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**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)***

1. The Committee on Budget and Finance (CBF), at its third session held in August 2004, requested the Court “to provide additional information at its next session on how the Court intends to determine indigence for the purposes of legal aid” (ICC-ASP/3/18, para. 116).
2. Since the beginning of consultations with the legal profession in January 2003, the Registry has received the input of the legal profession on the issue, as provided in rule 20, sub-rule 3, of the Rules of Procedure and Evidence, particularly during the seminars on defence issues held in October 2003 and May 2004. It has, in addition, conducted research on the systems established in the ad hoc tribunals and on several national systems.
3. The proposed system takes into account the experience of the analysed systems the legal bases on which it must be grounded, and the proposal for a legal aid system that was transmitted in 2004 to the CBF and is awaiting consideration.

I. Legal bases

4. Article 55, paragraph 2, of the Rome Statute provides that:

“Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned by the Prosecutor, or by national authorities pursuant to a request made under Part 9,”

that person shall have the right

“(c) To have legal assistance of the person’s choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the

* Previously issued as ICC-ASP/4/CBF.1/2.

interests of justice so require, and **without payment by the person in any such case if the person does not have sufficient means to pay for it.**"

In the case of accused persons, article 67, paragraph 1(d), states that they have the right

"to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and **without payment if the accused lacks sufficient means to pay for it**".

5. Rule 21 of the Rules of Procedure and Evidence states that:

"1. [...] criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in rule 20, sub-rule 3.

[...]

5. Where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel."

6. These provisions are developed in regulations 83 to 85 of the Regulations of the Court. Regulation 84, dealing with the determination of means, provides in paragraph 2 that:

"The means of the applicant shall include means of all kinds in respect of which the applicant has direct or indirect enjoyment or power freely to dispose, including, but not limited to, direct income, bank accounts, real or personal property, pensions, stocks, bonds or other assets held, but excluding any family or social benefits to which he or she may be entitled. In assessing such means, account shall also be taken of any transfers of property by the applicant which the Registrar considers relevant, and of the apparent lifestyle of the applicant. The Registrar shall allow for expenses claimed by the applicant provided they are reasonable and necessary."

In addition, regulation 84.1 provides that:

"Where a person applies for legal assistance to be paid by the Court, the Registrar shall determine the applicant's means and whether he or she shall be provided with full or partial payment of legal assistance."

7. The object of this report is to establish a system for the appraisal of indigence based on the principles set out below.

II. Principles underlying the proposed system

8. A fair system for the appraisal of indigence should be based on **objective criteria** for calculating both the means at the disposal of the person requesting payment of legal assistance by the Court and the scale of admissible expenses, thereby reducing, if not avoiding, the risk of error in the assessment of either by the Registry.

9. This system is also aimed at enabling the person requesting legal assistance to honour his or her **obligations to dependants**. To this effect, the financial information form, which is the standard form for legal aid applications, contains several slots in which the occupation, salary and other sources of income of these dependants must be stated in order to allow the Registry to calculate the amount of the obligations to them, if any, of the person requesting the payment of legal assistance by the Court.

10. To comply with fairness requirements, such a system should also be **flexible**, allowing account to be taken of any changes in the financial status of the person and his or her dependants.

11. Finally, to facilitate understanding and management of the system, excessive complexity has been avoided, enabling the Registry to present a **simple** mechanism that nevertheless complies with all the aforementioned principles.

III. Calculation of the financial means of the person claiming indigence

III.1. Assets of the person claiming indigence

12. The financial information form is designed to enable a person properly to inform the Registry of the income and assets at his or her own disposal and at the disposal of the persons living in his or her household. The purpose of this declaration is to commit the person claiming indigence to full cooperation with the Registry in the investigation process in order to facilitate the speedy completion of the initial phase of the investigation, allowing the Registrar, within one month, to make a provisional determination of eligibility and, in the event of a positive determination, to determine the extent of the Court's contribution to the cost of the person's legal representation. The information may be checked by the financial investigator proposed for the 2006 budget in order to avoid undue use of legal aid funds. It is worth mentioning that, given the likely commencement of pre-trial activities during the months ahead, the appointment of a financial investigator on a temporary basis is of the utmost importance.

13. Upon submission of the form, an estimation of the value of assets, excluding those deemed necessary for the normal living expenses of the person and his or her dependants, needs to be made to determine the person's disposable means. In particular:

- (a) The person's **residence** will be excluded from the disposable means, to the extent considered reasonable in light of the needs of the dependants living in it. The value considered reasonable will be calculated as follows: the estimated monthly rent (EMR), as determined by the relevant housing authority of the place where the residence is located, or by an independent taxation service, will be deducted from the monthly subsistence allowance (MSA) payable to the dependants actually living in the residence (see III.2).
- (b) The **furnishings** contained in the principal family home, and the property of the person claiming indigence, will be excluded from the disposable 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.
- (c) **Motor vehicles** that are the property of the person claiming indigence will be excluded from the disposable means, up to a maximum of two. The value of

vehicles considered as disposable means will be estimated according to any available official scale, or with the help of a certified expert.

- (d) **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 disposable 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.

14. For all assets included under subparagraphs 13 (b), (c) and (d), a **monthly value** will be determined:

- (a) In the case of real estate, by calculating the estimated monthly rent, as provided for in subparagraph 13 (a);
- (b) For other assets, by dividing the assessed total value by 60, which is the depreciation period calculated for the assets.

15. **Assets owned by dependants** will only be taken into account to determine the existence and extent of the obligations to such dependants of the person claiming indigence and cannot be considered as disposable means, subject to (d).

III.2. Obligations of the person claiming indigence

16. The obligations of the person claiming indigence to dependants will be calculated on a monthly basis [option 1]: on the basis of the daily subsistence allowance (DSA) determined by the United Nations for each city where the dependants live.

$$\text{MSA} = \frac{\text{DSA} \times 365.25}{12}$$

[option 2]: on the basis of cost-of-living statistics made available by any official authority of the relevant country or, where such statistics are not available, [option 1].

17. Where the value of the EMR in respect of the **residence** of any of these dependants is higher than the MSA:

- (a) If the residence is the property of the dependant, the monthly rent may be deducted from the MSA of that dependant and, if applicable, any other dependant living in the same residence up to a maximum of 100 per cent of the MSA;
- (b) If the residence is the property of the person claiming indigence, the difference will be taken into account as assets of that person.

III.3. Amount of monthly disposable means (MDM)

18. The MDM will be calculated by subtracting the obligations of the person claiming indigence (see III.2) from the assets calculated as explained in III.1. It will be used to determine indigence for the purpose of according legal aid to be paid by the Court.

IV. Determination of the legal costs to be paid by the court

IV.1. General principles

19. The Registry proposed in 2004 a **system** that will allow counsel to represent indigent persons efficiently in accordance with the principles of equality of arms, objectivity, transparency, continuity and economy. This system is based on a fixed sum to be paid to the members of defence teams on a monthly basis. It also includes a lump sum for investigations, to be used during the whole of the procedure.

20. As the amounts allocated for the different phases of the procedure are different, several options are available for assessing the ability of the person claiming indigence to contribute to the cost of his or her defence. For the purposes of calculation, the monthly cost will be incremented by one twelfth to cover the expenses of investigations.

21. A starting point for the determination of indigence is that, where the **MDM is higher** than the monthly cost of defence for the most onerous phase of the proceedings, i.e. that of the trial, when the maximum extent of the defence team is in place, the accused will be deemed not indigent and his or her request will be refused. On the other hand, where the **MDM is ≤ 0** , indigence will be recognized to the full extent, i.e. the Court will pay all defence costs according to the proposed system.

22. The issue of **partial indigence** has to be approached cautiously: the practical impossibility of forecasting the length of the proceedings makes calculation of their total cost a very risky proposition. Several options may be contemplated to find a fair and effective solution.

Option 1

23. **Indigence is appraised for each phase** in respect of which the allocation of funds by the Registry changes, i.e.:

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

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

25. Where the **MDM is sufficient** to meet the cost of representation during **one or more of these stages**, as calculated in the system proposed by the Registry, indigence will not be recognized for the stage or stages concerned.

26. Where the MDM is **insufficient** to satisfy this cost, the person will pay the MDM to the defence team on a monthly basis and the Court will contribute the rest.

27. The **advantages** of this system are:

- (a) *Accuracy*, as it takes into account the person's real ability to assume the burden of paying for legal assistance, and provides for a fair system of quantification of the person's obligations to his or her dependants;
- (b) *Flexibility*, as it is calculated for the different stages and can be adapted to the needs of the procedure as well as to substantial changes in the circumstances of the person for whom legal assistance is paid by the Court.

28. The **drawback** of this system is :

Lack of uniformity of the Court's contribution during the proceedings, which could be perceived from outside as unfair.

Option 2

29. The Registry, in consultation with the Prosecutor and the chamber dealing with the case, will make an assumption regarding the length of the procedure and establish the **cost of the defence for the whole length of the procedure**, according to the system put in place.

30. This total cost will be **divided by the number of months** that the procedure is assumed to last, and the MDM will be deducted from the result. Where the result of this last operation is negative, the person will be deemed not indigent. Where the result is positive, the person will bear the burden of his or her defence within the limits of his or her MDM, and the difference will be contributed by the Court.

31. The **advantage** of this system is:

Uniformity of the Court's contribution throughout the proceedings, thereby avoiding any perception of unfairness.

32. The **drawback** of this system is:

Risk of inaccuracy of the assumptions regarding the length of the trial, which would jeopardize the efficiency of such a system.

V. Conclusion

33. Bearing in mind all these considerations, we propose that **option 1** be adopted as the policy to be followed by the Registry.

Annex

Examples of calculation of indigence

In order to illustrate the practical application of option 1, we propose by way of example the case of an accused with four dependants (all figures are in euros):

- 1 husband/wife + 1 child living in the family house in A (DSA = €150/day)
- 1 son/daughter studying in B (DSA = €250/day)
- 1 son/daughter studying in C (DSA = €200/day)

$$\text{MSA} = \frac{\text{DSA} \times 365,25}{12}$$

$\frac{150 \times 365,25}{12} = 4\,565.63$	(MSA_A)
$\frac{250 \times 365,25}{12} = 7\,609.38$	(MSA_B)
$\frac{200 \times 365,25}{12} = 6\,087.50$	(MSA_C)

The following cases present the effects of different financial situations on the proposed system.

Case 1

Assets:

Real estate	EMR
Family house in A	€1 300/month
Apartment in B	€1 500/month
Apartment in C	€1 000/month
House in D (disposable)	€600/month(X₁)

3 cars (1 disposable)	€10 000	$\frac{10\,000}{60} = 166.67$	(X₂)
Paintings, jewellery	€300 000	$\frac{300\,000}{60} = 5\,000$	(X₃)
Bank accounts	€150 000	$\frac{150\,000}{60} = 2\,500$	(X₄)
Shares and bonds	€500 000	$\frac{500\,000}{60} = 8\,333.33$	(X₅)

Obligations of the accused:

$$(2 \times \text{MSA}_A - 1,300) + (\text{MSA}_B - 1,500) + (\text{MSA}_C - 1,000) = \mathbf{O}$$

$$(7,831.26) + (6,109.38) + (5,087.50) = \mathbf{19,028.14}$$

Monthly disposable means:

$$X_1 + X_2 + X_3 + X_4 + X_5 - \mathbf{O} = \mathbf{MDM}$$

$$(600 + 166.67 + 5,000 + 2,500 + 8,333.33 = 16,600) - 19,028.14 = - \mathbf{2,428.14}$$

In this example, the accused would be considered indigent to the full extent of his or her legal assistance.

Case 2

In this example, the obligations of the accused remain constant but his or her assets change as follows:

Assets:

Real estate	EMR
Family house in A	€3 000/month
Apartment in B	€2 000/month
Apartment in C	€1 500/month
House in D (disposable)	€1 500/month(X_1)

3 cars (1 disposable)	€20 000	$\frac{20\,000}{60} = 333.33$ (X_2)
Paintings, jewellery	€1 000 000	$\frac{1\,000\,000}{60} = 16\,666.67$ (X_3)
Bank accounts	€1 500 000	$\frac{1\,500\,000}{60} = 25\,000$ (X_4)
Shares and bonds	€3 000 000	$\frac{3\,000\,000}{60} = 50\,000$ (X_5)

Obligations of the accused:

$$(2 \times \text{MSA}_1 - 1,300) + (\text{MSA}_2 - 1,500) + (\text{MSA}_3 - 1,000) = \mathbf{O}$$

$$(7,831.26) + (6,109.38) + (5,087.50) = \mathbf{19,028.14}$$

Monthly disposable means:

$$X_1 + X_2 + X_3 + X_4 + X_5 - \mathbf{O} = \mathbf{MDM}$$

$$(1,500 + 333.33 + 16,666.67 + 25,000 + 50,000) - 19,028.14 = \mathbf{74,471.86}$$

On the basis of the proposed amounts to be allocated in the legal assistance system for 2006, where the maximum amount is €36,509 per month, the accused would not qualify as indigent.

Case 3

Assets:

Real estate	EMR
Family house in A	€1 300/month
Apartment in B	€1 500/month
Apartment in C	€1 000/month
House in D (disposable)	€600/month(X₁)

3 cars (1 disposable)	€10 000	$\frac{10\,000}{60} =$	166.67	(X₂)
Paintings, jewellery	€300 000	$\frac{300\,000}{60} =$	5 000	(X₃)
Bank accounts	€500 000	$\frac{500\,000}{60} =$	8 333.33	(X₄)
Shares and bonds	€1 000 000	$\frac{1\,000\,000}{60} =$	16 666.67	(X₅)

Obligations of the accused:

$$(2 \times \text{MSA}_A - 1,300) + (\text{MSA}_B - 1,500) + (\text{MSA}_C - 1,000) = \mathbf{O}$$

$$(7,831.26) + (6,109.38) + (5,087.50) = \mathbf{19,028.14}$$

Monthly disposable means:

$$X_1 + X_2 + X_3 + X_4 + X_5 - O = \mathbf{MDM}$$

$$(600 + 166.67 + 5,000 + 8,333.33 + 16,666.67) - 19,028.14 = \mathbf{11,738.53}$$

On the basis of the proposed amounts to be allocated in the legal assistance system for 2006, where the maximum amount is of €36,509 per month, the accused would be considered partially indigent. The Court's contribution would be calculated as follows:

According to option 1

PHASE	MONTHLY COST (€)	MONTHLY SUM TO BE CONTRIBUTED BY THE COURT (€)
PRE-TRIAL		
Investigation to initial appearance	12 410	671.47
Initial appearance to confirmation of charges	19 864	8 125.47
TRIAL		
Confirmation of charges to closing arguments	36 509	24 770.47
Closing arguments to delivery of decisions	12 410	671.47
APPEAL	21 023	9 284.47

According to option 2:

1. Determination of the length of the procedure (in consultation with the Prosecutor, counsel and the chamber dealing with the case)

For the purpose of this exercise, we propose a foreseen length as follows:

PHASE	LENGTH
PRE-TRIAL	
Investigation to initial appearance	6 months
Initial appearance to confirmation of charges	12 months
TRIAL	
Confirmation of charges to closing arguments	18 months
Closing arguments to delivery of decisions	3 months
APPEAL	12 months

2. Determination of the average monthly cost of the defence

According to the amounts proposed and the foreseen length of the case, the total cost of the defence would be €1,259,496. The average monthly cost, for a total of 51 months, would be €24,696.

3. Determination of the contribution of the Court

As the difference between the average monthly cost of the defence and the MDM of the accused is €12,957.47, this is the average amount that the Court should contribute to the defence of this indigent person.

It should be noted, however, that this average contribution should not be paid on a uniform basis, since the real cost of the defence will differ from phase to phase.

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