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**Report on different legal aid mechanisms before
international criminal jurisdictions**

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1. In resolution ICC-ASP/6/Res.2,¹ the Assembly of States Parties (“the Assembly”) invited the International Criminal Court (“the Court”) to “present to the Assembly at its next session an updated report on the different mechanisms for legal aid existing before international criminal jurisdictions in order to assess, inter alia, the different budgetary impact of the various mechanisms”.
2. In accordance with this request, the Registry proceeded to analyse the legal aid systems, including the resources allocated to defence teams² and the determination of indigence,³ and prepared a questionnaire of 15 questions deemed the most useful and relevant, in order to submit a comprehensive report on which the Assembly could make an informed decision.
3. On 28 May 2008, the Registry communicated the questionnaire to the following international criminal jurisdictions: the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY); the United Nations International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). The completed questionnaires were subsequently received and reviewed and a report was prepared based on the answers provided, together with any other relevant information.
4. In order to enable the Committee on Budget and Finance (“the Committee”) to consider the issues addressed in the report, and The Hague Working Group to engage the Court on the same, the Court initially issued an Interim Report (“the Interim Report”) on 19 August 2008.⁴
5. On 10 September 2008, The Hague Working Group discussed the Interim Report with the Court and suggested a series of amendments to the final Report. The Working Group further recommended that the Assembly enter into a detailed dialogue with the Court on the legal and financial aspects of victims’ participation, which were outside the existing Assembly mandate for the current legal aid report.⁵
6. During its eleventh session, the Committee considered the Interim Report and made some recommendations thereon in its report on the work of that session.⁶
7. The present report, which takes into consideration, as appropriate, the proposed amendments and recommendations of The Hague Working Group, as well as the recommendations of the Committee, supersedes and replaces the Interim Report.

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. I, part III, resolution ICC-ASP/6/Res.2, paragraph 13.

² Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons, (ICC-ASP/3/16, updated by ICC-ASP/5/INF.1), and Report on the operation of the Court’s legal aid system and proposals for its amendment (ICC-ASP/6/4).

³ Report on the principles and criteria for the determination of indigence for the purposes of legal aid, submitted pursuant to the request of the Committee on Budget and Finance at its third session (See: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third Session, The Hague, 6-10 September 2004* (International Criminal Court publication, ICC-ASP/3/25), part II. A.8 (b), para. 116).

⁴ ICC-ASP/7/12.

⁵ See annex I, summarizing the proposed amendments and recommendations of The Hague Working Group.

⁶ Report of the Committee on Budget and Finance on the work of its eleventh session, (ICC-ASP/7/15 and Add.1, para. 128).

I. Preliminary remarks

8. It should be noted that practical experience of proceedings is restricted by the young age of the Court and the limited number of cases currently before it, which are: one case in trial phase; another – the first with multiple defendants – in which the confirmation hearing has just been completed; and the third, which involves a newly transferred suspect who has just undergone his initial appearance before the Pre-Trial Chamber (PTC).

9. Given this limited experience, no definite benchmark can yet be set for future cases, the only current point of reference being the assessment of the legal aid system made by the Court in 2007, prompting adjustments which were endorsed by the Committee as constituting “a sound structure for the legal aid system”.⁷ The Committee further observed that “linking the composition of a team to the phase of the trial and, if so required, adding additional human resources according to a fixed set of quantified parameters, seemed reasonable”.⁸ The Court continues to monitor the performance of its legal aid system and, if and when deemed necessary, will propose further adjustments to ensure that the right of a suspect or accused to an effective and efficient defence is safeguarded, “while upholding the integrity of the system of legal aid administered by the Registrar and ensuring oversight of the costs of legal aid by the Committee and the Assembly of States Parties”.⁹

10. The above should be borne in mind when considering this report. So, too, should the differences compared with the proceedings of the other international criminal jurisdictions studied, as a result of the sui generis nature of the Court’s proceedings. The participation of victims in the latter proceedings best illustrates this, while other examples include challenges relating to the disclosure obligations of the parties.¹⁰ The tables below indicate the workload created by these issues and relate only to the filing of public documents. Confidential, *ex parte*, or under seal documents are not included.

Table 1: Total public documents filed in the case: *The Prosecutor v. Thomas Lubanga Dyilo*

<i>Issues</i>	<i>Documents filed</i>	<i>Percentage of filings</i>
Regarding victims’ requests to participate in the proceedings	77	18.55
Regarding participation modalities for admitted victims	23	5.54
Disclosure issues	255	61.45
<i>Sub-total</i>	355	85.54
Other issues	60	14.46
Total	415	100.00

⁷ *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, II.G, para. 80.

⁸ *Ibid.*

⁹ *Ibid.*, para. 82.

¹⁰ Trial Chamber I, 13 June 2008: “Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008,” ICC-01/04-01/06-1401.

Table 2: Total public documents filed by defence in the case: *The Prosecutor v. Thomas Lubanga Dyilo*

<i>Issues</i>	<i>Documents filed</i>	<i>Percentage of filings</i>
Regarding victims' requests to participate in the proceedings	19	21.35
Regarding participation modalities for admitted victims	4	4.49
Disclosure issues	38	42.70
<i>Sub-total</i>	<i>61</i>	<i>68.54</i>
Other issues	28	31.46
Total	89	100.00

Table 3: Total public documents filed in the case: *The Prosecutor v. Germain Katanga et al.*

<i>Issues</i>	<i>Documents filed</i>	<i>Percentage of filings</i>
Regarding victims' requests to participate in the proceedings	13	5.58
Regarding participation modalities for admitted victims	20	8.59
Disclosure issues	107	45.92
<i>Sub-total</i>	<i>140</i>	<i>60.09</i>
Other issues	93	39.91
Total	233	100.00

Table 4: Total public documents filed by defence in the case: *The Prosecutor v. Germain Katanga et al.*

<i>Issues</i>	<i>Documents filed</i>	<i>Percentage of filings</i>
Regarding victims' requests to participate in the proceedings	6	10.17
Regarding participation modalities for admitted victims	4	6.78
Disclosure issues	27	45.76
<i>Sub-total</i>	<i>37</i>	<i>62.71</i>
Other issues	22	37.29
Total	59	100.00

11. In the cases of Lubanga and Katanga et al., the total number of filings in each case is 1,431 documents (of which 415 are public) and 683 (of which 233 are public) respectively. This represents an average of some 2.5 filings per day and, in the case of documents submitted by parties or participants other than the defence, all require careful consideration by the defence itself. These documents are in addition to the countless items disclosed by the Prosecutor to the defence which are not in the case file.

12. The above tables illustrate the issues most characteristic of the Court; thus requests for participation by victims, modalities of participation of admitted victims, disclosure issues, etc., are the reason for most of the filings made by defence and other parties and participants in the proceedings. While a comparison between the cases seems to indicate a decrease in the

workload created by these issues, at such an early stage in the Court's evolution it is not possible to predict with any degree of certainty whether this trend will continue in the future.

13. It is also worth noting that, at this early stage in the development of the jurisprudence of the Court, many of the provisions of the Statute and of the Rules and Regulations of the Court are open to interpretation and need to be settled by the Chambers. Again, this requires added effort on the part of all parties and participants, including the defence, to litigate these ongoing contentious issues. It also increases the difficulty of assessing how and when the workload of defence teams will change in the future, or how often a similar situation will occur, either because of new circumstances that were hitherto unforeseen, or where former decisions need to be reviewed.

14. A further caveat that needs to be emphasised in order for this report to be properly understood is that the comparisons carried out relate solely to legal assistance provided to persons against whom charges have been brought by the Prosecutor. It should equally be noted that the application of the Court's legal aid system is generally wider in scope than that of other international criminal jurisdictions, not only because it grants resources to indigent victims,¹¹ but also due to the fact that the legal texts of the Court have created additional situations where the intervention of external counsel is required, namely as duty counsel or ad hoc counsel.¹² In the latter's case, no such role exists at the ad hoc tribunals. The intervention of duty counsel at the ad hoc tribunals is somewhat limited in scope and application (i.e. duty counsel are appointed only when urgent legal assistance is required *at the seat* of the tribunal in question, and such appointments are made from a pool of locally available counsel), resulting in marginal costs for the respective tribunal's legal aid system. The legal texts of the Court, including its founding instrument, the Rome Statute, have created additional circumstances where duty counsel may be appointed. The most significant of such instances which has a direct impact on the Court's legal aid system is when duty counsel are appointed to preserve the rights of persons during investigatory interviews carried out by the Office of the Prosecutor in accordance with article 55 of the Rome Statute. The practical realities of such missions require that duty counsel be appointed promptly for dispatch to the field, taking into account, inter alia, the geographical proximity of the counsel to the location of the mission, which can be anywhere in the world. The ensuing costs of such appointments are naturally higher, as a result of the travel and daily subsistence allowances payable. These significant differences in the coverage of the legal aid system of the Court vis-à-vis its counterparts at other international criminal jurisdictions should be borne in mind when assessing the comparative studies in the present report.

15. Since the determination of the level of indigence is inevitably linked to the costs of legal assistance, it is logical to start by presenting the results of the comparison of the resources allocated to the legal aid programme by each of the international criminal jurisdictions, and to continue with the consequences that the cost of these resources have on the determination of indigence.

II. Resources allocated

16. The amount of the resources allocated for legal aid in all of the international criminal jurisdictions studied is determined by assessment of the necessary and reasonable work required to ensure effective and efficient legal representation. The subsequent monitoring of the performance of the programme by the appropriate managers has led to a constant review of each programme.

¹¹ The only jurisdiction studied which allows for the participation of victims, other than the Court, is the ECCC.

¹² On ad hoc and duty counsel, see, for example, Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4, paras. 8 - 11).

17. The current ICTY legal aid system was adopted in 2006 and comprises two different schemes, with a special stand-alone regime for the pre-trial phase.¹³ The ICTR reviewed its legal aid programme in 2004, transforming its payment system from an hourly rate to a lump-sum per phase system, mainly to cover single-accused cases and, when applicable, joint cases. Neither the SCSL nor the ECCC, which have considerably less experience than the ad hoc tribunals, have yet felt the need to consider a review of their legal aid programmes.

18. As previously stated, the Court has taken a pro-active approach, and, in view of the experience acquired from the first proceedings before it, has, proprio motu, proposed several adjustments and is committed to continue such monitoring, taking into account, inter alia, effective use of resources, feedback from parties and participants in proceedings, and guidelines and orders handed down by the Chambers in response to counsel's challenges to decisions of the Registrar on requests for additional resources,¹⁴ or any other decision requiring the allocation of additional resources.¹⁵

A. Composition of teams

19. In the Court's case, from the moment a defendant is transferred to its custody, legal assistance is guaranteed. Where a defendant requests legal aid, and once all relevant documentation has been received in support of the claim, the Registrar will declare that person provisionally indigent pending the outcome of a thorough investigation into his or her financial situation. Such legal assistance can be provided by duty counsel¹⁶ for the short period preceding the defendant's initial appearance before the Chamber, the initial appearance itself, and any related legal submissions that may need to be filed with the Chamber arising from the initial appearance hearing. Thereafter, the defendant proceeds to the appointment of a counsel to represent him/her for the entire length of the proceedings before the Court. It is the responsibility of counsel to compose their team so as to best provide the defendant-client with the necessary legal assistance.

20. A core team of one Counsel (P-5), one Legal Assistant (P-2) and one Case Manager (P-1) will thus be set for the proceedings, and can be supplemented during proceedings by additional resources, some provided automatically, for example Associate Counsel, and some varying in accordance with certain parameters which may influence counsel's workload.¹⁷

21. Composition of the defence teams varies depending on the jurisdiction analysed, the stage of the proceedings in question, the system of legal aid payment applied, and, in some cases, where a change in the legal aid programme has taken place. In the international criminal jurisdictions surveyed, the various phases of proceedings, such as investigation and

¹³ See: Defence counsel payment scheme for the Pre-Trial phase, online at: http://www.un.org/icty/legaldoc-e/basic/counsel/payment_pretrial.htm (last consulted on 10 July 2008), and Defence counsel payment scheme, online at: http://www.un.org/icty/legaldoc-e/basic/counsel/payment_trial.htm (last consulted on 10 July 2008).

¹⁴ See Pre-Trial Chamber I, 22 September 2006, "Decision on Defence Request pursuant to regulation 83 (4)," ICC-01/04-01/06-460.

¹⁵ In its decision of 4 August 2006, Pre-Trial Chamber I ordered the Registrar "to have permanently available and free of any cost, a French interpreter to assist Thomas Lubanga Dyilo and the Defence team for the purpose of the confirmation hearing with documents of the case which are available only in English": Decision on the Requests of the Defence of 3 and 4 July 2006, ICC-01/04-01/06-268, p. 8, penultimate paragraph.

¹⁶ See regulation 73(2) of the Regulations of the Court: "If any person requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable, the Registrar may appoint duty counsel, taking into account the wishes of the person, and the geographical proximity of, and the languages spoken by, the counsel." This regulation has been applied in the case of all persons thus far transferred to the custody of the Court.

¹⁷ See: Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4, paras. 32-37).

pre-trial phase, trial phase and appeals phase, differ slightly depending on the applicable procedural texts of each jurisdiction (see annex I).

22. Table 5 below shows the two-tiered system used by the ICTY to define the composition of a team depending on the stage of the proceedings (see annex I) and the complexity of the case.

Table 5: Composition of teams under the ICTY legal aid system

Stage	Phase	Complexity level ¹⁸	Team composition ¹⁹
Pre-Trial	1		Counsel
	2		Counsel + 1 support staff
	3	Level 1	Counsel + 2 support staff + co-counsel (2.5 months)
		Level 2	Counsel + 3 support staff + co-counsel (4 months)
		Level 3	Counsel + 5 support staff + co-counsel (5.5 months)
Trial		Level 1	Counsel + co-counsel + 1 support staff
		Level 2	Counsel + co-counsel + 3 support staff
		Level 3	Counsel + co-counsel + 5 support staff
Appeal		Level 1	1,050 hours for counsel + 450 hours for support staff
		Level 2	1,400 hours for counsel + 600 hours for support staff
		Level 3	2,100 hours for counsel + 900 hours for support staff

23. In the case of the ICTR, the basic team comprises counsel and three support staff, including legal assistants and investigators. The appointed counsel has the freedom to distribute resources allocated in a manner he/she deems most appropriate, i.e. to appoint one legal assistant and two investigators, or two legal assistants and one investigator. Co-counsel has a restricted role in the pre-trial and appeal stages, whereas, under the Court's legal aid system, associate counsel (termed "co-counsel" at the ad hoc tribunals) can only be part of the team during the trial phase.

24. The SCSL system gives the Principal Defender wide powers to negotiate the composition of teams and remuneration of its members, which form the basis of a Legal Services Contract with counsel. The experience of the SCSL has evolved into cases being treated differently. This is illustrated by the fact that, in some co-accused cases, defendants in the same case have a different number of counsel and co-counsel, while respecting a fixed monthly cap of US\$25,000 per month. An ad hoc exception to this monthly cap was made in the case of *The Prosecutor v. Charles Ghankay Taylor*, where the monthly cap was set at

¹⁸ The three levels are: (1) difficult, (2) very difficult, and (3) extremely difficult/leadership; the assessment is determined by (a) the position of the accused within the political/military hierarchy; (b) the number and nature of counts in the indictment; (c) whether the case raises any novel issues; (d) whether the case involves multiple municipalities (geographical scope of the case); (e) the complexity of legal and factual arguments involved; and (f) the number and type of witnesses and documents involved. These factors were taken into account in the adjustments proposed by the Court in 2007, including quantifying, where feasible, the workload they entail. See: Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4, paras. 35 and 45).

¹⁹ This composition is the theoretical minimum set by the Tribunal. The system is flexible in that counsel is free to compose a team as he/she deems fit within the limits of the allocated funds.

US\$70,000. Normally, each team is assigned one legal assistant, but the Principal Defender can approve the addition of supplementary legal assistants if deemed necessary.

25. By contrast, the ECCC appoints a full legal team immediately on arrest, comprising two Co-Lawyers (one Cambodian and one foreign, both at P-5 level), a foreign Legal Consultant (P-3) and one Cambodian Case Manager (P-1). With the exception of the classification of one of the lawyers (under the Court's legal aid system, associate counsel is paid at P-4 level and must meet the qualifications of admission to the list of counsel) and the legal consultant (legal assistants are paid at P-2 level at the Court), the composition of defence teams under this system corresponds to that at the Court during the trial phase.

26. To conclude, the composition of teams is designed in view of the particular features of the procedure before the Court, as well as in consideration of the different formulas applied before the other jurisdictions analysed. The Court will continue to monitor the system, in order to ensure that its features, including the composition of legal teams, are not only effective, but also as cost-effective as possible.

B. Remuneration of team members

27. The Court's legal aid system is based on a monthly lump-sum system. Prior to each phase of the proceedings and every six months thereafter if the phase is still ongoing, counsel must submit a detailed action plan for the Registrar's approval in accordance with regulation 134 of the Regulations of the Registry. This action plan details all the activities counsel deems most appropriate in order to represent his/her client efficiently and effectively at each phase of the proceedings. This information is restricted to the Registry's internal use in the management of the legal aid programme and is treated with utmost confidentiality. At the end of each phase of the proceedings, or six months, whichever ever occurs first, counsel submits a report on implementation of the action plan to the Registry.

28. To ensure that legal aid funds are used for work actually carried out on the case, the Registry reviews the action plan and said report, and verifies them against the monthly time-sheets provided by team members. From the beginning of each phase until the end of the interval periods described above (end of phase or every six months depending on which comes first), each team member receives a monthly lump-sum salary corresponding to the post he/she fills within the team following processing of the time-sheets submitted. This system is based on the two core principles of providing an effective and efficient legal representation for indigent persons, and ensuring that the Court's legal aid funds are expended prudently.

29. These payments remain constant throughout the proceedings, provided the appointment of the team member remains valid, and are payable even when judicial activity is minimal or non-existent, such as waiting for a decision to be delivered. The reasoning behind this is:

- (a) To make defence teams feel part of the Court by making their payment structure similar to that used for Court staff members;
- (b) To regularize defence team members' payments;
- (c) To lessen the burden on counsel for remuneration of team members and to avoid payment disputes between counsel and team members; and
- (d) To simplify management of the periodical payments to the different team members, who also benefit, inter alia, from receiving a fixed amount each month.

The remuneration for each team member has been fixed at the same rate as for teams in the Office of the Prosecutor.²⁰

30. While the ECCC has also adopted this approach, ICTR has switched from an hourly rate system to a lump-sum system, which, keeping the hourly standard as the basis for calculation, has two different modalities: a maximum per phase during pre-trial and appeal stages, and a daily allocation during trial stage. In addition, the latter is applied differently depending on whether the relevant team member is at the seat of the Tribunal or elsewhere.

Table 6: Remuneration under the ICTR hourly rate system

<i>Team member</i>	<i>Hourly rate</i>	<i>Limit per month (p/m)</i>	<i>Remuneration limit p/m</i>
Counsel	US\$90-110	175 hours p/m	US\$15,750-19,250
Co-counsel	US\$80	250 hours (total) before trial	US\$20,000
		Trial: 175 hours p/m	US\$14,000
		350 hours (total) during appeal	US\$28,000
Legal assistants and investigators (3)	US\$25	100 hours p/m	US\$2,500

Table 7: Remuneration limits under the ICTR lump sum system

<i>Pre-trial stage</i>		Counsel	US\$180,000-220,000 (depending on experience)
		Co-counsel	US\$160,000
		Legal assistants + investigators (3)	US\$150,000
		<i>Stage total</i>	<i>US\$ 490,000-530,000</i>
<i>Trial stage</i>	At seat of Tribunal, per day	Counsel	US\$720-880
		Co-counsel	US\$640
		Legal assistants and investigators (3)	US\$600
	Away from seat of Tribunal, per day	Counsel	US\$450-550
		Co-counsel	US\$400
		Legal assistants and investigators (3)	US\$375
<i>Appeals stage</i>		Counsel	US\$153,000-187,000
		Co-counsel	US\$136,000
		Legal assistants and investigators (3)	US\$127,500
		<i>Stage total</i>	<i>US\$ 416,500-450,500</i>

31. The ICTY also extends the lump-sum payment structure to the trial stage and stresses that the amounts paid to the team per month correspond not to the monthly allotment of hours but, rather, to advances of the lump sum, which, for pre-trial and appeal phases, is determined according to the assessed complexity level, and, in the trial phase, in light of the estimated duration of the case and the complexity of the stage.

32. The remuneration of counsel and co-counsel at the ICTY is broadly similar to that under the Court's legal aid system, as is shown in table 8.

²⁰ See: Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4, annex VI). It should be noted that different contingencies were taken into account in setting the appropriate salary step for defence team members, which is set at step V, as they have to arrange and pay for their own insurance and pension. Also, they may work for a team for several years without any increment in salary entitlements.

Table 8: Basis for the remuneration of counsel under the ICTY legal aid system

		<i>ICTY</i>	<i>ICC</i>
Counsel	Remuneration level:	<i>P-5 Step VII</i>	<i>P-5 Step V</i>
	Modalities	75% of gross salary for pre-trial phase 100% of gross salary for trial phase	100% of gross salary ²¹ throughout the proceedings
	Professional charges	40% of remuneration (“office costs”)	Up to maximum of 40% of remuneration set, based on justification
	Reference date for remuneration	2006	2007
Co-Counsel	Remuneration level:	<i>P-4 Step VII</i>	<i>P-4 Step V</i>
	Modalities	100% of gross salary during intervention	100% of gross salary during intervention
	Professional charges	40% of remuneration (“office costs”)	Up to maximum of 40% of remuneration set, based on justification
	Reference date for remuneration	2006	2007

33. At the ICTY, the remuneration of support staff is fixed at €3000, based on the rate of €20 per hour at 150 hours per month.

34. It should be noted that the lump sum allocated in each case is based on an average length of the relevant phase. In both the ICTY and ICTR systems, in the event of a protracted phase where payment is calculated on a lump-sum basis, additional resources can be allocated by the Registry. In the case of the Court, the possibility exists for the composition of the team to be adjusted so as to correspond to the de facto needs for effective and efficient representation, in accordance with the Court’s legal texts.²² The Registry will take into consideration all the afore-mentioned elements, including the possibility of allocating a lump-sum per phase, if it is deemed that such a structural change will improve the cost-effectiveness of the system.

35. At the SCSL, counsel have more flexibility to negotiate the remuneration of their team members with the Principal Defender under the framework of the Legal Services Contract. Such negotiations are guided by the norms in table 9 below:

Table 9: Remuneration of team members in SCSL

Counsel	US\$110 per hour & US\$500 per court appearance
Co-counsel	US\$90 per hour & US\$350 per court appearance
Legal Assistant(s)	US\$35 per hour
National investigators	US\$1,000 per month
International investigators	Paid at UN P-3 and P-4 levels

²¹ The modalities of payment for the salary of counsel and co-counsel under the Court’s legal aid system are as follows: 75 per cent of gross salary is paid on a monthly basis during pre-trial and appeals phases, with the remaining 25 per cent payable at the end of each phase or every six months, after review of the implementation of the plan of action initially approved by the Registry, whichever occurs first. One hundred per cent of the salary is paid during the trial phase. See: Report on the operation of the Court’s legal aid system and proposals for its amendment (ICC-ASP/6/4, para. 63).

²² See regulation 83(3) of the Regulations of the Court.

36. In conclusion, in the future the Court could consider applying a lump-sum system similar to those at the ad hoc tribunals during its pre-trial and appeal phases once a reasonable assessment can be made of the average duration of a case, and, in particular, of the volume of victim participation at the pre-trial phase. To introduce the same degree of flexibility as that provided for in the SCSL system would entail assigning additional staff to properly manage each Legal Services Contract, which would have a financial impact without necessarily offering any guarantee of reducing the legal aid budget. As mentioned previously, the Court's legal aid system has a modicum of flexibility, in that counsel can structure their team as they deem appropriate within their set budget, but the Court will nevertheless consider the introduction of a lump-sum system which can co-exist with the need to maintain the current flexibility.

C. Compensation of professional charges

37. In the ICTY system, professional charges are compensated at a straight 40 per cent in phases two and three of the pre-trial and trial stages. By contrast, the systems at the ECCC and the Court allow for such charges to be paid up to a maximum of 40 per cent only if they can be justified. It should also be borne in mind that the ICTY compensates such charges in this way because it does not provide any permanent offices to its defence teams, unlike the Court, which does so.

38. The rationale behind the compensation of professional charges in the Court's system is detailed in the Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons.²³ The rule is that the Registry sets a ceiling up to a maximum of 40 per cent of the legal fees payable, based on documentary evidence (receipts, etc.) of the actual professional charges incurred. Once the percentage has been determined, this amount becomes payable automatically each month during the trial phase and is added to the remuneration of the eligible team member. During pre-trial and appeals phases, those eligible must be at the seat of the Court for at least 15 consecutive days to be entitled to compensation for professional charges.

39. The ICTR system includes a payment of US\$2,000 to counsel at the end of each stage as compensation of professional charges. The SCSL includes all compensations for professional charges in the remuneration paid to counsel.

40. To conclude, the Court's approach of requiring justification for payment of compensation of professional charges is in a minority among international criminal tribunals. It should also be noted that, at the Court, attempts are being made to individualise the calculation method applied, so as to determine the compensation payable for professional charges on a case-by-case basis, by reference to objective criteria. Nonetheless, a more detailed review of the system is suggested, with a view to determining fair and reasonable compensation for actual professional charges incurred that are directly linked to interventions before the Court. As part of this reassessment, the reasons underlying the felt need for compensation for professional charges must be carefully reviewed, and the system adjusted in view of the actual charges incurred and of the services that the Court already provides to counsel and their teams, namely permanent offices at the seat of the Court, as these will have a direct bearing on compensation for professional charges otherwise payable.

D. Other expenses

41. In the Court system, missions to the seat of the Court by counsel and associate counsel are included in the monthly sum of €4,000 allocated for the expenses of the team.

²³ Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16, paras. 21-22).

Other team members are expected to carry out their work in the offices provided by the Court at its headquarters and, with the exception of travel to The Hague on commencement and expiry of their appointment, no additional travel is compensated. The ICTY compensates only the costs of missions undertaken by counsel and co-counsel, whilst the other jurisdictions surveyed establish no limitation on the missions of team members to their respective seats, but subject all missions to review and approval by the Registry or the Defence Office, as applicable.

42. With regard to translation of documents, in all jurisdictions the general rule is that the appropriate section of the Registry translates all the necessary documents, as is the case at ECCC and SCSL. However, the ICTR covers the cost of any additional translations for defence team members when done by external translators, and at the ICTY resources can be used for documents to be tendered as evidence, and other translations can also be paid from the legal aid allotments received by teams. For the Court, such expenses are deducted from the above-mentioned monthly allowance of €4,000.

43. By way of conclusion, the Court believes that it has an appropriate level of remuneration of other expenses, unless and until experience indicates otherwise.

E. Investigations

44. At the Court, the budget limits investigations to 90 days of work for an investigator (paid at P-4 level) and a resource person (paid at P-1 level) for a case where other participants in the proceedings present up to 30 witnesses, plus a further €33,970 for travel and subsistence purposes. The total investigation budget allocated to each team is currently set at €73,000. The adjustments proposed by the Court in 2007, which were endorsed by the Committee, included an increase in the number of witnesses among the criteria which could allow the allocation of additional resources to a defence team.²⁴

45. The ECCC follows the same principle as the Court, and has established an investigations budget for each team.²⁵

46. The SCSL provides defence teams with a National investigator and an International investigator remunerated at a fee of US\$1,000 per month, and an International investigator hired at the P-4 level²⁶: investigative missions are approved by the Defence Office according to the needs of each team.

47. The ICTY and ICTR systems include investigators among the assistants to counsel. There is therefore no specific provision for them per se, and counsel must choose how they wish to construct their team, for example one investigator and one less legal assistant. They also approve investigations missions on a case-by-case basis without any pre-established ceiling.

48. To conclude, the Court is of the opinion that the existing investigations budget should be sufficient to cover the investigative needs of defence teams; however, should experience indicate otherwise, the relevant amendments will be sought from the Assembly.

²⁴ Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4, para. 48).

²⁵ The amount was not communicated to the Court.

²⁶ The Charles Taylor defence team is provided with a Sierra Leonean investigator, a Liberian investigator and an international investigator.

F. Assistance by the Office of Public Counsel for the Defence

49. In 2004, the judges of the Court decided to create an independent Office of Public Counsel for the Defence (OPCD), which would have a supportive role for defence teams acting before the Court by providing them with substantive legal assistance by specialized legal staff, in addition to the possibility that the Office might be appointed by the Chamber as ad hoc counsel to represent the interests of the defence during the initial stages of the investigation, or for qualified members of the Office to act as duty counsel in specific circumstances.

50. The Office has equally acted as duty counsel pursuant to regulation 73 of the Regulations of the Court. In essence, the existence of the Office helps reduce the traditional institutional gap between the Prosecutor and the Defence and, in particular, is highly proficient in researching matters relating to international criminal law for the defence when necessary. Lawyers admitted to the Court's List of Counsel, and hence entitled to practise before the Court, have undergone quality assurance screening and are, in principle, competent, experienced, and familiar with the elements of the Rome Statute. Nevertheless, for the most part, external defence counsel maintain their regular practices in their home jurisdictions in addition to intervening before the Court and do not necessarily specialise exclusively in international criminal law. Given that the OPCD retains institutional knowledge and is familiar with the intricacies of Court proceedings, as well as the latest developments in the jurisprudence of the Court, the Office can represent an asset to external defence counsel and their teams in facilitating their work before the Court. By developing practice manuals for counsel and in pro-actively advising defence teams on relevant case law and legislation, the Office bolsters the ability of the defence to file submissions in an expeditious and comprehensive manner.²⁷ The OPCD also participates in internal working groups in order to provide other Sections with their expertise during the formulation of Court policies and strategies which could impact on defence work before the Court.

51. The SCSL was a pioneer in public defenders' offices when it created its Defence Office, headed by a Principal Defender. This Office is competent in all issues concerning defence, and provides administrative, logistical and substantive legal assistance. By contrast, the Court splits these functions between two separate units: the Defence Support Section (DSS), which, inter alia, provides logistical and administrative assistance, manages the legal aid budget and arranges training of counsel on behalf of the Registrar; and the OPCD, which deals with substantive legal assistance. This delineation of tasks ensures that the OPCD is a wholly independent office falling within the remit of the Registry solely for administrative purposes, as stipulated in regulation 77.2 of the Regulations of the Court.

52. In addition to managing the two existing lists of lawyers (Cambodian and foreign) and the legal aid programme, the Defence Support Section of the ECCC (DSS-ECCC) also provides support to the defence teams, both substantively and administratively. Substantive assistance covers legal research and analysis, training on the law applicable by the Chambers and instruction in appropriate software, while administrative assistance includes hiring of legal consultants and case-managers to assist co-counsel, and, as with the Court's DSS, the provision of office space and facilities within the administration building at the ECCC.

53. As mentioned above, the DSS and the independent OPCD are separate offices at the Court and, unlike the Public Defence Office at the SCSL, they do not share any overlapping

²⁷ In this connection, it should be noted that prosecution teams are able to benefit from the legal research provided to them by the Legal Advisory Section and the Appeals Section in the Office of the Prosecutor. The need for such assistance from the OPCD was also recently recognized by Pre-Trial Chamber I, which ordered the OPCD to assign a different staff member to each defence team, for the purpose of providing ongoing assistance during the confirmation hearing process in the Katanga and Ngudjolo case (Oral Order of 10 June 2008, transcript).

functions, which corresponds to their clearly distinct mandates. The OPCD comprises Court staff who are directly paid by the Court and who provide substantive legal assistance to defence teams, and duty and ad hoc counsel acting before the Court, complementing their competence and experience with their specialised knowledge of the law and proceedings of the Court.²⁸ In addition, it is necessary for the OPCD to have sufficient staff to comply with Court decisions appointing the Office as ad hoc counsel during the situation phase, for example for the purpose of responding to victim applications and Trust Fund notifications, or to represent the interests of the defence during a unique investigative opportunity under article 56 of the Statute. In such scenarios, the OPCD does not provide support to an external counsel paid through legal aid but, in effect, acts as counsel in its own right. In this connection, Pre-Trial Chamber I has decided that, in light of its mandate, the OPCD (and not external counsel) will be appointed as ad hoc counsel for all future victim participation applications in the Democratic Republic of the Congo and Darfur situations.²⁹ The OPCD has also been appointed as ad hoc counsel in the Uganda situation, and may also be appointed in the event of victim participation in the Central African Republic situation.

54. The Court's legal aid budget, which is prepared and implemented by DSS, allocates resources to external counsel and their team members so as to ensure that eligible legal aid applicants can benefit from an effective and efficient defence in proceedings before the Court in conformity with its legal texts. It should be noted, however, that the substantive legal assistance provided by the OPCD within the limits of the office's mandate as defined in regulation 77 of the Regulations of the Court was one of the factors taken into account by the Court in proposing its adjustments to the legal aid system in 2007 and is normally also taken into account by the Registrar in deciding on requests for additional resources pursuant to regulation 83.3 of the Regulations of the Court. It should further be noted that the extent of the assistance provided by the Office to defence teams is constrained by the need for the Office to avoid any conflicts of interest which would prejudice its ability to fulfil any aspects of its mandate under regulation 77.

55. Annex III shows a comparison of total costs for three hypothetical cases before each of the international jurisdictions surveyed, in which the Court's costs came out as the lowest independently of the foreseen length of the proceedings. To conclude, it should be noted that the Court's legal aid system was established and developed after a comprehensive study and review of both domestic legal aid regimes, and more importantly, those in operation at different international criminal jurisdictions. Moreover, a re-assessment of the Court's legal aid system, initiated proprio motu by the Court in 2007, culminating in the Committee-endorsed Report on the operation of the Court's legal aid system and proposals for its amendment,³⁰ has only served to hone the existing system, making it more responsive to the actual needs of legal teams acting in proceedings, while staying true to the principles underlying the Court's legal aid system, in particular, economy, transparency, equality of arms and objectivity. The legal aid system in place is one that is scrupulously designed, and which uses objective criteria and considerations to provide resources to legal teams. It is a system that adequately takes into account the international nature of ICC proceedings, as well as the magnitude and complexity of cases before the Court, while possessing sufficient safeguards and controls in place to ensure that legal aid funds are expended judiciously.

²⁸ To date, the OPCD has been appointed a total of eight times as ad hoc counsel and once as duty counsel in proceedings before the Court.

²⁹ "Decision 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.

³⁰ ICC-ASP/6/4.

56. Annex IV contains the Court's legal aid budget for 2008 (as approved by the Assembly), as well as the Court's proposed legal aid budget for 2009, while annex V gives a comparison of figures with the other international tribunals' legal aid budgets for the last available budgetary years.

57. By way of conclusion, the Court believes that its system in this respect is sound and based on objective criteria. The Court will continue to analyse the existing system as well as the insights obtained from the experience of the jurisdictions under study in order to improve the cost-effectiveness of the system, including the possibility of introducing lump-sum systems for appropriate stages of the proceedings.

III. Determination of indigence of defendants

58. The Court ensures that those who are unable to pay for legal representation themselves are adequately provided for commensurate with their financial means. The burden of proof is on the person claiming indigence. The Court's legal aid system is based on a fair and objective assessment of the total assets of the claimant compared with the total amount of his/her liabilities, and whether any resulting surplus can be used in partial or full settlement of the cost of legal assistance. Details of the Court's determination of indigence are contained in the "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)" ("Report on the determination of indigence").³¹

59. Certain clarifications and adjustments were introduced in 2007 in order to reflect the option adopted by the Court regarding the basis for the assessment of living expenses. Thus, the text was clarified so as to ensure accurate and careful consideration of certain assets relating to residences belonging to the applicant and/or his/her dependant(s), and to emphasise that vehicles of a lavish or ostentatious nature could not be excluded from the determination of disposable means.³²

60. The Court believes it important that the calculation of the level of indigence of applicants seeking legal aid takes due consideration of the needs of dependants. However, this does not mean maintaining an accustomed standard of living which might have been enjoyed prior to transfer of the defendant to the Court. The view taken by the Court, and explained in the 2007 legal aid document, advocates the use of objective data for assessing the needs of dependants, so as to guarantee fairness of the system while ensuring that the Court's budget is judiciously applied. As explained in this report, the Court intends to adopt a holistic approach to the consideration of assets, excluding those which can reasonably be justified as meeting the obligations of the applicant to his/her dependants. Under the existing system, the following assets are excluded, within certain parameters:

- a) Residence: main residence, if considered reasonable in light of the needs of dependants living therein;³³
- b) Furnishings: essential items in main family home only. No luxury embellishments or items of extraordinary value;

³¹ Report on the principles and criteria for the determination of indigence for the purposes of legal aid (ICC-ASP/6/INF.1).

³² See "Report on the operation of the Court's legal aid system and proposals for its amendment" (ICC-ASP/6/4, annex I).

³³ Reasonability is appreciated in the light of the available national statistics on the cost of living; if the residence value is higher than these statistics, the difference will be included among the assets of the applicant. In practice, where national statistics on the cost of living include the lodging expenses, the full value of the residence will be taken into account as an asset.

- c) Motor vehicles: up to a maximum of two;
- d) Family or social benefits: all if entitled, in accordance with regulation 84, paragraph 2, of the Regulations of the Court; and,
- e) Assets owned by the dependants: all pursuant to regulation 84, paragraph 2, of the Regulations of the Court.

61. It should be noted that the two latter categories are not used to calculate the assets owned by the applicant, but are used to decrease, where available, the obligations of the applicant towards his/her dependants. Assets transferred to the dependants by the applicant in order to fraudulently decrease his own disposable means for the purpose of qualifying for legal aid, or seeking to elude the freezing of his or her assets, shall not be excluded from the calculation or, were they discovered as the result of the Court's financial investigation, they would give raise to a reconsideration of the applicant's request to receive legal aid.

62. All other assets relating to property, stocks, bonds, bank accounts, etc., owned by the applicant will be included in the determination of indigence, the formula for which is contained on page 3 of the Report on the determination of indigence. Furthermore, where available national statistics include the cost of residence, and they can therefore be taken into account in order to determine the needs of dependants in this respect, the main residence can also be included among the assets used to calculate the monthly disposable means of the applicant.

63. Regarding the suggestion made by the Committee to "establish absolute thresholds of assets holdings above which legal aid would not be provided,"³⁴ the Court considers that it is not appropriate at this stage to set such a ceiling. It should be pointed out that only the ICTR has in place such a threshold, and it has the opposite function of automatically considering indigent any applicant whose assets fall below it. The Court's existing system for calculation of indigence takes into account objective tangible criteria in arriving at a determination of indigence by including in the computation all assets and obligations of the person concerned as well as the actual costs of legal representation of proceedings before the Court. This latter consideration is of utmost importance in ensuring that the level of indigence, if any, of the person concerned is commensurate with the actual circumstances of the person. In view of the challenges in setting an appropriate ceiling based on objective criteria, the establishment of a threshold could result in the introduction of an arbitrary component into the Court's existing system of determination of indigence, which might then have the consequence of depriving individuals of the benefit of efficient and effective legal representation.

64. A further argument against the establishment of a ceiling is the fact that the Court, with all its novel features (victims' participation in proceedings before the Court, unique e-court system, permanent court with potential universal application) cannot, at this stage determine with any certainty the appropriate ceiling to be established. The Court is of the view that setting an appropriate absolute threshold can and will only be done when objective criteria for determining and setting the requisite ceiling are unambiguously available.

65. The existing system is, in the view of the Court, the most appropriate and functional at this stage. Further, the system allows for an objective, case-by-case approach to the determination of indigence based on the disposable means of the person concerned and the actual costs of legal representation in proceedings before the Court. Finally, the current system has sufficient safeguards in place, since it provides for an oversight mechanism

³⁴ Report of the Committee on Budget and Finance on the work of its eleventh session (ICC-ASP/7/15 and Add.1, para. 128).

whereby decisions of the Registrar on indigence could be subject to judicial review by the Presidency.

66. At the ICTY, in accordance with its Registry Policy for Determining the Extent to which an Accused is able to Remunerate Counsel, the basis of the determination of indigence is similar to that of the Court, seeking to ensure:

- (a) That an accused/suspect is not obliged to realize assets which are considered essential for life's existence; and,
- (b) If he/she owns assets of exceptional value or receives extraordinary income, that he/she contributes to the costs of his/her defence.

The ICTY system first determines the disposable means of an applicant and the persons with whom he/she habitually resides and, after deducting the living expenses of the family and/or dependants, contributes any remainder towards the cost of the defence. The other international criminal jurisdictions surveyed also use the same core principles to determine indigence.

67. When determining the means of a person applying for legal aid to be paid by the Court, unlike the corresponding provisions at the ICTY³⁵ and ICTR³⁶, regulation 84(2) of the Regulations of the Court does not include the means of an applicant's dependents in its determination. The Court deems that to do this would be an unfair sanction on otherwise innocent relatives, so long as such means had not been fraudulently transferred to them by the applicant, as explained above.

68. The information obtained from this survey is appended as annex VI and highlights the similarities and differences between the various systems.

69. In addition, annex VII contains a review of available cost-of-living statistics from different States, which demonstrate that, at the domestic level, account is taken of all expenses relating to housing and transport, inter alia, per person or per household, as applicable. This allows the Court's legal aid scheme to consider the value of all the assets of an applicant without excluding any disposable assets.

70. It is proposed that the Court adopt a similar system to that of the ICTY which, while it might result in a possible drop in the standard of living for the applicant's family and/or dependants, endeavours to keep this to a minimum. However, it is not expected that the Court should maintain an applicant's family and/or dependants at the same high standard they may previously have enjoyed prior to his/her arrest and subsequent transfer to the Court to face charges.

71. While the Court's threshold of indigence may initially seem excessive, it should be remembered that its determination of indigence is related to the costs of defence before it. The Committee, as recalled above, has already acknowledged that the proposed legal aid system has a sound structure in relation to the cases and nature of proceedings before the Court. The resources allocated within the framework of this system are the minimum necessary in order to guarantee an accused/suspect effective and efficient defence before the Court and, consequently, the indigence level must relate to the system's remuneration scheme. The Court will continue to monitor the association of these two factors as proceedings advance and additional cases are brought before it. The Court is amenable to effecting necessary adjustments to the existing system in the future if so required and deemed necessary.

³⁵ See article 10 of the ICTY Directive on the assignment of defence counsel (<http://www.un.org/icty/legaldoc-e/basic/counsel/IT073-Rev11e.pdf>)

³⁶ See article 6 (B) of the ICTR Directive on the assignment of defence counsel (<http://www.un.org/icty/legaldoc-e/basic/counsel/IT073-Rev11e.pdf>)

72. Basically, this is the same principle as that adopted by the other international criminal jurisdictions, with only minor differences in its application. In the ICTR system, the threshold below which a person is considered totally indigent is US\$10,000 of assets after obligations have been deducted; if over this threshold, then he/she is considered partially indigent or not indigent depending on the anticipated cost of legal assistance for the duration of the proceedings. In the SCSL, the Principal Defender determines such threshold.

73. In the ECCC system, the calculation of assets and obligations is similar to that of the Court, but in cases of partial indigence, the ECCC pays the total cost while retaining the power to order a payment of costs on conclusion of the trial if the suspect/accused is convicted.

74. It is important to note that at the ICTR and ECCC all suspects/accused persons have been found totally indigent; at the SCSL 90 per cent have been found totally indigent, with the remaining 10 per cent partially indigent; and at the ICTY 59.69 per cent have been found indigent and 27.91 per cent partially indigent.

Table No. 10: Percentage of indigent accused at the ICTY

<i>Type of indigence</i>	<i>% of accused</i>
Total indigence	59.69
Partial indigence	27.91

75. In annex V, the Court proposes new examples of the calculation of indigence, taking into account clarifications and adjustments in the system, so that the Assembly can assess the need for further possible amendment.

IV. The impact of the freezing of assets on the determination of indigence

76. Where assets of a defendant appearing before the Court have been frozen, the question arises of what impact this will have when determining his or her indigence for the purpose of legal aid.

77. At the outset, it is worth recalling some of the principles that may be relevant. The first of these is that, in view of the fact that the penalty for grave crimes is deprivation of liberty, and given the sheer complexity of defending a criminal matter, the interests of justice require that accused persons should have the benefit of legal representation, whether or not they are indigent.³⁷ Numerous national and international sources of law support this minimum guarantee of procedural fairness,³⁸ and the Court has entrenched this fundamental safeguard in article 67, paragraph 1, sub-paragraph (d), of the Rome Statute.³⁹

³⁷ This is particularly the case in proceedings before the Court, which involve complex and comprehensive legal and factual issues and where counsel's pleadings are governed by a hybrid of both common law and civil law principles.

³⁸ See e.g. article 2 of the International Criminal Tribunal for Rwanda's *Directive on the assignment of defence counsel*, (9 January 1996); article 14 (3)(d) of the International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, which entered into force on 23 March 1976; the Sixth Amendment to the Constitution of the United States of America, which states that: "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." See also the United States Supreme Court decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), per Justice H. Black; *The Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, which came into force on April 17, 1982, s. 10(b): "Everyone has the right on arrest or detention... to retain and instruct counsel without delay and to be informed of that right"; article 6(3)(C) of the European Convention on Human Rights

78. A second relevant principle is the presumption of innocence. In so far as a conflict of interest might arise between the victims' legitimate right to reparations and the right of the accused to legal representation and adequate defence, it is, in principle, to be expected that the latter interest will prevail, due to the 'presumption of innocence' that is a basic tenet of criminal law, and to the fact that the accused sits in jeopardy of losing his or her liberty.

79. In exercising its responsibility to determine indigence in cases where the assets of accused persons have been frozen, the Registry will, as in all cases, assess the totality of the assets in conformity with regulation 84 of the Regulations of the Court and annex 1 to the Report on the operation of the Court's legal aid system and proposals for its amendment,⁴⁰ as well as with its standard operating procedure, on the basis of information obtained as a result of financial investigation. If it is then determined that the person is partially indigent or fully able to contribute to the costs of his or her defence, the Court computes the total contribution expected of the person to the cost of his or her legal representation, through a formal decision of the Registrar on the determination of indigence, which is then notified to all parties, including the relevant Chamber.

80. It is consistent with established law that frozen financial assets and economic resources may be unfrozen to the extent determined to be necessary for basic expenses, including payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services. Making such an exception, in other words allowing accused persons access to their frozen assets to pay for the reasonable legal costs of their defence is consistent with the interests of justice, with the approach adopted in national jurisdictions and international sources,⁴¹ and with the Court's wider approach to legal aid, and the notion that accused who have the means should contribute to the costs of their defence.

(ECHR), Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11.

³⁹ The language of article 67 (1) (d) is echoed in other international instruments reinforcing the sanctity of the rights of accused persons to legal representation and to the provision of legal aid where appropriate. See e.g. article 21(4)(d) of the ICTY Statute, article 14.3 (d) of the International Covenant on Civil and Political Rights, article 20.4 (d) of the Statute of the ICTR, and article 6(3)(c) of the ECHR. See also rule 45(A) of the Rules of Procedure and Evidence of the ICTY: "[w]henver the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel..."; article 6(A) of the ICTY *Directive on the assignment of defence counsel*: "A suspect or accused who lacks the means to remunerate counsel shall be entitled to assignment of counsel paid for by the Tribunal."

⁴⁰ Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4), page 13).

⁴¹ For example, in the context of legislation on proceeds of crime, or on anti-terrorism, provisions for the freezing of assets are often subject to a proviso that those assets which are required to provide for the reasonable costs of legal representation should be excluded from the seizure/freezing order. See e.g. *Serious Organized Crime and Police Act 2005* (UK), *Proceeds of Crime Act 2002* (UK), Chapter 6, Section 98(1); Practice Note No. 23: Freezing Orders (also known as 'Mareva orders') supplementing Order 25A of the Federal Court Rules relating to freezing orders (also known as 'Mareva orders' after *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd's Rep 509, or 'asset preservation orders'); *Mansfield v Director of Public Prosecutions for Western Australia*, P53/2005, 20 July 2006, *High Court of Australia*, at para. 53; *United States of America, v. Richard H. Thier*, No. 85-4857, 10 October 1986, United States Court of Appeals, Fifth Circuit, at paras. 69-60. For international sources see e.g. United Nations Security Council resolution 1596 (2005), para. 16(a), whereby the Council introduces exceptions to the freezing of assets declaration of the resolution by stating that its provisions do not apply to funds, other financial assets and economic resources that "have been determined by relevant States to be *necessary for basic expenses*, including payment of (...) *reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services*." (Emphasis added). This resolution was cited in the Pre-Trial Chamber's decision of 31 March 2006 as the basis of its request to States Parties to freeze the assets of the accused, Thomas Lubanga Dyilo. Council Regulation (EC) No 1183/2005 of 18 July 2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo, article 3; Council Regulation (EC) No 1763/2004 of 11 October 2004 imposing certain restrictive measures in support of effective implementation of the mandate of the

81. As regards how any unfreezing of assets would be effected, this would be a matter between the defendant and the Chamber, since it does not fall within the ambit of the Registrar to request the relevant Chamber to unfreeze the assets of the person concerned. It is to be expected that the Chamber would decide, at the request of the defendant or on its own motion, to request States Parties to exclude from seizure any assets which needed to be realized for the purpose of the individual's defence or, in the case of assets already seized, that they be released forthwith for that purpose, on the basis of an assessment provided to it by the Registry. The exclusion order or decision would specify the amount that could be released for the case, and would be subject to the necessary conditions as to how and when funds could be released under the exclusion. In such a case, the freezing order would be lifted by the Chamber only as far as necessary in order to sell the assets or to raise money against them to pay for the reasonable costs of the defendant's legal representation.

82. Should the issue of the impact of the freezing of assets on the determination of indigence become the subject of a judicial finding before the Court, any guidance to be provided by the Chambers might result in a modification of the approach put forward above, should this vary from the existing *modus operandi* espoused at the Court.

83. If in future cases, a Chamber, for any reason, refuses to release the frozen assets of the accused, thus rendering the assets non-disposable, then the Registry will be unable to take those assets into account in assessing that defendant's means. This notion seems to be implicit in regulation 84.2 of the Regulations of the Court, through its provision that the means of an applicant shall be "of all kinds in respect of which the applicant has direct or indirect enjoyment or power freely to dispose."

84. In such cases, the Registry would be forced to treat defendants as provisionally indigent and to provide the requisite funding, since:

- (a) The freezing order will prevent them from realizing (freely disposing of) their assets; and
- (b) Given that the accused are defending themselves against allegations of grave crimes in complex criminal proceedings, the interests-of-justice test is met in all cases,⁴² warranting legal assistance paid by the Court.

International Criminal Tribunal for the former Yugoslavia (ICTY), article 3(b); Council Regulation (EC) No 560/2005 of 12 April 2005 imposing certain specific restrictive measures directed against certain persons and entities in view of the situation in Côte d'Ivoire, article 3.1(b); Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran, article 10.1(a) (ii); Council Regulation (EC) No 305/2006 of 21 February 2006 imposing specific restrictive measures against certain persons suspected of involvement in the assassination of former Lebanese Prime Minister Rafiq Hariri, article 3.1(b); Council Regulation (EC) No 872/2004 of 29 April 2004 concerning further restrictive measures in relation to Liberia, article 3.1(b); Council Regulation (EC) No 1184/2005 of 18 July 2005 imposing certain specific restrictive measures directed against certain persons impeding the peace process and breaking international law in the conflict in the Darfur region in Sudan, article 3.1(b); United Nations Security Council resolution 1452 (2002), para. 1(a); United Nations Security Council resolution 1532 (2004) (concerning the freezing of assets of Charles Taylor), para. 2 (a); United Nations Security Council resolution 1737 (2006) (concerning the freezing of assets in connection with Iran), para. 13(a).

⁴² The interests-of-justice test essentially determines whether it is in the interests of justice to provide funding to the accused, taking into account: (i) how seriously the accused will be affected by the Registry granting or not granting legal assistance; (ii) whether there are complex legal and factual issues that could not fairly be determined without legal representation for the accused; (iii) whether the accused suffers from any lack of understanding of the issues, including any language barriers, and (iv) whether the case requires extensive legal preparation, for example in preparing witnesses, investigations, and/or advocacy skills. Based on the above criteria, it is patently obvious that due the complexity of the nature of crimes heard by the Court, the interests-of-justice test is met in every case, warranting funding to accused persons.

85. Where funding is provided without the ability properly to assess the applicant's means, the accused could be obliged to sign an undertaking without which no legal aid is granted, guaranteeing that, should they be found innocent or have their case dismissed for any reason, the Registry will then be entitled to conduct an assessment of their indigence on the totality of their frozen assets (now released) *ex post facto*,⁴³ and, if found partially indigent or non-indigent, they will be under an obligation to reimburse the Court for the costs of their defence in proportion to the moneys received. In this case, the Registrar might, according to regulation 85.4 of the Regulations of the Court, seek:

- (a) An order from the Presidency for recovery of all funds paid; and
- (b) The assistance of the relevant States Parties to enforce that order.

V. Conclusion

86. Since the beginning of its work, the Court has endeavoured to present States Parties with a legal aid mechanism which meets the necessary balance between the rights of the defence and the financial constraints of the institution. Despite adjustments being made during the years of operation of the system, the principles inspiring it, such as equality of arms, objectivity, transparency, continuity and economy, have suffered no major changes and are still its main pillars.

87. The Court's legal aid system is a fundamental component of its commitment to the principle of fair trial, as defined in the Rome Statute, and while it is too soon for an in-depth review, the Court has been vigilant and pro-active in ensuring that to date its legal aid scheme is both judiciously applied and responsive to the real needs emanating from the proceedings before it. The Court will continue to monitor the performance of its legal aid programme assiduously, in order to ensure that it provides effective and efficient legal representation in accordance with its above-mentioned founding principles, and will take into particular consideration the possibility of introducing a lump-sum system at the appropriate stages of the proceedings.

88. Enshrined in the calculation of indigence at the Court is the need to take into account the obligations of persons seeking legal aid towards dependants, and to ensure that these are carefully and judiciously respected.

89. Finally, the Court notes the recommendation⁴⁴ of the Committee in the report on the work of its eleventh session, and reflected in the comments of The Hague Working Group, that the Assembly should enter into a detailed dialogue with the Court on the legal and financial aspects of victims' participation. The issue of legal aid for victims is not addressed specifically in the present report, due largely to the lack of comparative material from the other international criminal jurisdictions, which either do not accord such a role to victims in the proceedings, or, in the case of the ECCC, do not yet have a mechanism for legal aid to victims in place. Whilst the present report does not seek to address issues relating to the mechanism for legal aid for victims, the Court would nevertheless like to sound a note of caution in relation to the Committee's recommendation⁴⁵ that the Court and the Assembly consider the possibility of having a single legal team for victims for each case. The Court will take into consideration all relevant factors while dealing with legal aid for victims, including appointment of one legal team where the circumstances of a case so permit. However, in

⁴³ The means assessment in these cases can also be made at the outset of the proceedings, notwithstanding the fact that the accused is automatically provided with funding because of a freezing of assets order/judgment.

⁴⁴ Report of the Committee on Budget and Finance on the work of its eleventh session (ICC-ASP/7/15 and Add.1, para.129).

⁴⁵ *Ibid.*

many instances this would be impracticable In light of the potential conflicts of interest that may arise between different groups of victims participating in the same case, making it impossible for them to be represented by the same legal representative. It should be noted that such conflicts of interest have already arisen in the cases currently before the Court. The Court stands ready to enter a dialogue with the Assembly on the question of legal aid for victims and to present any reports that might be necessary.

90. It is hoped that this report has provided the Assembly with valuable and sufficient information.

Annex I

Summary of proposed amendments and recommendations of The Hague Working Group

1. The Court is invited to include in the final draft report the actual amount of legal aid proposed in the 2009 budget, as it had not been included in the Interim Report and was not readily discernible from reading the 2009 budget document;
2. The Court is invited to include in the final draft report the actual amount of legal aid allocation for the Court and the other international tribunals referred to in the report for the last two fiscal years, together with further case-study examples of the application of the legal aid formula through the different trial phases before all the tribunals, as illustrated at annex II of the existing Interim Report;
3. The Court is invited to include a clearer explanation of the formula used for determining indigence, together with an explanation of the reasoning behind the inclusion or exclusion of certain assets from the calculation:
4. The Court is invited to set out more clearly its conclusions on the various issues raised in its legal aid report; there is an impression that relevant material is set out in the report, but the reader is left with no view/conclusion from the Court:
5. The Court is invited to include a section addressing the impact of existing sanctions and/or freezing of assets of a suspect/accused when determining their indigence. Additionally, the section should also contain information on the impact of sanctions/ freezing orders on the ability of the Chamber to award reparations to victims;
6. The Hague Working Group endorsed the issues on legal aid raised by the Committee in its report following its eleventh session, namely:
 - a) The Committee expressed concern that in determining indigence the Court had provided examples which showed that individuals with extensive assets could be determined to be indigent. The problem appeared to be the method of calculating a figure for monthly disposable means from an individual's property and assets. The Committee suggested that alternatives to the method considered should be discussed and that it might be desirable to establish absolute thresholds of assets holdings above which legal aid would not be provided; and
 - b) With respect to legal aid for victims, given the likelihood that legal aid for victim participation would be a long-term and significant cost driver for the Court, the Committee strongly recommended that the Assembly enter into a detailed dialogue with the Court on the legal and financial aspects of victim participation.
7. These issues were outside the existing Assembly mandate of the current legal aid report, but were important issues that should be mentioned in the Court's final legal aid report, with a recommendation that the Assembly consider creating separate mandates in the omnibus resolution to allow these issues to be further considered next year by the Working Group.

Annex II

Phases in procedure before international criminal jurisdictions (for the purpose of legal aid)

ICC	
Investigation phase	Only for interviews under article 55, para. 2, of the Statute.
Pre-trial phase	From initial appearance to decision on confirmation of charges.
Trial phase	From transfer of case to Trial Chamber by Presidency until final judgment of Trial Chamber.
Appeals phase	From transfer of dossier of the case to Appeals Chamber until decision of Appeals Chamber.
ICTY	
Pre-trial stage	
• Phase 1:	Initial appearance: from appointment of counsel to the day after entrance of plea by accused.
• Phase 2:	From end of phase 1 (up to ninety days) or until counsel submits work plan (whichever is later).
• Phase 3:	From end of phase 2 until commencement of trial.
Trial stage	
Appeals stage	
ICTR	
Initial appearance	Rule 62 of the Rules of Procedure and Evidence.
Trial phase	After initial appearance until final judgement.
Appeals phase	From final judgement of Trial Chamber until Appeals Chamber decision.
SCSL	
Initial appearance	Rule 61 of the Rules of Procedure and Evidence.
Trial phase	After the initial appearance until final judgment.
Appeals phase	From final judgment of the Trial Chamber until the Appeals Chamber decision.
ECCC	
Investigation phase	Investigative judges confirm charges brought by Prosecutors (who submit an introductory submission) by conducting interviews and gathering evidence. Also, investigative judges hand out decisions on issues which can be appealed to Pre-Trial Chamber (PTC). Confirmed charges are usually appealed to PTC and, if confirmed again, case file heads to Trial Chamber.
Pre-Trial phase	PTC oversees the investigative phase by handing down decision on appealed issues.
Trial phase	Trial Chamber receives the case file from investigative judges and conducts trial.
Appeals phase	Supreme Court Chamber handles all appeals from Trial Chambers and appeals against convictions/acquittals.

Annex III

Standard costs (team remuneration) of a case before each international criminal jurisdiction¹

Notes:

1. The table below refers to the remuneration of legal team members; other expenses of the teams (in particular, missions to the seat of the Court) are not included because of the difficulty in establishing a reliable comparison (see paragraphs 30 and 31 of the present report).
2. The figures are calculated based on different lengths of pre-trial, trial phase and appeals phases. It has to be borne in mind that the definition of phases is not the same throughout the different jurisdictions considered, and that the trial phase does not necessarily correspond to the actual duration of the trial, but to all proceedings before the Trial Chamber.
3. The budgets of the ICTY and ICTR include fees for investigators; under the Court's legal aid scheme, these are part of a single package amounting to a total of €73,006. This single package is excluded from the comparative tables below.
4. All costs have been converted to euros where expressed in US dollars, based on the exchange rate of US\$1 = €0.642 as at 30 July 2008.

¹ In view of the extraordinary flexibility allowed by the SCSL in the allocation of resources to each team (between US\$30,000 and US\$70,000 per month), which is carried out by the Principal Defender under the Legal Services Contract he/she concludes with counsel, the Court deems it appropriate to exclude that court from this comparison.

Case A: 6 months of pre-trial phase, 12 months of trial phase and 6 months of appeals phase

<i>Phase</i>	<i>ICTY</i>	<i>ICTR</i>	<i>ECCC</i> ²	<i>ICC</i>
Pre-trial (6 months)	€382,827 ⁷	€530,000 ⁸	€203,556	€130,902
Trial (12 months)	€488,856 ⁶	€465,340 ⁹	€407,112	€369,384
Appeal (6 months)	€226,200 ⁷	€450,500 ⁸	€203,556	€130,902
<i>Total</i>	€1,096,883	€1,445,840	€814,224	€631,188

Case B: 12 months of pre-trial phase, 18 months of trial phase and 12 months of appeals phase

<i>Phase</i>	<i>ICTY</i>	<i>ICTR</i>	<i>ECCC</i> ⁹	<i>ICC</i>
Pre-trial (12 months)	€382,827 ⁰	€530,000 ¹	€351,528	€261,804
Trial (18 months)	€733,284 ²	€696,950 ³	€753,210	€554,076
Appeal (12 months)	€226,200 ⁴	€450,500 ⁵	€351,528	€261,804
<i>Total</i>	€1,342,311	€1,677,450	€1,456,266	€1,077,684

² Remuneration rates were calculated at the same level as at the Court, except for the legal assistant (P-2 at the Court and P-3 at ECCC), and on the same principle, i.e. P-3, Step V = €7,390 per month.

³ Lump sum per phase. Source: ICTY, Defence counsel payment scheme for the pre-trial stage, 1 May 2006 (http://www.un.org/icty/legaldoc-e/basic/counsel/payment_pretrial.htm).

⁴ Lump sum per phase (2,000 hours per team member).

⁵ See the ICTY payment scheme for the trial stage at (“E. Calculation of the Lump Sum”): <http://www.un.org/icty/legaldoc-e/>: calculation based on a 12 months projected period of trial: €169,116 (counsel) + €139,740 (co-counsel) + €180,000 (assistants and investigators) = €488,856.

⁶ 114 days of hearings + 23 further days at the seat of the Court + 132 days of work outside the seat of the Court for all team members.

Lump sum comprising remuneration of counsel: 2,100 hours at €97 per hour + support staff: 900 hrs at €25 per hour.

⁸ Lump sum per phase (1,700 hours per team member).

⁹ Remuneration rates were calculated at the same level as at the Court, except for the legal assistant (P-2 at the Court and P-3 at ECCC), and on the same principle, i.e. P-3, Step V = €7,390 per month.

¹⁰ Lump sum per phase. Source: ICTY, Defence counsel payment scheme for the pre-trial stage, 1 May 2006 (http://www.un.org/icty/legaldoc-e/basic/counsel/payment_pretrial.htm).

¹¹ Lump sum per phase.

¹² See the ICTY payment scheme for the trial stage at (“E. Calculation of the Lump Sum”): <http://www.un.org/icty/legaldoc-e/>: calculation based on a 18 months projected period of trial: €253,674 (counsel) + €209,610 (co-counsel) + €270,000 (assistants and investigators) = €733,284.

¹³ 171 days of hearings + 34 further days at the seat of the Court + 198 days of work outside the seat of the Court.

¹⁴ Lump sum comprising remuneration of counsel: 2,100 hours at €97 per hour + support staff: 900 hrs at €25 per hour.

¹⁵ Lump sum per phase.

Case C: 18 months of pre-trial phase, 24 months of trial phase and 12 months of appeals phase

<i>Phase</i>	<i>ICTY</i>	<i>ICTR</i>	<i>ECCC</i> ¹⁶	<i>ICC</i>
Pre-trial (18 months)	€382,827 ¹⁷	€530,000 ¹⁸	€527,292	€392,706
Trial (24 months)	€977,712 ¹⁹	€930,680 ²⁰	€1,004,280	€738,768
Appeal (12 months)	€226,200 ²¹	€450,500 ²²	€351,528	€261,804
<i>Total</i>	€1,586,739	€1,911,180	€1,883,100	€1,393,278

¹⁶ Remuneration rates were calculated at the same level as at the Court, except for the legal assistant (P-2 at the Court and P-3 at ECCC), and on the same principle, i.e. P-3, Step V = €7,390 per month.

¹⁷ Lump sum per phase. Source: ICTY, Defence counsel payment scheme for the pre-trial stage, 1 May 2006 (http://www.un.org/icty/legaldoc-e/basic/counsel/payment_pretrial.htm).

¹⁸ Lump sum per phase.

¹⁹ See the ICTY payment scheme for the trial stage at (“E. Calculation of the Lump Sum”): <http://www.un.org/icty/legaldoc-e/>: calculation based on a 24 months projected period of trial: €338,232 (counsel) + €279,480 (co-counsel) + €360,000 (assistants and investigators) = €977,712.

²⁰ 228 days of hearings + 46 further days at the seat of the Court + 264 days of work outside the seat of the Court.

²¹ Lump sum comprising remuneration of counsel: 2,100 hours at €97 per hour + support staff: 900 hrs at €25 per hour; this calculation does not include any additional resources which might be allocated due to the length of the phase.

²² Lump sum per phase.

Annex IV

Court's legal aid budget for 2008 and proposed legal aid budget for 2009

2008 budget

Legal aid for defendants

<i>Regular budget</i>	<i>Contingency Fund</i>	<i>Total</i>
832,120	793,600	1,625,720 ¹

<i>Case</i>	<i>Phase</i>	<i>Remunerations</i>	<i>Expenses</i>	<i>Investigations²</i>	<i>Total</i>
<i>Lubanga</i>	Trial (12m)	537,768 ³	48,000	41,965 ⁴	627,733
<i>Katanga</i>	Pre-Trial (9m) ⁵	235,350	36,000	73,006 ⁶	344,356
<i>Katanga</i>	Trial (3m)	116,103	12,000	0	128,103
<i>Katanga</i>	Total				472,459
<i>Ngudjolo</i>	Pre-Trial (8m) ⁷	209,200	32,000	73,006 ⁸	314,206
<i>Ngudjolo</i>	Trial (3m)	116,103	12,000	0	128,103
<i>Ngudjolo</i>	Total				442,309
<i>Total</i>					1,542,501

¹ Includes cost of assistance by duty counsel and ad hoc counsel.

² Professional investigators and resource persons are paid (fees and expenses) from the investigation budget provided to the defence team.

³ Includes an additional legal assistant, as ordered by the Pre-Trial Chamber on 22 September 2006 (ICC-01/04-01/06-460).

⁴ Available budget as of 1 January 2008

⁵ A decision on the confirmation of charges is anticipated during September 2008.

⁶ Because of the flexibility enjoyed by teams regarding allocation of this item, the figure given is that for the total budget under this head..

⁷ A decision on the confirmation of charges is anticipated during September 2008.

⁸ Because of the flexibility enjoyed by teams regarding allocation of this item, the figure given is that for the total budget under this head.

Legal aid for victims

<i>Regular budget</i>	<i>Contingency Fund</i>	<i>Total</i>
574,200 ⁹	995,259	1,594,023 ¹⁰

<i>Case</i>	<i>Phase</i>	<i>Remunerations</i>	<i>Expenses</i>	<i>Investigations¹¹</i>	<i>Total</i>
<i>Lubanga¹²</i>	Trial (12m)	517,566 ¹³	96,000	87,504	701,070
<i>Katanga/Ngudjolo¹⁴</i>	Pre-Trial (9m) ¹⁵	540,999	108,000	75,000	723,999
	Trial (3m)	235,260	36,000		271,260
<i>Ad hoc counsel</i>	Any	30,330	4,234		34,564
<i>Total</i>					1,730,893

2009 budget

In the preparation of the budget proposal for 2009, the assumptions employed by the Registry were two cases involving three defendants, each with duration of 12 months of trial phase. It has to be stressed that neither remuneration nor other expenses have been updated for the purpose of the 2009 budget. Thus the budget proposal is as follows:

⁹ This represents the budget approved by the Assembly at its sixth session, where the proposed increases for legal aid in line with the budget's underlying assumptions failed to gain approval (see: *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. I, part II, para. 33). However, the distribution of the budget per case and stage in the table that follows is based on the budget proposal of the Court according to the underlying budgetary assumptions, since it would not otherwise be possible to match the distribution with the approved budget. This explains the difference between the regular budget and the total of the table entitled "Distribution of the budget per case and stage".

¹⁰ Includes fees and expenses of counsel acting on an ad hoc basis. Legal aid has been granted in 2008, for example, for legal representatives of victims to participate in interlocutory in appeals in relation to a situation.

¹¹ Professional investigators and resource persons are paid (fees and expenses) from the investigation budget provided to the legal representatives of victims.

¹² Two teams of legal representatives (based on an assumption of two teams per accused).

¹³ Includes an additional legal assistant during the reparations phase, which was assumed to constitute 3 months of the trial phase.

¹⁴ Three teams of legal representatives. It should be noted that only three legal teams were provided for in the request to the contingency fund even though the budgetary assumption is two teams per accused and there are two accused in the case.

¹⁵ This includes the possibility for a case manager. A decision on the confirmation of charges is anticipated during September 2008.

Legal aid for defendants

Justification	Total cost
Legal aid team 1 ¹⁶	585,418.00
Legal aid team 2 ¹⁷	585,418.00
Legal aid team 3 ¹⁸	585,418.00
<i>Subtotal legal aid teams</i>	<i>1,756,254</i>
Duty counsel sit 1 ¹⁹	55,543.00
Duty counsel sit 2 ²⁰	58,164.00
Duty counsel sit 3 ²¹	60,595.00
Duty counsel sit 4 ²²	75,728.00
<i>Subtotal duty counsel</i>	<i>250,030</i>
Ad hoc counsel sit 1 ²³	78,012.00
Ad hoc counsel sit 2 ²⁴	78,558.00
Ad hoc counsel sit 3 ²⁵	79,064.00
Ad hoc counsel sit 4 ²⁶	82,436.00
<i>Subtotal ad hoc counsel</i>	<i>318,070</i>
<i>Total</i>	<i>2,324,354</i>

Legal aid for victims

Case	Phase	Remunerations	Expenses	Investigations ²⁷	Total
<i>Lubanga</i> ²⁸	Trial (3m)	120,222	24,000		
	Reparation (6m)	313,800 ²⁹	48,000	87,504 ³⁰	593,526
<i>Katanga/Ngudjolo</i>	Trial (12m)	721,332	144,000		865,332
<i>Ad hoc counsel</i>	Any	30,330	4,366		34,696
<i>Total</i>					1,493,554

¹⁶ Does not include any additional resources that the Registrar or a Chamber might allocate.

¹⁷ Does not include any additional resources that the Registrar or a Chamber might allocate.

¹⁸ Does not include any additional resources that the Registrar or a Chamber might allocate.

¹⁹ Based on 30 days of fees and 10 missions of 10 days to Kampala.

²⁰ Based on 30 days of fees and 10 missions of 10 days to Kinshasa.

²¹ Based on 30 days of fees and 10 missions of 10 days to N'Djamena.

²² Based on 30 days of fees and 10 missions of 10 days to Bangui.

²³ Based on 60 days of fees and 2 missions of 7 days to Kampala.

²⁴ Based on 60 days of fees and 2 missions of 7 days to Kinshasa.

²⁵ Based on 60 days of fees and 2 missions of 7 days to N'Djamena.

²⁶ Based on 60 days of fees and 2 missions of 7 days to Bangui.

²⁷ Professional investigators and resource persons are paid (fees and expenses) from the investigation budget provided to the legal representatives of victims.

²⁸ Two teams of legal representatives: the budgetary assumption is 9 months of trial phase, of which 3 months would be a reparations phase

²⁹ Includes an additional legal assistant during the reparations phase.

³⁰ Only available to the extent that the investigations budget for the team was not spent the previous year (see: Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4, para. 58).

Annex V

Comparative legal aid budget for fiscal years 2008 and 2009 in the different international criminal tribunals

The inclusion of this annex is dependent on authorisation to disclose the relevant information by the jurisdictions consulted. As a result, this information will be issued as an addendum to the present report.

Annex VI

Evaluation of indigence by the different international criminal jurisdictions surveyed

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>	<i>ICC</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.	Yes: 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.
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.	Yes: The furnishing contained in the principal family home, and the property of the person claiming indigence, will be included from the disposal means, except for luxury items of extraordinary value, including but not limited to art and antique collections. The value of these items will be estimated by a certified expert.

<i>Assets</i>	<i>ICTR</i>	<i>ICTY</i>	<i>SCSL</i>	<i>ECCC</i>	<i>ICC</i>
Motor vehicles	Yes	Yes: The Tribunal takes into account only the equity in the applicant's principal family vehicles 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.	Yes: No vehicle which, in the opinion of the Registry, was of a lavish or ostentatious nature could be excluded.
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.	Yes: All other assets, including real estate, owned by the person claiming indigence, as well as assets transferred to another person for the purpose of concealment, will be included among the person's disposal means. These assets include, among others, stocks, bonds or bank accounts. Family or social benefits to which the person claiming indigence may be entitled are excluded.
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.	No: Assets owned by dependants will only be taken into account to determine the existence and extent of the obligations to such dependant of the person claiming indigence and cannot be considered as disposable means, except in the case of assets transferred for the purpose of concealment.

b) Obligations

<i>Obligations</i>	<i>ICTR</i>	<i>ICTY</i>	<i>SCSL</i>	<i>ECCC</i>	<i>ICC</i>
Calculation basis	The current threshold for a determination of indigence is US\$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.	All assets and obligations of the applicant are considered in order to calculate his or her monthly disposable means, which will be used to pay legal assistance.
Persons concerned	Suspects/accused persons	Suspects/accused persons	Suspects/accused persons	Suspects/accused persons	Suspects/accused persons and victims

c) **Determination of indigence**

<i>Determination</i>	<i>ICTR</i>	<i>ICTY</i>	<i>SCSL</i>	<i>ECCC</i>	<i>ICC</i>
Formula used	The threshold is US\$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: (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>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.</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>	<p>Where monthly disposable means are:</p> <ul style="list-style-type: none"> – ≤ 0, total indigence – More than 0 but less than the total cost of a legal aid team: partial indigence – Higher than the cost of a legal aid team: no indigence

<i>Determination</i>	<i>ICTR</i>	<i>ICTY</i>	<i>SCSL</i>	<i>ECCC</i>	<i>ICC</i>
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.	See above.

Annex VII

National and regional statistics resources

For this exercise, only those websites available in a working language of the Court have been selected. The Court would appreciate receiving additional information from any State Party concerning missing institutes or units, as well as the availability of relevant statistics.

Table 1: National institutes or administrative units

<i>States</i>	<i>Website address</i>
Afghanistan	http://www.cso-af.net/cso/index.php?page=1&language=en
Albania	http://www.instat.gov.al/
Algeria	http://www.ons.dz/IN_DEX1.htm
Argentina	http://www.indec.mecon.ar/
Armenia	http://www.armstat.am/en/
Australia	http://www.abs.gov.au/
Belgium	http://www.statbel.fgov.be
Belize	http://www.cso.gov.bz/
Bosnia and Herzegovina	http://www.bhas.ba/eng/Default.asp
Brazil	http://www.ibge.gov.br/english/
Bulgaria	http://www.nsi.bg/Index_e.htm
Cambodia	http://www.nis.gov.kh/
Cameroon	http://www.statistics-cameroon.org/
Canada	http://www.statcan.ca
Central African Republic	http://www.stat-centrafrique.com/
Chad	http://www.inseed-tchad.org/
Chile	http://www.ine.cl/canales/chile_estadistico/home_eng.php?lang=eng
China	http://www.stats.gov.cn/english/index.htm
Congo	http://www.cnsee.org/
Côte d'Ivoire	http://www.ins.ci/
Croatia	http://www.dzs.hr/default_e.htm

<i>States</i>	<i>Website address</i>
Cyprus	http://www.mof.gov.cy/mof/mof.nsf/DMLstatistics_en/DMLstatistics_en
Czech Republic	http://www.czso.cz/eng/redakce.nsf/i/home
Denmark	http://www.dst.dk/HomeUK.aspx
Denmark (Faroe Islands)	http://www.hagstova.fo/portal/page/portal/HAGSTOVAN/Statistics_%20Faroe_Islands
Djibouti	http://www.ministere-finances.dj/statist.htm
Egypt	http://www.msrintranet.capmas.gov.eg/pls/fdl/tst12e?action=&lname=
Estonia	http://www.stat.ee/?lang=en
Fiji	http://www.statsfiji.gov.fj/
Finland	http://www.stat.fi/index_en.html
France	http://www.insee.fr/fr/default.asp
Gabon	http://www.stat-gabon.ga/Home/Index1.htm
Gambia	http://www.csd.gm/
Georgia	http://www.statistics.ge/index.php?plang=1
Germany	http://www.destatis.de
Greece	http://www.statistics.gr/main_eng.asp
Guinea	http://www.stat-guinee.org/
Hungary	http://portal.ksh.hu/portal/page?_pageid=38,119919&_dad=portal&_schema=PORTAL
Iceland	http://www.statice.is/
Indonesia	http://www.bps.go.id/index.shtml
Ireland	http://www.cso.ie/
Israel	http://www1.cbs.gov.il/reader/?MIval=cw_usr_view_Folder&ID=141
Italy	http://www.istat.it/english/
Jamaica	http://www.statinja.com/
Japan	http://www.stat.go.jp/english/index.htm
Jordan	http://www.dos.gov.jo/dos_home/home_e.htm
Latvia	http://www.csb.gov.lv/?lng=en
Lebanon	http://www.cas.gov.lb/Newsrep_en.asp
Lesotho	http://www.bos.gov.ls/
Lithuania	http://www.stat.gov.lt/en/

<i>States</i>	<i>Website address</i>
Luxembourg	http://www.statec.public.lu
Madagascar	http://www.instat.mg/
Malawi	http://www.nso.malawi.net/
Malaysia	http://www.statistics.gov.my/
Maldives	http://www.planning.gov.mv/en/
Malta	http://www.nso.gov.mt/
Mauritania	http://www.ons.mr/
Mauritius	http://www.gov.mu/portal/site/cso
Moldova	http://www.statistica.md/index.php?lang=en
Mozambique	http://www.ine.gov.mz/Ingles
Nepal	http://www.cbs.gov.np/
Netherlands	http://www.cbs.nl/en-GB/default.htm
New Zealand	http://www.stats.govt.nz/default.htm
Niger	http://www.stat-niger.org/
Nigeria	http://www.nigerianstat.gov.ng/
Norway	http://www.ssb.no/english/
Oman	http://www.moneoman.gov.om/index.asp
Pakistan	http://www.statpak.gov.pk/
Papua New Guinea	http://www.nso.gov.pg/
Philippines	http://www.census.gov.ph/
Poland	http://www.stat.gov.pl/english/
Portugal	http://www.ine.pt
Republic of Korea	http://www.nso.go.kr/eng2006/emain/index.html
Romania	http://www.insse.ro/cms/rw/pages/index.en.do
Russian Federation	http://www.gks.ru/eng/
Saint Lucia	http://www.stats.gov.lc/
Senegal	http://www.ansd.sn/
Serbia	http://webrzs.statserb.sr.gov.yu/axd/en/index.php
Seychelles	http://www.misd.gov.sc/sdas/

<i>States</i>	<i>Website address</i>
Singapore	http://www.singstat.gov.sg/
Slovakia	http://portal.statistics.sk/showdoc.do?docid=359
Slovenia	http://www.stat.si/eng/index.asp
South Africa	http://www.statssa.gov.za/
Sri Lanka	http://www.statistics.gov.lk/
Swaziland	http://www.gov.sz/home.asp?pid=75
Sweden	http://www.scb.se/default___2154.asp
Switzerland	http://www.bfs.admin.ch/bfs/portal/fr/index.html
Tanzania	http://www.nbs.go.tz/
The former Yugoslav Republic of Macedonia	http://www.stat.gov.mk/english/glavna_eng.asp
Tunisia	http://www.ins.nat.tn/
Turkey	http://www.turkstat.gov.tr/Start.do
Ukraine	http://www.ukrstat.gov.ua/
United Kingdom	http://www.statistics.gov.uk/
United States of America	http://www.fedstats.gov/
Uzbekistan	http://www.stat.uz/STAT/index.php?lng=1
Vietnam	http://www.gso.gov.vn/default_en.aspx?tabid=491
Zambia	http://www.zamstats.gov.zm/

Table 2: International and regional resources

<i>Organizations</i>	<i>Website Address</i>
Afristat	http://www.afristat.org/
Asian Development Bank	http://www.adb.org/Economics/
Eurostat	http://epp.eurostat.ec.europa.eu/
Inter-American Development Bank	http://www.iadb.org/research/data.cfm?language=en&parid=2
International Monetary Fund	http://dsbb.imf.org/
International Statistical Institute	http://isi.cbs.nl/
Organisation for Economic Co-operation and Development (OECD)	http://www.oecd.org/statsportal/0,3352,en_2825_293564_1_1_1_1_1,00.html
The World Bank	http://www.worldbank.org/

Annex VIII

Examples of calculation of indigence

Following all changes, adjustments, and clarifications to the two mechanisms, namely the payment scheme and the determination of indigence under the legal aid system, the Court proposes the following examples of calculation, which are based on the same case as that used in the calculations provided in 2005.¹ Real names of places have been included as examples of available statistics.

Table 1: Monthly obligations of applicant

1 spouse + 1 child living in Luxembourg	Yearly budget of households = €43,673.5 in 1996 ² Applying Consumer Price Index (CPI), annual changes from 1996-2007 (25,31%), total = €54,727.26.	€4,560.60
1 son/daughter living in Douala (Cameroon)	Yearly budget per person = XOF 496,660.69 ³ = €757.15 ⁴	€63.10
1 son/daughter in Boston	US\$51,980 per year ⁵ = US\$4,332.67 per month	€2,718.38
<i>Total monthly obligations = €7,342.08</i>		

¹ Report on the principles and criteria for the determination of indigence for the purposes of legal aid (ICC-ASP/6/INF.1, annex).

² <http://www.statistiques.public.lu/stat/TableView/tableView.aspx?ReportId=1551> (16 July 2008).

³ <http://www.statistics-cameroon.org/> (16 July 2008).

⁴ All conversions were made or reviewed on 16 July 2008.

⁵ <http://www.epi.org> (16 July 2008).

Case 1

ASSETS	
<i>Property</i>	<i>EMR⁶ (euros)</i>
Family house in A	1,300
Apartment in B	1,500
Apartment in C	1,000
House in D	600

<i>Other assets</i>	<i>Total value (euros)</i>	<i>Total/60</i>
3 cars	40,000	666.67
Paintings, jewellery	300,000	5,000
Bank accounts	150,000	2,500
Shares and bonds	500,000	8,333.33
<i>Total</i>	990,000	20,900

$$MDM^7 = \text{Monthly value of assets} - \text{Monthly Obligations} = \text{€}13,558$$

In case 1, the applicant would be found partially indigent, and should pay his or her defence team a sum equal to his or her MDM.

The Court's contribution would be calculated as follows (in euros):

<i>Phase</i>	<i>Monthly cost⁸</i>	<i>Monthly contribution</i>
Phase 1 (Investigation to initial appearance)	22,206.79 ⁹	8,648.79
Phase 2 (Initial appearance to confirmation of charges)	33,191.79	19,633.79
Phase 3 (Confirmation of charges to closing arguments)	45,742.79	32,184.79
Phase 4 (Closing arguments to delivery of judgment)	22,206.79 ¹⁰	8,648.79
Phase 5 (Appeal)	33,191.79	19,633.79

⁶ Estimated monthly rent (see ICC-ASP/6/INF.1, para. 13).

⁷ Monthly disposable means (see document ICC-ASP/6/INF.1, para. 18).

⁸ For this calculation, the total budget for investigations was divided by 24 and added to the monthly cost. See Report on the operation of the Court's legal aid system and proposals for its amendment (ICC-ASP/6/4, annex IV).

⁹ Monthly ceiling for the legal cost of legal assistance during this phase.

¹⁰ Monthly ceiling for the legal cost of legal assistance during this phase.

Case 2

<i>ASSETS</i>	
<i>Property</i>	<i>EMR (euros)</i>
Family house in A	3,000
Apartment in B	2,000
Apartment in C	1,500
House in D	1,500

<i>Other assets</i>	<i>Total value (euros)</i>	<i>Total/60</i>
3 cars	50,000	833.33
Paintings, jewellery	1,000,000	16,666.67
Bank accounts	1,500,000	25,000
Shares and bonds	3,000,000	50,000
<i>Total</i>	5,550,000	92,500

$$MDM = \text{Monthly value of assets} - \text{Monthly Obligations} = \text{€}83,342.08$$

In case 2, the applicant would be found not indigent.

Case 3

<i>ASSETS</i>	
<i>Property</i>	<i>EMR (euros)</i>
Family house in A	1,300
Apartment in B	1,500
Apartment in C	1,000
House in D	600

<i>Other Assets</i>	<i>Total Value (euros)</i>	<i>Total/60</i>
3 cars	20,000	333.33
Paintings, jewellery	300,000	5,000
Bank accounts	500,000	8,333.33
Shares and bonds	1,000,000	16,666.67
<i>Total</i>	1,820,000	34,733

$$MDM = \text{Monthly value of assets} - \text{Monthly Obligations} = \text{€}27,391$$

In case 3, the applicant would be found partially indigent.

The Court's contribution would be calculated as follows (in euros):

<i>Phase</i>	<i>Monthly cost</i>	<i>Monthly contribution.</i>
Phase 1 (Investigation to initial appearance)	22,206.79	0 ¹¹
Phase 2 (Initial appearance to confirmation of charges)	33,191.79	12,016.38
Phase 3 (Confirmation of charges to closing arguments)	45,742.79	18,351.79
Phase 4 (Closing arguments to delivery of judgment)	22,206.79	0
Phase 5 (Appeal)	33,191.79	12,016.38

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¹¹ The difference of €5,184.21 could be deducted from the contribution of the Court during the next phase.