

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05-01/08**
Date: **25 February 2009**

THE PRESIDENCY

Before: **Judge Philippe Kirsch, President**
 Judge Akua Kuenyehia, First Vice-President
 Judge René Blattmann, Second Vice-President

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public

Decision Filing a Public Redacted Version of the “Decision on the ‘Request for Review of the Registrar’s Decision of 25 August 2008 on the Application for Legal Assistance Paid by the Court’”

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

Counsel for the Defence
Mr Nkwebe Liriss, Counsel
Mr Aimé Kilolo-Musamba, Associate
Counsel

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section
Mr Esteban Peralta Losilla

Deputy Registrar
Mr Didier Preira

Other
Pre-Trial Chamber III

The Presidency of the International Criminal Court (“Court”),

In the application of Mr Jean-Pierre Bemba of 9 September 2008 for judicial review entitled: “Request for Review of the Registrar’s Decision of 25 August 2008 on the Application for Legal Assistance Paid by the Court”;¹

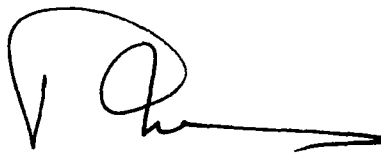
Recalling that on 10 February 2009 the Presidency issued a confidential decision on the application entitled “Decision on the ‘Request for Review of the Registrar’s Decision of 25 August 2008 on the Application for Legal Assistance Paid by the Court’”² (“Decision”), in which it determined that in the absence of any communication to the contrary from Mr Jean-Pierre Bemba Gombo prior to 16 February 2009 it would file a public redacted version of the Decision;

Noting the absence of any such communication, the Presidency annexes to the present decision a public redacted version of the Decision;

Informing that in order to enable identification of repeated references to the same figures in the public redacted version of the Decision, wherever possible the redaction of numerical figures is done in the following form:

[€A] – [€S]; each letter representing a distinct monetary sum, and
[x] and [y]; each letter representing other non-monetary numerical figures.

Done in both English and French, the English version being authoritative.



Judge Philippe Kirsch
President

Dated this 25 February 2009
At The Hague, The Netherlands

¹ ICC-RoC85-01/08-1-Conf-tENG.

² ICC-RoC85-01/08-3-Conf.

ANNEX

**Cour
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**International
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Original: **English**

No.: **ICC-01/05-01/08**
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THE PRESIDENCY

Before: **Judge Philippe Kirsch, President**
 Judge Akua Kuenyehia, First Vice-President
 Judge René Blattmann, Second Vice-President

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public redacted

**Decision on the “Request for Review of the Registrar’s Decision of 25 August 2008 on
the Application for Legal Assistance Paid by the Court”**

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

Counsel for the Defence
Mr Nkwebe Liriss, Counsel
Mr Aimé Kilolo-Musamba, Associate
Counsel

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section
Mr Esteban Peralta Losilla

Deputy Registrar
Mr Didier Preira

Other
Pre-Trial Chamber III

The Presidency of the International Criminal Court (hereinafter “Court”) has before it the application of Mr Jean-Pierre Bemba Gombo for judicial review of the decision of the Registrar on the determination of his indigency for the purpose of legal assistance paid by the Court.

The application is dismissed for the reasons set out below.

I. PROCEDURAL HISTORY

1. On 25 August 2008, the Registrar issued her decision on Mr Jean-Pierre Bemba Gombo’s (hereinafter “the applicant”) application for legal assistance paid by the Court (hereinafter “Impugned Decision”).¹ In the Impugned Decision, the Registrar considered the questionnaire on the financial situation of the applicant which was submitted to the Registry on 9 July 2008, as well as his letters of 21 and 22 July 2008 in support of his application for legal assistance.² The Registrar also considered other documents officially transmitted to her containing information on the assets and property of the applicant³ and declarations made by the applicant during his meeting with representatives of the Registry.⁴ The Registrar provisionally determined that for the purpose of the pre-trial stage of proceedings the applicant was not indigent and would not benefit in whole or in part from legal assistance paid by the Court. The Impugned Decision was to be reviewed upon conclusion of an investigation of the applicant’s assets.
2. On 9 September 2008, the applicant sought from the Presidency judicial review of the Impugned Decision on the grounds that it contained a discernable error in the assessment of the applicant’s indigence (hereinafter “Application”).⁵ The relief sought by the applicant is the granting of legal assistance paid by the Court.
3. On 22 September 2008, the Registrar provided observations on the Application (hereinafter “Observations”)⁶ pursuant to regulation 24*bis* of the Regulations of the Court (hereinafter “Regulations”). The Registrar challenges the admissibility, merits and classification of the Application.

¹ Registrar’s Decision on the Application for Legal Assistance Paid by the Court Filed by Mr Jean-Pierre Bemba Gombo, ICC-01/05-01/08-76-tENG.

² Impugned Decision, annex 1.

³ Impugned Decision, annex 2.

⁴ Impugned Decision, page 4.

⁵ Request for Review of the Registrar’s Decision of 25 August 2008 on the Application for Legal Assistance Paid by the Court, ICC-RoC85-01/08-1-Conf-tENG.

⁶ Observations of the Registrar on the “Request for Review of the Registrar’s Decision of 25 August 2008 on the Application for Legal Assistance Paid by the Court” submitted to the Presidency on 9 September 2008, ICC-RoC85-01/08-2-Conf-tENG.

II. ADMISSIBILITY

A. The submissions of the Registrar

4. The Registrar contests the admissibility of the Application on the ground that it fails to state the relevant legal and factual issues including details of the articles, rules, regulations or other applicable law relied upon as is required by regulation 23(1)(d) of the Regulations.⁷ The Registrar submits that as a result of this failure, the Presidency must declare the Application inadmissible⁸ and dismiss it in its entirety.⁹

B. Determination of the Presidency

5. The Application is admissible. By virtue of regulation 85(3) of the Regulations, the applicant was entitled to seek review of the Impugned Decision before the Presidency.
6. Regulation 23(1)(d) of the Regulations provides that “[u]nless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber, any document filed with the Court shall, as far as practicable, state ... [a]ll relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied upon”.
7. The Application fails to comply with regulation 23(1)(d) of the Regulations in that it does not refer to any legal authority from the Rome Statute of the International Criminal Court (hereinafter “Statute”), the Rules of Procedure and Evidence (hereinafter “Rules”) or the Regulations. Notwithstanding this failure, the prayer of the Registrar to dismiss the Application as inadmissible is denied.
8. Despite the non-compliance with regulation 23(1)(d), the Application contains sufficient information for the Presidency to discern the general nature of the issues raised and is authorised by regulation 85(3) of the Regulations. Moreover, the Application pertains to the applicant’s ability to access legal assistance, a matter of fundamental importance to the applicant which may have implications for the fairness of proceedings before the Court. Given the seriousness of the contention that the applicant has been unable to properly access legal assistance to which he is entitled, the Presidency will consider the Application, pursuant to regulation 85(3) of the Regulations.
9. In the future, however, the Presidency requires the parties to comply with regulation 23(1)(d), clearly setting out the legal and factual basis of the filing.

⁷ Observations, paragraphs 5-6.

⁸ Observations, paragraph 7.

⁹ Observations, paragraph 8.

III. STANDARD OF JUDICIAL REVIEW

10. It is recalled that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.¹⁰

IV. THE MERITS

A. The submissions

1. *The arguments of the applicant*

11. Essentially, the applicant argues that the Impugned Decision is based on a discernable error in the assessment of his indigence¹¹ which violates his right to a fair trial.¹² It is argued that the nature of the error by the Registrar involves both miscalculation and the erroneous inclusion of certain types of assets.¹³

(a) Discernable error in the assessment of indigence

(i) *Miscalculation*

12. The applicant argues that the Registrar has made a discernable error¹⁴ and refers to the existence of a miscalculation.¹⁵ Whilst the applicant fails to explain the details of any alleged mathematical miscalculation, the applicant does refer to several of the specific figures used in the calculations: the amount of his family obligations as set at €6,109.84¹⁶ and the available sums in relation to his bank account ([€A]) and vehicles ([€B]).¹⁷ In so doing, the applicant is implicitly questioning the correctness of these figures.

¹⁰ The standard of judicial review was defined by the Presidency in its decision of 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16, and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24. See also the decision of 10 July 2008, ICC-Pres-RoC72-01-8-10, paragraph 20.

¹¹ Application, paragraph 10.

¹² Application, paragraph 15.

¹³ Application, paragraphs 12-14.

¹⁴ Application, paragraph 10.

¹⁵ Application, paragraph 12.

¹⁶ Application, paragraph 11.

¹⁷ Application, paragraph 12.

(ii) Inclusion of certain assets

13. In addition to any miscalculation in the mathematical sense, the applicant argues that certain assets assessed by the Registrar do not constitute monthly income, implying that these amounts should not have been taken into account for the purpose of the indigence calculation. The applicant's specific claim is that "the [€A] available in his bank accounts as well as the sum of [€B] being the value of his vehicles constitute a one-time credit amount, and not monthly income, such that once it is spent, there will only remain [€C] being the rental value of the house in [REDACTED]".¹⁸ The applicant argues that he is only able to fund his own legal defence team for a period of one month, because after this time the available figures representing his bank accounts and vehicles will be expended and he will only have access to the [€C] derived from the monthly rent of the house in [REDACTED].¹⁹ The applicant therefore suggests that the Registrar erred in law by including in the indigence calculation bank account assets and vehicle assets which he understands will be depleted within a one-month period.
14. Further to this, the applicant argues that the logical approach would have been to treat only the [€C] derived from the monthly rent of the house in [REDACTED] as monthly disposable income.²⁰ Accordingly, the monthly sums derived from the applicant's bank account and vehicles should have been ignored. The argument being made is that it is illogical to include sums which are fully expendable within the scope of the applicant's assets and that in so doing, the Registrar committed an error of law. As a result of the approach proposed by the applicant in which only recurring forms of monthly income are included, his monthly disposable income would be only [€C] and the monthly cost of his defence would be €30,150. Therefore, the applicant would be declared partially indigent because his monthly legal costs are greater than his disposable monthly income and he would be entitled to legal assistance paid by the Court to the sum of [€D] per month.²¹

(b) Violation of the right to a fair trial

15. As a result of the errors set out above, the applicant argues, by reference to article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter "European Convention"), that his right to a fair trial has been violated.²² The applicant also argues that his defence team has not been fully constituted due to financial constraints.²³ He requests that the Presidency "grant him legal assistance paid by the Court".²⁴

¹⁸ Application, paragraph 12.

¹⁹ Application, paragraph 13.

²⁰ Application, paragraph 14.

²¹ Application, paragraph 14.

²² Application, paragraph 15.

²³ Application, paragraph 16.

²⁴ Application, page 5.

2. *The observations of the Registrar*

(a) **Discernable error in the assessment of indigence**

16. The Registrar submits that the calculation of the monthly disposable income of the applicant is consistent with the principles and criteria for such calculations as established by regulation 84 of the Regulations and the various reports to the Assembly of States Parties,²⁵ in particular the *Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons*;²⁶ *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)* (hereinafter “Indigence Report”);²⁷ *Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons, Update to Annex 2: Payment details of the ICC legal aid scheme*;²⁸ and *Report on the operation of the Court’s legal aid system and proposals for its amendment* (hereinafter “Legal Aid Amendment Report”).²⁹
17. The Registrar submits that the applicant’s claim of a discernable error is based on “a failure on his part to understand the criteria and principles for determining indigence”.³⁰ More specifically, the Registrar submits that the applicant appears to be confusing his total assets with his monthly assets.³¹ The Registrar indicates that the calculation of the monthly value of the applicant’s assets in annex 6 of the Impugned Decision is properly derived from dividing the total value of the applicant’s assets (being [€E] in bank accounts and [€F] for vehicles) by 60, which is the depreciation period for assets other than real estate provided for in paragraph 14 of the Indigence Report. In this manner, the Registrar submits that the Impugned Decision adheres to the applicable texts and that the calculation of monthly disposable funds is thus supported in law.³² According to the Registrar, “the argument based on a discernable error in the assessment is without merit, hence the Request should be dismissed accordingly”.³³

(b) **Violation of the right to a fair trial**

18. The Registrar submits that the Application does not show in what way the applicant believes there has been a violation of his right to a fair trial.³⁴ The Registrar therefore

²⁵ Observations, paragraph 11.

²⁶ 17 August 2004, ICC-ASP/3/16.

²⁷ 31 May 2007, ICC-ASP/6/INF.1.

²⁸ 31 October 2005, ICC-ASP/5/INF.1.

²⁹ 31 May 2007, ICC-ASP/6/4.

³⁰ Observations, paragraph 14.

³¹ Observations, paragraphs 12-13.

³² Observations, paragraph 15.

³³ Observations, paragraph 16.

³⁴ Observations, paragraph 18.

assumes that the allegation is that there has been a violation of article 6(3)(c) of the European Convention which protects, *inter alia*, the right of a person charged with a criminal offence “if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”. The Registrar observes that a substantively similar provision is contained in article 67(1)(d) of the Statute.³⁵

19. The Registrar submits that such assistance is offered to persons who do not have the means to pay for defence counsel and that the applicant is not such a person.³⁶ The Registrar re-iterates that the applicant is at this stage able to bear the costs of his defence before the Court and that he has been duly represented before the Court since his transfer to the detention centre.³⁷ According to the Registrar, therefore, “the violation of the right to a fair trial argument is without merit and should be dismissed accordingly”.³⁸

B. Determination of the Presidency

1. Discernable error in the assessment of indigence

(a) Miscalculation

20. In determining whether the Registrar erred in law by the Impugned Decision, the Presidency first turns to the correctness of the figures to which the applicant has specifically referred in his Application.³⁹ Given the nature of the mathematical formulae, these individual figures cannot be meaningfully reviewed in isolation; therefore the Presidency will also review the calculation process undertaken by the Registrar more generally. The Presidency emphasises that whilst, as a result of the importance of the Application and the seriousness of the suggestion that the applicant has not had access to proper legal assistance,⁴⁰ it will examine the possibility of a mathematical miscalculation in full, its expectation is that future applications which suggest that miscalculations have occurred provide specific details.
21. Both the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”) and the International Criminal Tribunal for Rwanda (hereinafter “ICTR”) have emphasised that in the context of the judicial review of decisions taken by the Registrar in relation to legal assistance, such review “is concerned initially with the propriety of the procedure by which Registrar [*sic*] reached the particular decision and the manner in which he reached it”.⁴¹ The calculation process constitutes a special

³⁵ Observations, paragraph 19

³⁶ Observations, paragraph 20.

³⁷ Observations, paragraph 21.

³⁸ Observations, paragraph 22.

³⁹ Application, paragraphs 11-12.

⁴⁰ Application, paragraph 16.

⁴¹ *Prosecutor v Kvočka et al*, Case No IT-98-30/1-A, “Decision on Review of Registrar’s Decision to Withdraw Legal Aid From Zoran Zigić”, 7 February 2003, paragraph 13; *Prosecutor v Krajisnik*, Case No IT-00-39-PT, “Decision on the Defence’s Motion for an Order Setting Aside The Registrar’s Decision Declaring Momčilo

part of this decision-making procedure in the legal assistance context. A failure to correctly apply the indigence formula could constitute an error of law by the Registrar.

22. The applicable formula, procedures and rules for the calculation of indigence for legal assistance purposes are specified in several of the Court's reports to the Assembly of States Parties, in particular, the Indigence Report and annex I of the Legal Aid Amendment Report. The basic principles for the calculation of indigence for legal assistance purposes as set out in these reports are as follows. The calculation of the financial means of a person claiming indigence before the Court is assessed separately for each stage of proceedings: pre-trial, trial and appeal. The formula requires the calculation of two sums: the monthly value of assets owned by an applicant⁴² and the amount of the monthly obligations of an applicant to his or her dependents.⁴³ At the relevant time,⁴⁴ an applicant's residence, the furnishings of his or her principal family home and up to two motor vehicles would be excluded from the calculation of his or her assets, provided that their value was not excessive in light of the needs of that applicant's dependents.⁴⁵ The monthly disposable means of an applicant are calculated by subtracting the monthly family obligations of the person claiming indigence from his or her total monthly assets.⁴⁶ The amount of the monthly disposable means is, as a rule, put towards the cost of legal assistance. If the monthly disposable means are greater than the estimated monthly cost of a legal team acting at the relevant stage of proceedings, a person is not indigent. To represent these basic principles formulaically:

$$\text{Monthly Disposable Means (MDM)} = \text{MA} - \text{FO}^{47}$$

23. The Presidency notes that the calculations in the Impugned Decision contain minor errors, none of which affect the propriety of the Registrar's finding that the applicant is not indigent. First, there is a miscalculation in the assessment of the standard cost of a dwelling, furniture and household appliances in the Flemish region where the applicant's dependents reside. In annex 6 of the Impugned Decision, the Registrar adopts a standard household cost of [€G] for a household the size of the applicant's in

Krajsnik Partially Indigent for Legal Aid Purposes", 20 January 2004, paragraph 16; *Nahimana et al v Prosecutor*, Case No ICTR-99-52-A, "Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel", 23 November 2006, paragraph 9.

⁴² Indigence Report, paragraphs 13-14.

⁴³ Indigence Report, paragraph 16 ; Legal Aid Amendment Report, annex I.

⁴⁴ This position appears to have been subsequently modified by the *Report on different legal aid mechanisms before international criminal jurisdictions*, 31 October 2008, ICC-ASP/7/23, paragraph 69, however this later report is immaterial to the issue of the propriety of the Impugned Decision.

⁴⁵ Indigence Report, paragraph 13; Legal Aid Amendment Report, annex I.

⁴⁶ Indigence Report, paragraph 18.

⁴⁷ MA represents the applicant's monthly assets and FO represents the applicant's monthly family obligations. An applicant for legal aid is not indigent where $\text{MDM} \geq$ monthly defence costs.

the Flemish region.⁴⁸ This figure is taken directly from the Belgian official statistics of 2006 and is not adjusted upwards in accordance with the consumer price index (hereinafter “CPI”). In other sections of the Impugned Decision,⁴⁹ the practice is to adjust local statistics from 2006 up to July 2008 levels. In the interests of consistency and accuracy, the standard dwelling cost for a household of six people in the Flemish region should also be calculated at July 2008 levels. The 2006 figure of [€G] is to be adjusted as such: $([€G] \times 112.87)/105.15 = [€H]$, where 112.87 represents the CPI in July 2008 and 105.15 represents the CPI in December 2006. The correct standard cost for a household of six people in the Flemish region is therefore [€H].

24. The above procedure of determining any difference between the value of the dwelling in which the applicant’s family resides and the dwelling needs of a household of that size in the region also reveals a further inconsistency in the Registrar’s calculation process. According to annex I of the Legal Aid Amendment Report the process to be undertaken is that “the estimated rental value would be deducted from the estimated needs of the dependents 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*” (emphasis added).⁵⁰ The Presidency understands that the purpose of this allowance is to ensure that an applicant for legal assistance does not benefit disproportionately from the exclusion of the family residence from the total assets. Contrary to the instructions in the above report, the calculations of the Registrar do not take the difference between the estimated rental value of the family home and the estimated rental needs of the family into account as an asset of the applicant. Instead, the Registrar subtracts this sum from the applicant’s family obligations. Whilst this difference is immaterial in terms of the outcome, the Presidency emphasises that in the interest of clarity it is important to adhere closely to policy documents or explain any departures from them.
25. A further error occurs in the calculation of the total value of the applicant’s bank accounts. According to annex 6 of the Impugned Decision, the total value of the applicant’s bank account is [€E]. This amount, however, is actually the total of only *one* of the applicant’s bank accounts. According to the provisional list of identified property contained in annex 4 of the Impugned Decision, the applicant is owner or agent of a total of [x] bank accounts. Annex 6 of the Impugned Decision notes that the total value of the applicant’s assets is to include all the “property identified as belonging directly or indirectly to the Applicant and whose value has been provisionally estimated as indicated in Annex 4”.⁵¹ Accordingly, the correct total

⁴⁸ Although the Registrar states in annex 6 that the rental needs of each individual is [€G], this is supposed to say that the total rental needs for the household is [€G]. [REDACTED] Despite stating that the figure of [€G] is a per person figure, the Registrar correctly treats it as though it is a per household figure.

⁴⁹ Impugned Decision, page 7; Impugned Decision, annex 6

⁵⁰ Legal Aid Amendment Report, annex I.

⁵¹ Impugned Decision, annex 6.

value of the applicant's bank accounts, taking into account all [x] bank accounts referred to in annex 4, is [€I].

26. The Registrar has also made a miscalculation in determining the total value of the vehicles of the applicant. Taking into account the individual values of all [y] vehicles in annex 4, the total value of the applicant's vehicles is [€J]. According to the Indigence Report, up to a maximum of two vehicles will be excluded from the calculation of an applicant's total assets.⁵² The Legal Aid Amendment Report then clarifies that "no vehicle which, in the opinion of the Registry, was of a lavish or ostentatious nature could be excluded".⁵³ The Presidency notes that contrary to the abovementioned reports, the Registrar has not removed the value of two motor vehicles from the applicant's assets. The Presidency understands that the Registrar has not done so because the official living expense statistics already make allowances for the cost of vehicles and transportation. The Registrar does not, however, explain this rationale in the Impugned Decision and the Presidency has only been able to reach this understanding based on a report to States Parties dated subsequent to the Impugned Decision.⁵⁴ Regardless of any later change in policy, the reports on which the Registrar purports to rely call for the exclusion of two motor vehicles. The Presidency regards the applicant's [REDACTED] valued at [€K] as a lavish vehicle which cannot be excluded.⁵⁵ Accordingly, of the motor vehicles identified in annex 4, the Presidency must exclude the value of the applicant's [REDACTED] ([€L]) and one of his [REDACTED] ([€M]). The applicable total value of the Applicant's vehicles for the purposes of the indigence assessment is therefore [€N]. Although the exclusion of two vehicles benefits the applicant because the family obligations figure already makes allowances for transportation, the Presidency has made the assessment in this manner because the Registrar offers no explanation in the Impugned Decision as to why two vehicles were not excluded from the total assets in the manner instructed by the Indigence Report and the Legal Aid Amendment Report.
27. The above errors do not materially affect the Registrar's finding that the applicant is not indigent. In the interest of transparency, however, the Presidency will demonstrate that the applicant remains non-indigent even when the errors outlined above are corrected. Prior to doing so, the Presidency notes that it would be greatly assisted in its task of judicial review of legal assistance decisions if the Registrar provides further details of her calculation of indigence. Such details would enable the Presidency to more easily identify any errors and would also help applicants for legal assistance to understand the process which has been undertaken. At minimum, the calculation process as set out in annex 6 should identify:

⁵² Indigence Report, paragraph 13.

⁵³ Legal Aid Amendment Report, annex I.

⁵⁴ *Report on different legal aid mechanisms before international criminal jurisdictions*, 31 October 2008, ICC-ASP/7/23, paragraph 69.

⁵⁵ Legal Aid Amendment Report, annex I.

- (i) The relevant principles or rules from the applicable reports which the Registrar is applying;
- (ii) An explanation of any departures from the principles or rules established in these reports;
- (iii) A step-by-step demonstration of the manner in which these principles, rules and any relevant formulae are applied to an applicant's circumstances; and
- (iv) The value of any individual assets (e.g. the value of individual bank accounts) which are included within the sum total value for asset of that type.

28. Turning to the demonstration that the applicant remains non-indigent, the first step in the indigence calculation process is the assessment of the applicant's monthly family obligations to his dependents. Where possible, this assessment is based on official statistics of living expenses in the State of residence.⁵⁶ Based on these statistics, the monthly amount of the applicant's obligations for a total of six dependents is [€O]. To represent this step formulaically:

$$FO = LE \times D^{57}$$

29. The second step in the indigence calculation process is the assessment of the monthly value of the assets of the applicant. Any real estate is taken into account using the estimated rental value of the property.⁵⁸ All other assets are accounted for by dividing the total value of the property by 60 which represents the depreciation period.⁵⁹ According to annex 4 of the Impugned Decision, the assets of the applicant which must be taken into account are his bank accounts, his vehicles and the estimated rental value of real estate in [REDACTED]. In addition, the difference between the estimated rental value of the applicant's family residence and the rental needs of the family must also be taken into account as an asset. To represent this step formulaically:

$$MA = ERV + (TA/60) - [(RN - ERVF)]^{60}$$

30. Turning first to the difference between the estimated rental value of the applicant's family residence and the rental needs of his dependents, the rental needs of a family the size of the applicant's in the region in which the applicant's dependents reside is [€H].⁶¹ The estimated rental value of the property in which the applicant's dependents

⁵⁶ Legal Aid Amendment Report, annex I.

⁵⁷ LE represents the average living expenses per person per month and D represents the number of dependents.

⁵⁸ Indigence Report, paragraph 14.

⁵⁹ Indigence Report, paragraph 14.

⁶⁰ ERV represents the estimated monthly rental value of any included real estate assets, TA represents the total asset value of all included non-real estate assets, RN represents the average rental needs of a household such as that of the applicant's dependents and ERVF represents the estimated rental value of the family home. The calculation in square brackets only need be performed where ERVF > RN.

⁶¹ See paragraph 23 above.

reside is [€P]. The difference between the rental needs and the estimated rental value is [€Q] i.e. [REDACTED]. Therefore, the applicant has a monthly asset of [€Q] which must be included in the calculation of his total monthly assets.

31. Turning to the applicant's bank accounts, the correct total value of the applicant's bank accounts is [€I].⁶² In order to represent this value on a month-by-month basis, this total figure must be divided by the depreciation period of 60. Accordingly, the monthly value of the applicant's bank accounts is [€I/60].
32. In relation to the applicant's vehicles, the correct total value is [€N].⁶³ This total amount is translated into a monthly asset value by dividing by 60. The monthly asset value of the applicant's vehicles is [€N/60].
33. The estimated monthly rental value of the applicant's property in [REDACTED] is [€C]. According to the Indigence Report, the estimated monthly rental value is determined by the relevant housing authorities of the place where the residence is located or by an independent taxation service.⁶⁴
34. The total monthly value of the assets of the applicant is the sum of the assets referred to above i.e. (monthly rental value of property in [REDACTED]) + [(monthly bank account value) + (monthly vehicles value)]⁶⁵ + (the difference between his family rental needs and the value of the family residence). Formulaically,

$$MA = ERV + (TA/60) - [(RN - ERVF)]$$

$$MA = [€C] + [(€I) + (€N)/60] - [(€H) - (€P)]$$

[REDACTED]

The total monthly assets of the applicant are therefore valued at [€R].

35. In order to calculate the monthly disposable means of an applicant for legal assistance, the amount of his or her family obligations to dependents is subtracted from the total monthly assets (i.e. MDM = MA – FO). In the case of the applicant, [REDACTED]. The applicant therefore has monthly disposable means of [€S]. This figure is €136.96 less than the applicant's monthly disposable means as assessed by the Registrar in the Impugned Decision.
36. If the monthly disposable means of the applicant are greater than the monthly cost of a defence team at the applicable stage of proceedings, the applicant is not indigent. The monthly cost of a defence team at the pre-trial stage of proceedings has been assessed in relation to the applicant as €30,150.⁶⁶ The applicant's monthly disposable means of [€S] is greater than the monthly cost of a defence team. None of the mathematical or procedural errors identified in the Impugned Decision are material to

⁶² See paragraph 25 above.

⁶³ See paragraph 26 above.

⁶⁴ Indigence Report, paragraphs 13-14

⁶⁵ This figure can also be represented as total bank account value plus total vehicle value, divided by 60, as in the formula below.

⁶⁶ Impugned Decision, annex 6.

the Registrar's ultimate finding of non-indigence; therefore, the Registrar was entitled to come to the conclusion to which she came in the instant case.

(b) Inclusion of certain assets

37. In addition to implying that there has been a mathematical miscalculation in the assessment of indigence, the applicant argues that the inclusion of the 'one-time credit amount' representing his bank accounts ([€A]) and vehicles ([€B]) constitutes a discernable error.⁶⁷ The applicant believes that after a period of one month he will no longer have access to the figures of [€A] and [€B] and his only available monthly asset will be the estimated rental value of his property in [REDACTED] which is [€C].⁶⁸
38. The applicant has misunderstood the basic nature of the figures of [€A] and [€B]. Contrary to the understanding expressed in his Application, these do not constitute a 'one time credit amount'. The first sum of [€A] is derived from the total value of the applicant's bank accounts. In order to represent the total asset value of the applicant's bank accounts as a monthly asset value, the Registrar has divided the total by 60, which represents the depreciation period.⁶⁹ The amount of [€A] is therefore not a one time credit amount but a recurring amount intended to represent the applicant's total bank account value on a month-by-month basis. The same is true in relation to the applicant's vehicles. According to annex 6 of the Impugned Decision, the total value of the applicant's vehicles is [€F]. When this figure is divided by the depreciation period of 60, the monthly value of this asset is [€B]. Again, this amount recurs on a monthly basis. Accordingly, the Presidency accepts the Registrar's argument that the applicant has confused his total disposable assets with his monthly disposable assets.⁷⁰ The Presidency emphasises that the amounts of [€A] and [€B] are a monthly representation of the applicant's total assets. These amounts recur on a month-by-month basis throughout the entire period of pre-trial proceedings. The applicant's argument that he can only pay his defence team for a period of one month⁷¹ is incorrect.
39. Despite this misunderstanding on the part of the applicant, the Presidency understands that the applicant is concerned by the basic proposition that non-recurring assets which can be fully depleted such as bank accounts and vehicles are included in the indigence calculation. This concern is demonstrated by the applicant's proposition

⁶⁷ For the sake of clarity, all figures hereafter refer to the figures as used in the Impugned Decision and referred to in the Application and Observations, rather than the correct figures as assessed above. In relation to the applicant's arguments in this part, the technical correctness of these figures is immaterial.

⁶⁸ Application, paragraph 13.

⁶⁹ Indigence Report, paragraph 14.

⁷⁰ Observations, paragraph 13.

⁷¹ Application, paragraph 13.

that a logical decision would only take into account the monthly rental value of [€C],⁷² a recurring amount.

40. Prior to considering this argument, it is necessary to clarify an issue of terminology. The applicant refers to the figure representing all of his available monthly assets prior to any adjustment for his family obligations as his monthly disposable income⁷³ or monthly income.⁷⁴ In annex 6 of the Impugned Decision, the Registrar refers to the same figure as the monthly value of the applicant's property. The Indigence Report refers to this figure generally as the "[a]ssets of the person claiming indigence".⁷⁵ The Presidency prefers the terminology used by the Registrar and the Indigence Report or even the simpler terminology of 'monthly assets'. The language of monthly income used by the applicant is misleading and may be a source of the applicant's confusion in that common usage of the term 'income' denotes a specific type of recurring asset. The alternative language of the Registrar or the general term of 'monthly assets' makes it clear that more than just 'income' in a narrow sense may be taken into account.
41. The Presidency also observes that some confusion might be caused by the use of differing terminology in relation to the final figure which represents the difference between an applicant's family obligations and his or her monthly assets. The Indigence Report refers to this figure as the monthly disposable means.⁷⁶ Annex 6 of the Impugned Decision uses the term disposable monthly funds, whereas in the Observations the Registrar refers to monthly disposable funds.⁷⁷ The Presidency understands these terms to be synonymous and leaves these questions of terminology to the Registrar.
42. The Presidency will now return to the applicant's argument that assets which can be fully depleted such as his bank accounts and vehicles should not be included in the calculation of his monthly assets. By virtue of rule 21(1) of the Rules, the criteria and procedures for the assignment of legal assistance shall be established in the Regulations based on a proposal by the Registrar after consultations with counsel or legal associations. The main criteria for assessment of means for the purpose of the assignment of legal assistance were set out in regulation 84(2) of the Regulations which provide that the applicant's means include, *inter alia*, "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".

⁷² Application, paragraph 14.

⁷³ Application, paragraph 12.

⁷⁴ Application, paragraph 13.

⁷⁵ Indigence Report, part III.

⁷⁶ Indigence Report, part III.3.

⁷⁷ Observations, paragraph 13.

43. It is axiomatic that the process of assessing these diverse types of assets in order to determine a person's ability to meet the costs of legal assistance requires a formula or fixed methodology. Rule 20(3) of the Rules provides, *inter alia*, that “[f]or purposes such as the management of legal assistance in accordance with rule 21 ... the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations”. In accordance with this rule, the Registrar engaged in extensive consultations in order to assist in the establishment of the scheme of legal assistance paid by the Court. This included consultations with the *ad hoc* tribunals, the Special Court for Sierra Leone, non-governmental organisations, lawyers' associations and national bars in both civil and common law countries. The Registrar also convened two seminars on defence related issues attended by more than 40 experts.⁷⁸ The Court's procedures for the calculation of indigence for legal assistance purposes emerge from this extensive consultation process.⁷⁹
44. The Presidency notes that the procedures used by the Court in the calculation of indigence are at least as generous to accused persons as those used by the ICTY and the ICTR. The ICTY's formula is very similar to that of the Court's; however, it also takes into account the means of an applicant's spouse and of persons with whom an applicant habitually resides.⁸⁰ The ICTR adopts a uniform indigence threshold of \$US10,000.⁸¹ The ICTY specifically provides for the assessment of bank accounts and personal property in the determination of means,⁸² whereas the ICTR refers to “means of all kinds” and an applicant's “enjoyment of any property ... whether or not he derives income from it”.⁸³
45. Based on the above considerations, the Presidency rejects the argument that the Registrar erred by including the applicant's bank accounts and vehicles within his monthly assets in the calculation of indigence. The Registrar is obliged to comply with regulation 84(2) of the Regulations which specifies that bank accounts and personal property such as vehicles are included in the calculation of means. In addition, the Registrar's practice of including these assets in her assessment of means is consistent with the practice of the *ad hoc* tribunals and occurred as a result of procedures formulated by an extensive period of consultation. It follows that the

⁷⁸ *Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons*, 17 August 2004, ICC-ASP/3/16, paragraph 3.

⁷⁹ Indigence Report, paragraph 2.

⁸⁰ *Registry Policy for determining the extent to which an accused is able to remunerate counsel*, available as appendix II to the following decisions: *Prosecutor v Stanistic*, Case No IT-03-69-PT, “Decision of the Registry on Assignment of Counsel and the Extent to Which the Accused is Able to Remunerate Counsel”, 29 June 2004; *Prosecutor v Oric*, Case No IT-03-68-PT, “Decision of the Registry on Assignment of Counsel and the Extent to Which the Accused is Able to Remunerate Counsel”, 18 June 2004.

⁸¹ UN Secretary-General, *Comprehensive report on the progress made by the International Criminal Tribunal for Rwanda in reforming its legal aid system*, UN GAOR, 58th sess, Provisional Agenda Item 133, UN Doc A/58/366 (12 September 2003), paragraph 33.

⁸² *Directive on the Assignment of Defence Counsel*, IT/73/REV.11, 11 July 2006, article 10(A).

⁸³ *Directive on the Assignment of Defence Counsel*, No. 1/96, 14 March 2008, article 6; See also Special Court for Sierra Leone, *Directive on the Assignment of Defence Counsel*, 1 October 2003, article 6.

Registrar did not err in law by including the bank account and vehicle assets in her assessment of the applicant's request for legal assistance.

2. *Violation of the right to a fair trial*

46. The applicant argues that the Impugned Decision violates his right to a fair trial as provided for in article 6 of the European Convention.⁸⁴ The Presidency understands the applicant to be suggesting that the failure to provide free legal assistance breaches his right to a fair trial as provided for in article 6(3)(c) of the European Convention.
47. Although the applicant refers to the European Convention, the Presidency understands this to be a claim related to article 67(1)(d) of the Statute. In the event that the Statute contains provisions similar to those recognised by international human rights law, the Presidency expects that an applicant will draw the Court's attention, in the first place, to the relevant provision of the Statute. Article 67(1)(d) provides in relevant part that an accused person is entitled to the minimum guarantee of "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".⁸⁵ A materially similar right is also protected by article 14(3)(d) of the *International Covenant on Civil and Political Rights* (hereinafter "ICCPR").
48. The Statute does not provide that any accused person has an unqualified right to free legal assistance. Article 67(1)(d) specifies that an accused person is only guaranteed the assignment of legal assistance without payment where that person lacks sufficient means to pay for it. Without passing judgment on their applicability, it is noted that the rights contained in the European Convention and the ICCPR are similarly qualified. The Registrar's assessment of the applicant's financial status in the Impugned Decision indicates that he does not currently lack sufficient means to fund the cost of his legal assistance during the pre-trial stage of proceedings. The applicant is therefore not guaranteed the assignment of legal assistance without payment and there has been no violation of the applicant's right to a fair trial as provided for by article 67(1)(d) of the Statute.

V. CLASSIFICATION

A. The submissions of the Registrar

49. The Registrar observes that the Application was filed confidentially without stating the factual and legal basis for the chosen classification as required by regulation 23*bis*

⁸⁴ Application, paragraph 15.

⁸⁵ See also Statute, article 55(2)(c).

of the Regulations.⁸⁶ The Registrar submits that the purpose of confidential filings is generally to protect the public interest or the private interests of a person or institution.⁸⁷ In the context of judicial proceedings, filings are protected by confidentiality where publication would endanger a party to the proceedings or a third party or otherwise prejudice their interests.⁸⁸

50. The Registrar requests that the Presidency order the publication of a redacted version of both the Application and the Observations.⁸⁹ The Registrar acknowledges that the publication of the Application and the Observations might fail to satisfy regulation 130 of the Regulations of the Registry which provides for a duty of confidentiality in relation to information communicated to the Registry for the purposes of the legal assistance scheme.⁹⁰ Nonetheless, the Registrar advocates the release of public redacted versions, relying on the desirability of enhancing the transparency of proceedings before the Court and the public interest in access to information about the allocation of States Parties' funds to the Court's legal assistance scheme.⁹¹
51. The Registrar argues that public redacted release of the Application and Observations would not endanger any parties or participants, would not harm the interests of the applicant and is consistent with both the texts of the Court and the interests of justice.⁹²

B. Determination of the Presidency

52. The Presidency notes that the Application fails to provide any factual or legal basis for its confidential classification and emphasises that regulation 23*bis* of the Regulations requires an explanation for a chosen classification. The Presidency expects all filings to properly adhere to this requirement. The Presidency also observes that regulation 23*bis* of the Regulations empowers it to modify the classification of a document.
53. The importance of transparency in the Court's proceedings and of public access to information is implicitly recognised in the requirement in regulation 23*bis* of the Regulations that any departure from public filing be justified by factual and legal reasons, as well as in the Statute's emphasis on the importance of proceedings occurring publicly. Article 67(1) of the Statute provides that "[i]n the determination of any charge, the accused shall be entitled to a public hearing".⁹³

⁸⁶ Observations, paragraph 24.

⁸⁷ Observations, paragraph 25.

⁸⁸ Observations, paragraph 25.

⁸⁹ Observations, paragraph 28.

⁹⁰ Observations, paragraph 26.

⁹¹ Observations, paragraph 26.

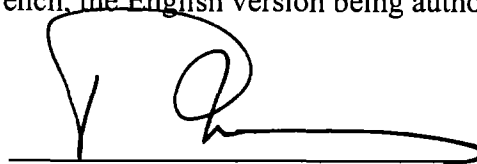
⁹² Observations, paragraph 28.

⁹³ See also Statute, articles 64(7), 68(2) and 76(4); Regulations, regulation 20.

54. The public interest in transparency, however, must be balanced against the applicant's interest in protecting the confidentiality of his private financial information. Regulation 130(2) of the Regulations of the Registry provides, *inter alia*, that "[t]he Registry staff responsible for managing the funds allocated to the legal assistance paid by the Court shall treat all information known with the utmost confidentiality". This indicates that information related to the provision of legal assistance should, as a rule, be treated as confidential.
55. Despite its failure to state the factual or legal basis for the classification, the filing of the Application as confidential does not appear to be an obvious error, a position which the Registrar does not contest. The Registrar's claim is that notwithstanding the applicant's interest in maintaining confidentiality, the public interest demands the release of public redacted versions.
56. The Presidency acknowledges the importance of the privacy of the applicant's personal financial information, but believes that the applicant's interests can be properly protected by redacting all details about his financial situation, the specific details of his assets and details relating to his dependents. The Presidency therefore finds that the public interest in transparency will be satisfied by filing a public version of this Decision redacted in the manner set out in the previous sentence. Such version would include all pertinent information about the management of the Court's legal assistance scheme. Thus, it is unnecessary to order the filing of a public redacted version of the Application and Observations. If the applicant has compelling factual and/or legal bases for retaining this Decision's confidential classification, he must communicate such bases to the Presidency in a filing which addresses only the issue of classification by 4pm on 16 February 2009. In the absence of such communication, the public redacted version of this Decision will be filed.

The Application is dismissed.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to be 'P. Kirsch', written over a horizontal line.

Judge Philippe Kirsch
President

Dated this 25 February 2009
At The Hague, The Netherlands