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14-22 November 2008**Report on appropriate resources for financial investigations under
the Court's legal aid programme***

1. This report is submitted to the Committee on Budget and Finance (hereinafter referred to as "the Committee") pursuant to paragraph 73 of the Committee's report on the work of its ninth session, held at The Hague from 10 to 18 September 2007,¹ in which the Committee invited the Court to consider how the function of financial investigator could best be performed and funded in the long run and requested it to report to the Committee on this subject at its next session.

2. During the work of its fourth session, the Committee agreed with the Court that the determination of indigence should be conducted in an objective manner on the basis of a full examination of each applicant's financial assets and income. It therefore encouraged the Court to propose appropriate resources to fund an investigation capacity to locate the financial assets of persons declaring themselves to be indigent.² Such resources would enable the Court thoroughly and rigorously to examine the claims of persons requesting legal assistance paid by the Court.³

3. In determining appropriate financing for the function of financial investigator, as further described in the second part of this report, the Registry took into account the constraints, difficulties and challenges involved in any financial investigation and, in particular, investigations undertaken as part of proceedings before the International Criminal Court.

* Previously issued as ICC-ASP/7/CBF.1/1.

¹ *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 II.B.2.II.C.2 (j), para. 73.

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, fourth session, New York, 28 November - 3 December 2005* (International Criminal Court publication, ICC-ASP/4/32), Part II.B.6 (a) II.F, para. 50.

³ *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 II.B.2.II.C.2 (j), para. 73.

I. Context of the financial investigation

4. The primary objective of the function of financial investigator in the context of legal assistance paid by the Court is to provide the Registrar with reliable evidence to enable him to decide whether the claimant requesting legal assistance:⁴

- (a) should be considered completely indigent, so that all the costs relating to his/her representation before the Court will be paid in full;
- (b) should be considered partially indigent, so that the costs relating to his/her representation before the Court will be paid in part; or
- (c) should not be considered indigent, so that none of the costs relating to his/her representation before the Court will be paid by the Court's legal aid system.

5. The function of financial investigator also allows action to be taken pursuant to a decision of the competent Chamber relating to the assets of a suspect or defendant who has wrongly been granted legal assistance, so that all his/her national and international assets can be temporarily frozen to permit, inter alia, the full or partial recovery of all or some of the costs which may have been incurred by the Court.⁵

6. Incidentally, the function of financial investigator will help the Registrar to deal more effectively with any financial irregularities which might occur among the teams of counsel working under the Court's legal aid scheme (fee splitting, fee padding, etc.). From this point of view, it helps to strengthen the monitoring mechanisms intended to detect abuses of the Court's legal aid scheme.

7. In order to assess the indigent status of the person claiming legal assistance paid by the Court, it is essential to have specific, accurate, reliable and legally acquired information. The financial investigation faces various constraints in the collection of relevant information. The main constraints may be summarized as follows.

Shortness of deadlines

8. Regulation 85.1 of the Regulations of the Court obliges the Registrar to reach a decision relating to indigence within one month of the submission of the application for legal assistance to be paid by the Court. In addition, paragraph 3 of the same regulation allows any claimant to seek a review of the Registrar's decision by the Presidency. The experience of other international criminal jurisdictions has shown that investigators required a relatively long period – sometimes several months – to complete their investigations with the necessary degree of rigour. Consequently, the shortness of the legal deadline imposed on the Registrar for making his decision and the possibility of review available to the claimant appear to constitute major constraints which justify the need to create resources which will promote a proactive approach to financial investigation and allow the Registrar to consider the applications for legal assistance paid by the Court which are submitted to him with the necessary rigour and diligence.

Difficulties in the collection and analysis of evidence

9. One of the first tasks facing a financial investigation team is to collect and analyse evidence and documents found on the persons concerned or in their surroundings. It is not always easy to obtain or communicate this evidence. Access to relevant documents may be

⁴ The term "claimant" may refer to the suspect, the defendant or the victim.

⁵ Regulation 85.4 of the Regulations of the Court authorizes the Registrar to seek an order from the Presidency for recovery of funds paid when it is proved that the person receiving legal aid provided information which is subsequently proved to be inaccurate.

delayed. Experience has shown that any delay in this process is likely to entail the loss of documents or important information. Therefore, in order to maximize the amount of information collected, access to all evidence must, or should, be gained immediately. If financial investigators could lay hands on some or all of the suspect's assets very rapidly, or could locate them accurately enough that they could induce a State to intervene, the Registry could rule directly whether the person was indigent or not.

Need for international cooperation

10. International cooperation is particularly necessary since the assets of legal-assistance claimants will probably be spread over various countries or among various financial institutions. However, international collaboration is more difficult to obtain in financial investigations, since it involves the law of currency circulation. This difficulty is even more acute in cases where the legal-assistance claimant is supported and, in particular, well advised, and can hide, or try to hide, his/her assets, both movable and immovable, for example by using pseudonyms or digital codes. Therefore, in order to impede or thwart these manoeuvres, effective mechanisms for cooperation with the actors involved must be put in place if the success of the investigations is to be guaranteed. This should, in fact, be one of the financial investigators' aims.

11. Given that the concealment of assets outside the country can be suspected in many cases, a system of international collaboration should be provided. Moreover, the fact that the investigation has to be structured as an asset search rather than an attempt to establish a suspect's guilt will further increase the time required to obtain replies to the request for cooperation.

Need for local collaboration

12. Plans must be made for cooperation with existing local and national structures, which have a better knowledge of the local political situation, taking all due account of the risks of corruption and leaks. Collaboration with local sources should be undertaken with caution: this guarantees, inter alia, the objectivity of the investigator's report and presupposes that the report is based on information from unbiased local sources. From this point of view, these sources must be regularly assessed and updated.

Need for internal cooperation

13. The Office of the Prosecutor employs a financial analyst whose mandate goes beyond merely identifying the financial assets of suspects and defendants. Cooperation between this function and the financial investigation conducted by the Registry would help to ensure that the Court's resources are used judiciously and avoid any duplication.

14. In this type of investigation, the preliminary research undertaken by the prosecution should complement the financial investigations, since data which can be used for the financial investigations may – perhaps – be in the possession of the Office of the Prosecutor. Clearly, this cooperation is not intended to interfere with the mandate of the Office of the Prosecutor.

Security and protection of sources

15. The task of identifying concealed assets likewise requires contact with various persons. Although some of them will collaborate readily because involvement is not a danger to them, that will not be true for all of them. It should be remembered that, in this type of investigation, witnesses and "sources" will need to be identified, located and, if necessary, protected. If important documents should happen to be discovered, they will need to be

secured quickly because of their content. This situation explains why, inter alia, action involving certain budgetary considerations will need to be taken.⁶

II. Financing of the financial investigation

16. The clearly identified and desired strategic objective is to have one or more teams of experienced, reliable, committed, neutral and incorruptible financial investigators to provide active support for the decision to be taken by the Registrar⁷ about the financial participation of the person claiming legal assistance paid by the Court.

17. At present, the Registry has only one approved financial-investigator post (P3). Although the vacancy notice has been re-issued, the Registry has received no applications from candidates with sound experience and proven expertise in complex financial investigations, coupled with experience in collaboration with institutions active in finance, information and/or the police services. The Registry is convinced that the current classification of the post is not conducive to attracting the best possible candidates and that its reclassification to P4 level would do a great deal to promote the timely recruitment of the financial investigator. The Registry therefore plans to reclassify the post to P4 as part of the consideration of the Court budget for the financial year 2009.

18. Besides the reclassification of the financial-investigator post, a number of options have been studied for financing the function of financial investigation related to legal assistance: the establishment of a team of permanent financial investigators (Option 1), the establishment of a team of investigators available “on demand” (Option 2) or the establishment of a modular team (Option 3). The option recommended should combine the need to use the Court’s limited resources effectively and the need to conduct a rigorous and diligent investigation of the assets of persons claiming legal assistance to be paid by the Court.

19. *Option 1* is to establish a *permanent team* consisting of one financial investigator at P4 level, one financial analyst at P3 level and one administrative support worker at GS level. These resources would make it possible to establish a permanent structure for financial investigations within the Registry

20. The advantages of this option are, inter alia, the team’s ability to act immediately, conduct regular case analyses and capitalize on the experience gained in earlier investigations. It would also allow contacts to be developed and maintained and negotiations to take place both internally and with external organizations (especially national police forces, financial institutions, the International Criminal Police Organization (INTERPOL), the European Police Office (EUROPOL), the European Anti-Fraud Office (OLAF),⁸ the European Union’s Judicial Cooperation Unit (EUROJUST), non-governmental organizations and embassies), partly in order to benefit from their expertise, particularly the way they fulfil their mandate in the field (e.g. movement around the region, access to administrative, police and court databases).

21. The main disadvantage of this option is the financial burden it would entail for the Court. The implementation of this option would require the provision of an extra 513,200 euros in the Court’s annual budget to cover staffing costs for financial investigations.

⁶ These considerations may be analysed on a case-by-case basis.

⁷ Regulation 84, para. 1 of the Regulations of the Court.

⁸ Although these organizations (EUROPOL, EUROJUST and OLAF) were theoretically created as part of the European Union, they have ramifications and potential areas of action which go beyond the European area.

22. *Option 2* is to establish a *group (pool) of qualified investigators* who would operate only when the need for an investigation arose.
23. The advantage of this option is that a team of specialists in the relevant fields will be available, who will be paid on a consultant basis. There will, therefore, be no financial burden on the Court between investigations and, when action is required, costs will be confined to consultancy fees covering a limited period. Three months seems a reasonable reference period for this purpose.
24. This team would consist of three consultants specializing in case analysis, financial research and financing methods of criminal organizations. The cost of running the team would amount to approximately 80,000 euros for three months of investigation.
25. However, the disadvantages of this option are that there will be no proactive interventions or continuity in investigations. Similarly, this solution provides few guarantees of its capacity to support the Registrar in reaching appropriate decisions within the legally ordained time limits imposed on him.
26. *Option 3* is to appoint a full-time *financial investigator* to ensure coordination and continuity of investigation activities. The investigator would be assisted by a *small team of consultants* specializing in financial analysis and/or financing methods of criminal organizations, one of whom would be a native of the country of the person claiming legal assistance paid by the Court. This team would only operate when the need arose.
27. This option combines the advantages of the first two options, without suffering their disadvantages. Moreover, taking into account the resources currently allocated to financial investigations for the appraisal of indigence, it will not impose an excessive financial burden. In addition to the post of financial investigator, which has already been included in the budget, it is thought that an annual provision of 50,000 euros would cover the costs of the experts employed as consultants.
28. The Registry is of the opinion that, in the short term, **Option 3** best responds to the concerns expressed by the Committee at its ninth session, and recommends this option.
29. The Court will approach States Parties to ask for temporary staff to be seconded as gratis personnel to support the implementation of any of the options.
30. However, it should be emphasized that the Registry will study the lessons learned from the use of the recommended option and decide whether it needs to ask in the near future for more resources, if the experience gained proves them to be necessary.