of the different formula employed at the national level (in both common and civil law, and hybrid jurisdictions) in the determination of indigence, it is suggested that the indigence determination formula in use by the Registry is adequately responsive to three main considerations:

- a) The need to take into account the obligations of person(s) seeking legal aid towards dependants;
- b) The determination of indigence is based solely on objective criteria as measured against the actual costs of legal representation in Court proceedings; and
- c) The system is managed with the utmost respect for economy, while great care and oversight are employed to ensure its judicious application.

39. Careful monitoring of the performance of the Court's legal aid programme will continue to ensure that the system provides effective and efficient legal representation guided by the above-mentioned founding principles.

40. 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.

Annex

Recommendations

Recommendations	Advantages	Disadvantages
<p>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. In this case, it is submitted that the review by the Presidency should be adapted to the specific circumstances of the decision.</p>	<ul style="list-style-type: none"> - Preventing a gap in legal representation, ensuring that persons in need of legal representation receive such vital services - Prevents delay in the proceedings caused by lack of legal representation - Finding of not indigent for persons, in circumstances where there are credible reasons to believe that the person is not indigent and assets are not fully disclosed and/or hidden - Possible savings 	<ul style="list-style-type: none"> - Adoption of decisions without confirmed information - Payment to persons who are potentially not indigent - Increase of requests for review before the Presidency, without any guarantee of success - Possibility of having to reimburse all costs where the Presidency finds in favour of the applicant in the request for review
<p>2. Include assets and income of members of the household among the assets available of the person.</p>	<ul style="list-style-type: none"> - Increase in assets pooled for the purposes of computation of means and determination of indigence - Possible 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 finds in favour of the applicant in the request for review
<p>3. Change the evaluation method of the real estate, abandoning the EMR calculation in favour of the total value, which would be thereafter divided by 60.</p>	<ul style="list-style-type: none"> - Increase of 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 foreseen 60 months, person will be deprived of all his or her assets, and he or she will then qualify for legal aid
<p>4. Monitor the length of proceedings before the Court in order to ensure that the divisor used for the assets of applicants to receive legal assistance paid by the Court corresponds to the average length of the cases.</p>	<ul style="list-style-type: none"> - Increased economy where the length of proceedings gets closer to the Court Capacity Model - Allocation of reasonably necessary means is ensured 	<ul style="list-style-type: none"> - Possible perception of lack of consistency or lack of respect for acquired rights