



Guidelines for Determining the Extent to Which an Applicant for Legal Aid is Able to Remunerate Counsel

13 November 2017

Preamble

The Registrar adopts these Guidelines to facilitate the consistent and transparent determination of the extent to which any Applicant for legal aid is able to remunerate counsel in proceedings before the MICT pursuant to Articles 7 to 10 of the Directive. The Registry shall apply these Guidelines to all indigency determinations pursuant to Articles 7 to 10 of the Directive.

I. Definitions

1. For the purpose of these Guidelines, the following definitions shall apply:

- Accused:** A person indicted by the ICTR, the ICTY or the MICT in accordance with Article 1 of the Statute.
- Applicant:** A Suspect, an Accused or a Convicted Person who has applied for legal aid before the MICT.
- Contribution:** The extent to which an Applicant is able to remunerate counsel; that is, the amount the Applicant must contribute to his defence.
- Convicted Person:** A person against whom the ICTR, the ICTY or the MICT has rendered a final judgement of conviction.
- Dependent:** A person who derives his main financial support from the Applicant, his spouse or persons with whom he habitually resides but who does not habitually reside in the principal family home.
- Directive:** The Directive on the Assignment of Defence Counsel, issued by the Registrar on 14 November 2012, in accordance with Rule 43 of the Rules, and as subsequently amended.
- Disposable means:** Income and assets of the Applicant and his Household that the Registry considers as exceeding the reasonable needs of the Applicant, his spouse, his dependents and the persons with whom he habitually resides. The Registry's calculation of the disposable means is based on Section III of these Guidelines.
- Estimated living expenses:** The living costs likely to be incurred by the Applicant and his Household during the estimated period when the Registry issues its decision on the extent to which an Applicant is able to remunerate counsel until the conclusion of the estimated period in which the Applicant will require representation before the MICT, as calculated under paragraph 14 of these Guidelines.

Guidelines:	The present Guidelines for Determining the Extent to Which an Applicant for Legal Aid is able to Remunerate Counsel.
Household:	The Applicant's spouse, children and others with whom he habitually resides.
ICTR:	The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council resolution 955 of 8 November 1994.
ICTY:	The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, established by Security Council resolution 827 of 25 May 1993.
Marital property:	Property acquired by the Applicant and his spouse during their marital union, excluding gifts made to one spouse specifically.
MICT:	The International Residual Mechanism for Criminal Tribunals, as established by Security Council resolution 1966 of 22 December 2010.
Persons with whom he habitually resides:	Individuals who usually live with the Applicant or who would live with the Applicant if he 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.
Principal family home:	The principal place of residence of the Applicant and his Household, owned by the Applicant or his Household; usually where the Applicant would reside if he were not in custody.
Principal family vehicle:	A vehicle habitually used as a primary form of transport for the Applicant or his Household, owned by the Applicant or his Household.
Readily disposable asset:	An asset owned by the Applicant or his Household that can be sold, mortgaged or leased in order to raise money for the Applicant's defence.
Registrar:	The Registrar of the MICT appointed pursuant to Article 15 of the Statute.

- Registry:** The organ of the MICT responsible for the administration and servicing of the MICT pursuant to Article 15 of the Statute, and, for purposes of these Guidelines, Registry staff specifically tasked with administering legal aid.
- Rules:** The Rules of Procedure and Evidence adopted by the MICT pursuant to Article 13 of the Statute, adopted on 8 June 2012, and as subsequently amended.
- Spouse:** An adult who is living with the Applicant as husband or wife, regardless of legal marital status.
- Statute:** The Statute of the MICT annexed to Security Council resolution 1966 of 22 December 2010, and as subsequently amended.
- Suspect:** A person concerning whom the MICT has a reasonable basis to believe has committed a crime under Article 1 of the Statute, over which the MICT has jurisdiction.
- Tools of the trade:** Standard tools or equipment needed in a particular trade, profession or business.
- UNDF:** The United Nations Detention Facility in Arusha, Tanzania.
- UNDU:** The United Nations Detention Unit in The Hague, The Netherlands.

In these Guidelines, the masculine shall include the feminine and *vice versa*.

II. General Provisions

2. When an Applicant for legal aid submits a declaration of means form pursuant to Article 7(B) of the Directive, the Registry assesses the income and assets of the Applicant and his Household. In doing so, the Registry shall rely on the Applicant's declaration of means form, submitted together with the request for the assignment of counsel, and may undertake an inquiry into the Applicant's means, pursuant to Article 9 of the Directive.
3. From the established pool of income and assets, the Registry calculates the Applicant's disposable means, according to Section III of these Guidelines. From the disposable means, the Registry deducts the estimated living expenses of the Applicant's family and dependents during the estimated period in which the Applicant will require representation before the MICT. The amount remaining is the contribution the Applicant must make to his defence.
4. Should a Suspect submit a declaration of means form pursuant to Article 7(B) of the Directive, the Registry will make a *prima facie* determination of the means of the Suspect. Should the Suspect be formally indicted by the MICT, the Registry may adjust such a *prima facie* determination in light of any further inquiry into the means pursuant to Article 9 of the Directive.
5. Pursuant to Article 8 of the Directive, the Applicant bears the burden of proof to show that he is unable to remunerate counsel. The Applicant must establish by credible and convincing evidence that he is fully or partially indigent.
6. These Guidelines do not purport to create any rights or entitlements beyond those established by Article 19 of the Statute, and are without prejudice to the Rules and the Directive. In case of conflict, the provisions of the Statute, Rules or Directive shall apply.
7. Where the ICTR or the ICTY has made a determination of the financial status of an Accused, the MICT shall recognise such determination, unless new information is obtained, that establishes that the Accused has sufficient means to remunerate Counsel or a judicial order directs the Registry to confirm or verify a previous indigency determination.

III. Disposable Means

A. Assets included in disposable means

8. Further to Article 10 of the Directive, in determining the Applicant's disposable means, the Registry shall include the following:
 - the equity in the principal family home that exceeds the reasonable needs of the Applicant and his Household. The principal family home will exceed the reasonable needs of the Applicant and his Household if it is of greater value than the average family home in the region in which it is located. The Registry determines the extent to which the principal family home exceeds the reasonable needs of the Applicant and his Household in accordance with the formula in paragraph 13;
 - the equity in furnishings contained in the principal family home and owned by the Applicant or his Household that exceeds the reasonable needs of the Applicant and his Household. The furnishings in the principal family home will exceed the reasonable needs of the Applicant and his Household if they are luxury items of extraordinary value, including but not limited to art collections and antique collections;

- the equity in the principal family vehicle or principal family vehicles that exceeds the reasonable needs of the Applicant and his Household. The principal family vehicle or vehicles will exceed the reasonable needs of the Applicant and his Household if their combined value is greater than the value of one average automobile in the state in which the Applicant's family resides. In determining the value of the average automobile in the state in which the Applicant's family resides, the Registry relies on reliable data from the relevant government or from a relevant qualified institution (insurance company, official car dealer);
- the equity in stocks, bonds or bank accounts owned by the Applicant or his Household, including but not limited to the Applicant's account at the UNDF the UNDU or the facility where the Applicant is serving his sentence, less allowances paid by the United Nations into that account;
- the equity in any other assets, not listed in paragraph 9, owned by the Applicant or his Household; and
- any assets previously owned by the Applicant or his Household, including those listed above, where the Applicant and his Household assigned or transferred any interest in those assets to another person for the purpose of sheltering or concealing those assets.

B. Assets excluded from disposable means

9. In determining the Applicant's disposable means, the Registry excludes the following:
 - the equity in the principal family home to the extent that the principal family home is reasonably necessary for the Applicant and his Household;
 - the equity in furnishings contained in the principal family home and owned by the Applicant or his Household, to the extent that those furnishings are reasonably necessary for the Applicant and his Household;
 - the equity in the principal family vehicle to the extent that the principal family vehicle is reasonably necessary for the Applicant and his Household;
 - the equity in assets owned by the Applicant or his Household that are not readily disposable through no fault of the Applicant and of which the Applicant can relay proof to establish that the Applicant or his Household has made a reasonable effort to dispose of the assets;
 - the equity in assets owned by the Applicant's spouse that do not constitute marital property, including those assets listed in paragraph 8. The Registry determines whether assets constitute marital property according to the marital property regime of the state in which the Applicant and his spouse were wed or reside unless proof is offered that the assets do not constitute marital or communal property; and
 - the equity in tools of the trade owned by the Applicant or his Household that are reasonably necessary to the livelihood of the Applicant and his Household.

C. Income included in disposable means

10. In determining the Applicant's disposable means, the Registry considers that the Applicant and his Household will continue to receive their personal income from when the Registry issues its decision on the extent to which an Applicant is able to remunerate counsel until the conclusion of the estimated period in which the Applicant will require representation before the MICT at the pre-trial, trial, appeal or post-conviction stage.
11. In determining the Applicant's disposable means, the Registry includes the following income of the Applicant and his Household:

- 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; and
- any other regular income that is not excluded in paragraph 12.

D. Income excluded from disposable means

12. In determining the Applicant's disposable means, the Registry does not include the following income of the Applicant and his Household:
- government welfare payments;
 - earnings of the Applicant's child or children if under 18 years of age; or
 - alimony, separation or maintenance payments owed to the Applicant and his Household.

IV. Formulas for Calculating Contribution

A. Formula for calculating the extent to which the equity in the Applicant's principal family home exceeds the value of an average family home

13. Based on reliable data obtained from the government of the state where the Applicant has his principal family home or, alternatively, from a reputable national or international organisation or agency,¹ the Registry uses the following formula to determine the extent to which the Applicant's principal family home exceeds the needs of the Applicant and his Household:

$$\frac{(V \times LSE)}{LS} - EN = E$$

Where-

V represents the valuation of the principal family home obtained by the Registry;

LS represents the living space in square meters in the principal family home;

EN represents any encumbrances registered against the principal family home;

E represents the equity in the principal family home that exceeds the reasonable needs of the Applicant and his Household. If this amount is greater than zero, it is included in the Applicant's disposable means in accordance with paragraph 8; and

LSE represents the living space in the principal family home that exceeds the average living space for the number of persons who habitually reside in the principal family home in the state in which it

¹ Such as the World Bank, the Food and Agriculture Organization of the United Nations or the World Health Organization.

is located, according to reliable data obtained by the Registry. The following formula is used to calculate LSE:

$$LS - (ALS \times M) = LSE$$

Where-

ALS represents the average number of square meters of living space per person in the state in which the principal family home is located, obtained from the relevant government or, alternatively, from a reputable national or international organisation or agency;² and

M represents the number of persons who habitually reside in the principal family home, including the Applicant and his Household.

B. Formula for calculating the estimated living expenses

14. The Registry uses the following formula to calculate the estimated living expenses of the Applicant and his Household:

$$\frac{[AE \times (M + D) + EE] \times T}{4} = ELE$$

Where-

AE represents the average monthly expenditure for a four-person household, obtained from the government of the state where the Applicant has his principal family home or, alternatively, from a reputable national or international organisation or agency.³ This includes accommodation and living costs;

EE represent additional monthly living expenses of the Applicant and his Household. These additional living expenses are expenses that are particular to the Applicant and his Household and are accordingly not foreseen in AE as defined above. Additional living expenses may include but are not limited to tuition fees and costs of extraordinary medical care;

M represents the number of people who habitually reside in the principal family home, including the Applicant and his Household;

D represents the Applicant's dependents who do not habitually reside in the principal family home;

T represents the period from when the Registry issues its decision on the extent to which an Applicant is able to remunerate counsel until the conclusion of the estimated period in which the Applicant will require representation before the MICT, at the pre-trial, trial, appeal or post-conviction stage; and

ELE represents the estimated living expenses for the Applicant and his Household, during the period from when the Registry issues its decision on the extent to which an Applicant is able to remunerate counsel until the conclusion of the estimated period in which the Applicant will require representation before the MICT at the pre-trial, trial, appeal or post-conviction stage.

² *Id.*

³ *Id.*

C. Formula for calculating the extent to which an Applicant is able to remunerate counsel

15. The Registry uses the following formula to calculate the extent to which an Applicant is able to remunerate counsel:

$$\mathbf{DM - ELE = C}$$

Where-

DM represents the Applicant's disposable means as calculated under Section III;

ELE represents the estimated living expenses for the Applicant and his Household as calculated under paragraph 14; and

C represents the contribution to be made by the Applicant to his defence.

V. Deduction of the Contribution

16. The Registry shall deduct the value of the contribution as established under paragraph 15 from the legal aid allotments allocated to the defence team of the Applicant.

VI. Final Provisions

17. The Registry shall treat all documents submitted by the Applicant pursuant to these Guidelines with due respect for the appropriate level of confidentiality.
18. Article 13 of the Directive shall govern the settlement of any dispute arising from the application of these Guidelines.