

**Tenth session**

New York, 12-21 December 2011

**Report of the Court regarding the desirability of absolute thresholds for the purposes of indigence calculation\*****I. Introduction**

1. In paragraph 22 of resolution ICC-ASP/8/Res.3, the Assembly of States Parties (hereinafter “the Assembly”) “[t]akes note of the report, “Legal Aid: Alternate Methods for the Assessment of Indigence”, submitted by the Court to the Assembly, endorses the recommendations contained therein, and invites the Court to report to the Assembly at its tenth session on the desirability of introducing absolute thresholds of asset holdings beyond which legal aid would not be provided”.<sup>1</sup>

2. In its report of the Court on legal aid: Alternative models for assessment of indigence,<sup>2</sup> the Court had 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”. This recommendation followed a thorough consideration of the practice of other international criminal jurisdictions, as well as that of an important number of States which had replied to a questionnaire sent to all States Parties in 2009 about their respective legal aid systems. It is also in line with a similar recommendation made by the Court in 2008.<sup>3</sup>

3. The principal reasons behind the Court’s recommendation were as follows: a lack of consistency in the approach of States to the concept and function of a threshold; the difficulty of adopting such a threshold where it has to apply to States with very different costs and standards of living; the fact that a threshold does not adequately take into consideration the particular needs of the family of persons claiming indigence; and the limited experience of the Court to date, which makes it premature to attempt accurately to forecast the standard duration of proceedings before the Court. It bears noting that not a single case before the Court has yet concluded the trial phase.

4. Moreover, due to the complex nature of the Court’s proceedings, the resources required for effective legal representation before the Court differ from those required at national level. Distinctive aspects of ICC practice include, inter alia, expenses related to long stays in The Hague away from counsel’s place of ordinary residence, as well as investigation missions to the field, and the fact that counsel and legal team members have

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<sup>1</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth session, The Hague, 18-26 November 2009* (ICC-ASP/8/20), vol. I, part II, p. 23.

<sup>2</sup> ICC-ASP/8/24, paras. 17-20.

<sup>3</sup> Report on different legal aid mechanisms before international criminal jurisdictions (ICC-ASP/7/23), paras. 63-65.

to reduce their national practices in order to fulfil their mandates before the Court, and must therefore be adequately compensated for this loss.<sup>4</sup>

5. The subsequent practice of the Court has also shown that the main challenge it faces regarding the assessment of indigence is not related to the level at which indigence is established, but to exhaustively identifying the assets belonging to an individual in cases where steps have been taken to conceal those assets. In this regard, the Court is grateful for the cooperation that States Parties have provided pursuant to articles 57(3)(e) and 93(1)(k) of the Statute and Regulation 85(4) of the Regulations of the Court, and trusts that such cooperation will increase further as needs arise.

## **II. Recommendation of the Court regarding thresholds**

6. The rationale underlying the previous recommendation of the Court not to establish thresholds has not changed in the intervening period, and the Court therefore maintains the recommendation it made in 2009 not to use thresholds in the determination of indigence.

7. Appreciating, however, that the Assembly attaches importance to this issue and wishes to explore the matter further, the Court offers below some options for the consideration of the Assembly in future discussions.

## **III. The functions of the threshold**

8. The comparative survey carried out by the Court in 2009 demonstrates that, in the practice of the different States, thresholds can have two fundamental functions: they are used either as a ceiling above which persons are deemed not indigent, and therefore no legal aid is granted, or alternatively as a floor below which all legal aid applicants would be deemed indigent.

9. Should there be an ultimate decision to establish a threshold, it is proposed for it to be composed of both elements, an upper limit or ceiling and a lower limit or floor, reflecting the real cost of legal representation before the Court over a long period of time and establishing clear boundaries between situations where a person would be totally indigent, partially indigent or not indigent.

## **IV. The absolute or relative character of a threshold**

10. A threshold could be defined that gives no consideration to the particular circumstances of each claimant; the Court in its assessment of indigence would thus only take into consideration the assets of claimants, without having to enter into an analysis and calculation of their obligations towards dependants.

11. Alternatively, the threshold could allow for consideration of the obligations of a particular person vis-à-vis third persons, namely his or her dependants.

12. The Court considers that a threshold would be of doubtful utility if individual considerations are factored in, since it would lose its absolute character and would be conditioned by the same factors currently taken into account by the existing system of indigence calculation, thus not meeting its intended objective or adding any added value to the system in place.

## **V. Possible determination of a threshold**

13. In order to provide for a threshold that could be applied to all legal aid applicants, no matter where they come from or where their dependants live, it needs to be applicable at a worldwide level; otherwise, it would lose its absolute character and added value as explained above.

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<sup>4</sup> Remunerations of external counsel and team members were set taking as a basis those of the members of the Office of the Prosecutor who conduct equivalent tasks. The CBF endorsed this approach (see Report of the Committee on Budget and Finance on the work of its eighth session, April 2007, *Official Records... Sixth session... 2007* (ICC-ASP/6/20), vol. II, part B.1, para. 80).

14. It is suggested that an appropriate method for calculating an absolute threshold is by reference to (a) the average cost of living and (b) the standard duration of proceedings before the Court, in order to determine the part of the person's assets which would be necessary in order to honour his or her obligations towards any dependants during the proceedings. To make this threshold applicable worldwide, the average at (a) would have to be a global one, not tied to any specific claimant.

#### **A. Which cost of living standards to use**

15. While the cost of living standard used by the International Civil Service Commission (ICSC) might at first glance seem appropriate, closer examination suggests that it is not suitable: first, the ICSC system is conceived for the exclusive purpose of calculating the remuneration of international civil servants in the United Nations system; second, it does not include a cost-of-living component, but only offers a comparison among different cities in the world.

16. The Court has researched other possible systems. There are privately compiled studies, some of them offering information from almost 300 cities around the world,<sup>5</sup> whilst, among publicly available sources, there is the Organization for Economic Co-operation and Development (OECD), which offers relevant statistics of real expenditure per head at average European Union prices in euros for some 48 countries in 2008.<sup>6</sup>

17. Although the OECD standard is weighted towards some of the wealthier countries, it would appear to be the most accurate and reliable standard to use. According to OECD statistics, the average living cost in OECD countries is €19,228 per year.

18. Hence, should an absolute threshold be established, the Court recommends that this annual OECD figure be adopted as the yearly obligation per dependant.

19. It is to be noted that the Court currently applies, where available, national statistics pertaining to the place where requester's dependants actually reside; this system requires a higher degree of research and analysis, but the Court notes that it brings more fairness to the calculation.

#### **B. Determination of a standard family nucleus**

20. When establishing an absolute threshold which can be adopted irrespective of the (national, cultural, etc.) background of the claimant, it has to be taken into account that family nuclei can greatly vary from one culture to another; one parameter which can be applied is the average number of dependants based on the composition of families of persons implicated in ICC proceedings to date. This average is 7.75 dependants per person. The Court accordingly proposes to define the standard family nucleus at seven dependants per legal aid claimant.

21. Of course, as the Court extends its activities to other countries and continents, this average figure may need to be revised to reflect the new reality on the ground.

#### **C. Determination of a standard duration of proceedings**

22. To date, as at February 2011, the Court's first case, that of Mr. Thomas Lubanga Dyilo, is still ongoing 59 months since his transfer to The Hague; Mr. Germain Katanga has been in the custody of the Court for 40 months, and the presentation of the defence's case is about to commence; his co-defendant Mr. Mathieu Ngudjolo Chui has been at the Court's Detention Centre for 36 months, and it has been 31 months since Mr. Jean-Pierre Bemba Gombo arrived in Scheveningen. It therefore seems prudent to maintain for the time being the average of 60 months proposed in 2005.

<sup>5</sup> <http://www.mercer.com/costoflivingservices> (last visited on 31 January 2011).

<sup>6</sup> 2008 PPP [Purchasing Power Parities] Benchmark results: 2008 PPP results in euros, European Union as reference (<http://stats.oecd.org/Index.aspx?DataSetCode=CPL>, last visited on 31 January 2011).

23. It is therefore proposed that the duration of 60 months<sup>7</sup> used in setting up the current system be retained, divided as follows: 12 months of pre-trial phase – which roughly corresponds to the average duration of that phase so far –, 36 months of trial phase, and 12 months of appeals phase. The Court will continue to monitor the length of proceedings before it in order to adapt the calculation, if necessary, to the actual duration of cases before it.

## VI. Possible calculation of a threshold

24. Should the Assembly decide in favour of establishing an absolute threshold for indigence, the Court proposes that it be calculated as follows:

(a) Family obligations: €19,228 per person per year; for seven dependants over five years, the total would thus be €672,980;

(b) Costs of legal assistance:

(i) 12 months of pre-trial phase: €361,800;

(ii) 36 months of trial phase: €1,537,236;

(iii) 12 months of appeals phase: €361,800; and

(iv) Investigations for the whole case: €73,006.

(c) Total: €3,006,822.

25. Where the assets of the person are between €0 and the threshold of €672,980, the person would be declared totally indigent; between €672,980 and €3,006,822, partially indigent and, above the ceiling of €3,006,822, not indigent.

26. In case of partial indigence, the Court would calculate the part that it should contribute to the cost of legal assistance and pay it directly to counsel and team members. The person claiming indigence would be responsible for the rest. The Court will present further details, should the Assembly decide to adopt this approach to the calculation of indigence.

## VII. Conclusion

27. The Court recommends, as it has previously done in 2008 and 2009,<sup>8</sup> that it should not introduce a threshold element, and that it maintain the current system, which objectively takes into consideration the particular circumstances of each person in light of the actual cost of legal representation in ICC proceedings, and which allows for an objective and facts-based decision on a case-by-case basis for each legal aid claimant.

28. Nevertheless, in order to present elements for a discussion on threshold levels, should the Assembly consider it appropriate to do so, the Court has proposed a model calculation for threshold levels in the determination of indigence.

29. Finally, it must be noted that, of all cases of legal aid claimants in the history of the Court thus far, the introduction of an absolute threshold would not have changed the ultimate outcome of the Registrar's indigence assessment and ensuing decision in any particular case.

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<sup>7</sup> See *Report on the principles and criteria for the determination of indigence for the purposes of legal aid* (ICC-ASP/6/INF.1), para. 14 (b) and ICC-ASP/8/24, cit., paras. 27-34.

<sup>8</sup> ICC-ASP/7/23, cit., para. 63 and ICC-ASP/8/24, cit. para. 20.