

IBA/ICC Monitoring and Outreach Programme

IBA Presentation to the Hague Working Group
Comments on *Draft report of the Court on legal aid: Alternative models for assessment of indigence*
July 15, 2009

The International Bar Association (IBA) welcomes the opportunity to comment on the draft report of the International Criminal Court (ICC or the Court) entitled *Draft report of the Court on legal aid: Alternative models for assessment of indigence*. The Court was invited by the Assembly of States Parties (ASP) pursuant to Resolution ICC-ASP/7/Res. 3 at paragraph 16 to present to the Assembly at its eighth session “an updated report on the legal and financial aspects of funding victims’ legal representation before the Court, together with a further report considering alternatives to the formula currently used by the Court for calculating indigence”.

The IBA recalls that while it is important that the legal aid system be administered in an efficient and cost-effective manner, the core tenets of the legal assistance programme must be fairness, ensuring equality of arms and the need to guarantee effective and efficient legal representation. Transparency and objective, clear criteria are key prerequisites when determining indigence.

Proposals and Comments

Preliminary assessment of indigence

Proposal

The Court recommends that a preliminary assessment of indigence be prepared within one month of the submission of an application for legal aid on the basis of whatever *prima facie* information is available to the Registrar.

Comment

An early evaluation of the applicant’s indigent status is to be welcomed, as it will prevent a gap in legal representation and limit delays in proceedings. The right to representation is thus fully realised in every case. It should be noted that while the burden of proving that they lack sufficient means to retain counsel lies with the applicant, in conformity with international standards of human rights this requirement need not be shown ‘beyond all doubt’.¹ Legal aid should be provided to an applicant if there are “some indications” that he is indigent.² The risk that an applicant is found to be indigent when they in fact have adequate resources available is outweighed by the need to ensure effective

¹ Stuart Beresford and Hafida Lahiouel, ‘The Right to be Defended in Person or Through Legal Assistance and the International Criminal Court’ (2000) 13 *Leiden Journal of International Law* 949, 967.

² *Pakelli v. Federal Republic of Germany*, Judgement of 25 April 1983, 6 EHRR 1 (1984), para. 34.

representation from the outset of proceedings. The IBA recommends exercising caution when considering whether a person is an “exception” to the rule. Any information that suggests that a person is affluent, or otherwise not indigent, should come from a reliable and objective source.

The imposition of a threshold for the allocation of legal aid

Proposal

There is presently no financial threshold applied by the ICC for the purpose of determining indigence. The determination of indigence is based on objective criteria measured against the actual costs of legal representation in proceedings. The Court proposes to maintain this system.

Comment

The IBA concurs with the Court’s assessment that the imposition of a threshold at this stage would tend to be arbitrary and may deprive the Court of the necessary flexibility to respond to the needs of ICC trials. The report notes that the imposition of threshold limits at the national level vary depending on the jurisdiction, thus it would be difficult to establish a reasonable threshold which could be universally applied at the ICC given the diversity of countries from which applicants come. The imposition of an arbitrary threshold for indigence would risk unfairly denying applicants access to legal aid and undermining their fundamental fair trial rights.

Inclusion of assets of members of the applicants’ household

Proposal

The report proposes that the assets and income of members of the applicant’s household should be included among the available assets of the applicant for the purpose of determining indigence unless national law or conflict of interest makes it impossible.

Comment

The IBA is concerned that the report does not adequately elaborate on the reasons for this proposed change nor the policies which would be adopted in relation to its practical implementation.

It is unclear which persons would be included in the category of financially-related persons, as the report broadly refers to ‘assets and income of members of the applicant’s household’. There must be a clear distinction between those who reside in or are a part of the applicant’s household but who have no direct financial ties with the applicant and those who are financially-related. The practice of including the assets of financially-related persons has been applied at the International Criminal Tribunal for the former Yugoslavia (ICTY), however this is restricted to persons with whom the applicant is financially co-dependent; which means that there is evidence of a pooling of financial

resources such that the applicant and the individual constitute one financial unit.³ The present proposal does not clearly address the issue of the nexus necessary for a person to be considered financially-related to an applicant.

Article 10 of the ICTY Directive on the Assignment of Defence Counsel⁴ specifies that in assessing the means of the suspect or accused “account shall also be taken of the means of the spouse of a suspect or accused, as well as those of persons with whom he habitually resides, **provided that it is reasonable to take such means into account**”. The question of when it is reasonable to take into account the assets of financially-related persons invites a difficult assessment of the nature of the relationship between the applicant and is subject to different legal and cultural considerations.

For example, the approach of the ICTY has been to exclude assets owned by the applicants’ spouse that do not constitute marital property.⁵ Marital property is defined as property acquired by the applicant and their spouse during their marital union, excluding gifts made to one spouse specifically. The Registry at the ICTY determines whether assets are deemed marital property according to the marital property regime of the state in which the applicant and his spouse were wed or habitually reside unless proof is offered to the contrary. Were such an approach to be implemented at the ICC, it would place spouses in jurisdictions applying a more inclusive interpretation of marital property at a disadvantage relative to other spouses.

The Court has noted in the report, and in the past, that the principal rationale for excluding the assets of family members from the assessment of the applicant’s indigence is the unfair and punitive burden it imposes on innocent relatives.⁶ In light of the potential prejudice to the interests of the applicants’ relatives, the IBA submits that the report does not demonstrate a compelling reason to amend the present system.

Treatment of principal place of residence when calculating the assets of the applicant

Proposal

The Court’s report proposes a change to the evaluation method of the value of real estate, including the principal place of residence, abandoning the estimated monthly rent (EMR) value in favour of the total property value.

³ Report on different legal aid mechanisms before international tribunals, ICC-ASP7/23, of 31 October 2008, Annex VI.

⁴ International Criminal Tribunal for the Former Yugoslavia, Directive on the Assignment of Defence Counsel, UN Doc. IT/73/Rev. 11, 11 July 2006.

⁵ International Criminal Tribunal for the former Yugoslavia, Registry Policy for Determining the Extent to Which an Accused is Able to Remunerate Counsel, cl 6.

⁶ Report on different legal aid mechanisms before international tribunals, ICC-ASP7/23, of 31 October 2008, para 67.

Comment

Whilst the IBA does not in principle oppose the amendment of the calculation method in order to obtain a more accurate assessment, the IBA is concerned that there is insufficient detail in the Court's proposal as to how the proposed evaluation method will impact applicants in specific circumstances.

There are two key issues raised by the proposal that are not clearly addressed in the Court's report. The first is what is meant by total value of the property. This raises a number of questions, including:

- How would the Court address the variety of possible arrangements in relation to the equity held in the property? For example, the applicant may be the sole equity holder, may have part equity with one or more persons, or may have no equity in the property at all. In these circumstances the Court may need to consider what, if any, part of the property value should be attributed to the applicant.
- How is the value of the property to be assessed? By the applicant, the Court, or an independent arbiter?

The situation at the ICTY in this regard is instructive. In determining the applicant's disposable means, the ICTY Registry includes the following:

“...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.**”⁷

The second issue is that whilst the total value of the principal place of residence might sensibly exceed the calculation of the EMR over 60 months, it will not always be reasonable to expect that an applicant will be able to sell the property in order to realise this value in the short term – especially where the applicant is retained in custody or the property is located in a conflict area. This issue was noted by Trial Chamber II at the ICTY in the *Dokmanovic* case:

‘...it is clear that there is a dispute concerning the value of the property of the Accused, particularly the house and land at Trpinja, and this substantially affects the total amount of his financial assets. In addition, it is conceivable that the disposal of this property may prove problematic for the Accused in his current situation. Until the questions over the value of the property and its disposability are resolved within the Registry, the Trial Chamber finds it appropriate to exclude this property from the calculation of the financial

⁷ International Criminal Tribunal for the former Yugoslavia, Registry Policy for Determining the Extent to Which an Accused is Able to Remunerate Counsel, cl 5. The Registry determines the extent to which the principal family home exceeds the reasonable needs of the applicant, his spouse and the persons with whom he habitually resides in accordance with the formula in section 9 of the Policy.



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means of the Accused. This alone has substantial effect and the Trial Chamber thus finds that the Accused is indeed indigent at the present time. He therefore, has the right to counsel assigned by the Registrar.’⁸

⁸ *The Prosecutor v Dokmanovic*, Decision on Defence Preliminary Motion of the Assignment of Counsel, Case No. IT-95-13a-PT, Tr. Ch. II, 30 September 1997, para 12.