

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-ROC85-01/09**

Date: **1 April 2009**

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Fatoumata Dembele Diarra, First Vice-President
Judge Hans-Peter Kaul, Second Vice-President

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Thomas Lubanga Dyilo***

Confidential

Ex parte only available to legal representatives of victims

Observations of the Registry in accordance with regulation 24 bis of the Regulations of the Court relating to the "Demande de réexamen de la décision du Greffier sur la demande d'aide judiciaire aux frais de la Cour déposée par Maitres Walley, Mulenda, Diakiese et Mulamba dans l'affaire le Procureur c/Thomas Lubanga Dyilo" dated 11 March 2009

Source: Registry

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

Legal Representatives of Victims

M Hervé Diakiese
M Luc Walley
M Franck Mulenda
M Jean Chrysostome Mulamba

Legal Representatives of Applicants

[1 name per team maximum]

Registrar & Deputy Registrar

Ms Silvana Arbia & Mr Didier Preira

**Victims Participation and Reparations
Section**

Ms Fiona McKay

THE REGISTRAR of the International Criminal Court ("the Court"),

NOTING Rule 16 of the Rules of Procedure and Evidence ("the Rules") setting out the responsibilities of the Registrar relating to victims and witnesses;

NOTING Regulation 83.2 of the Regulations of the Court ("the Regulations") which provide that: "The scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate";

NOTING Regulations 130 to 132 of the Regulations of the Registry;

NOTING the “Décision du Greffier sur la demande d’aide judiciaire aux frais de la Cour déposée par Maitre Walley, Mulenda, Diakiese et Mulamba dans l’affaire Le Procureur c/ Thomas Lubanga Dyilo » dated 25 February 2009 ;¹

NOTING the « Demande de réexamen de la décision du Greffier sur la demande d’aide judiciaire aux frais de la Cour déposée par Maitres Walley, Mulenda, Diakiese et Mulamba dans l’affaire Le Procureur c/ Thomas Lubanga Dyilo » dated 11 March 2009 ;²

NOTING the order of the Presidency entitled “Order concerning the ‘Demande de réexamen de la décision du Greffier sur la demande d’aide judiciaire aux frais de la Cour déposée par Maitres Walley, Mulenda, Diakiese et Mulamba dans l’affaire Le Procureur c/ Thomas Lubanga Dyilo’ dated 16 March 2009 requesting the Registry to provide the Presidency with the complete case file of the Application³ ;

NOTING the transmission to the Presidency on 18 March 2009 of the complete case file of the Application presented by Maitres Walley, Mulenda, Diakiese and Mulamba (“the legal representatives”)⁴;

SUMITS the following observations and recommendations pursuant to regulation 24 bis and 34(b) of the Regulations:

A. Preliminary observations

¹ ICC-RoC85-01/09-3-Conf-Exp-Ann2

² ICC-RoC85-01/09-1-Conf-Exp

³ ICC-RoC85-01/09-2-Conf-Exp

⁴ ICC-RoC85-01/09-3-Conf-Exp, ICC-RoC85-01/09-3-Conf-Exp-Anx 1, ICC-RoC85-01/09-3-Conf-Exp-Anx 2, ICC-RoC85-01/09-3-Conf-Exp-Anx 3, ICC-RoC85-01/09-3-Conf-Exp-Anx 4

1. In line with the seminal jurisprudence rendered by the *ad hoc* tribunals, the Presidency of the Court has established a clear test to be applied in all cases where a request for review of an administrative decision of the Registrar is sought. The Presidency has articulated the test as follows:

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.⁵

The person seeking judicial review of the Registrar's decision, whether in relation to a request for review of a decision on legal aid, detention matters or any other matter of concern, must demonstrate that the impugned Registry decision falls within the ambit of the above defined test.

2. The Registrar submits that in taking the impugned decision, she acted within the ambit of her responsibilities, has not committed an error of law, has acted with procedural fairness, has not acted in a disproportionate manner, has not taken into account irrelevant factors or failed to take into account relevant factors, and has not reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.

⁵ See decisions of the Presidency of the Court, dated 20 December 2005, ICC-Pres-RoC72-02-5 at para. 16, and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, at para. 24. See also the decision of 10 July 2008, ICC-Pres-RoC72-01-8-10 at para. 20

3. The Registrar would like to respectfully draw to the attention of the Presidency the responsibilities falling upon her to ensure that the funds that are allocated by the States Parties to legal aid are managed in a balanced and judicious manner in accordance with Regulation 83 of the Regulations, as well as the concern of the States Parties, and in particular its Committee on Budget and Finance, to ensure that the legal assistance paid by the Court is managed with great prudence in order to avoid abuse and contain costs.⁶

B. Observations regarding the nature of the Registrar's discretion in relation to the scope of legal assistance paid by the Court

4. The Registrar considers that questions such as the number of missions that could be covered by the legal aid scheme, and the number of counsel in respect of whom the costs would be covered, are not matters that can be the subject of established principles or rules, but fall to be considered on a case by case basis.
5. As regards the basis on which such discretion should be exercised, the Registrar considers that the factors set out in Regulation 83.1 of the Regulations, according to which legal assistance paid by the Court should cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, guide also her discretion under Regulation 83.2 in relation to legal aid for victims.

C. Observations in response to the specific issues raised by the legal representatives

⁶ See for instance ICC-ASP/4/2 page 16, para. 52

6. The legal representatives raise two issues in their request for review, which will be dealt with in turn.

(i) Issues relating to missions

7. The legal representatives assert that legal assistance paid by the Court should cover three missions to visit their clients during the course of the six month period covered by their first plan of action for the trial, rather than two, as approved by the Registrar in her response to the plan of action.⁷
8. The Registrar is surprised to see, in paragraph 14 of the request for review, that it is claimed that she had agreed in her decision of 25 February to the principle of three missions. In the said decision, which was not in response to the plan of action in question but was intended to cover the entire period of the trial or until as otherwise decided, the Registrar simply indicated that all requests for missions would be considered on a case by case basis in function of the evolution of the proceedings and in the context of plans of action approved in accordance with regulation 134 of the Regulations of the Registry.
9. Further, in her letter in response to the plan of action, the Registrar indicated that, at this stage of the proceedings, the coverage of two missions appeared reasonable. The Registrar notes the lack of sound justification in the plan of action presented to her for the proposal to conduct three missions. She noted in her reply that she had taken into account the assumption that the legal representatives would already have consulted with their clients prior to the commencement of the trial.

⁷ ICC-RoC85-01/09-3-Conf-Exp-Anx3

10. The legal representatives further request that the said missions should involve not one but two legal representatives. Again, the Registrar does not see, in the justifications presented in the plan of action, a concrete and sound basis for the need for two legal representatives to go on a mission. The legal representatives had proposed, and the Chamber had accepted, that they join together in a team as common legal representatives, representing at this point a total of 15 victims accepted to participate in the case. In other words, they entered such an arrangement at their own initiative. The Registrar understands this to mean that each legal representative represents the group of victims, and each of the victims individually. Further, as indicated by the legal representatives, their contact with the victims is made through intermediaries, who appear to be best placed to facilitate communication between the victims and any of the common legal representatives.

11. In relation to both of the above matters, the Registrar reiterates that she considers that such matters fall to be decided on a case by case basis, and is always ready to consider other costs, if they are supported by sound justifications. The Registrar notes that, in view of the additional information provided in the request for review, she does not see a basis for changing her decision on either of the two points raised. However, should further justifications be presented, she would consider them.

(ii) Medical insurance

12. The legal representatives assert that the legal aid scheme of the Court should cover the costs of medical insurance and repatriation for legal representatives in case of accident or illness arising while they are in the Netherlands. Whilst it is not specified, the Registrar assumes that the intention is that such request is limited to circumstances in which the legal representatives travel to the seat

of the Court in The Hague in the course of their duties as legal representatives of victims before the Court.

13. The Registrar notes that no arguments are advanced in support of this request as to the reasons why the legal aid scheme of the Court should support such costs.

14. The Registrar further notes that there is no provision requiring the Court to cover the costs of medical insurance for counsel and for other external personnel who have a relationship with the Court but are not staff of the Court such as consultants. Indeed, policies of the different services of the Court that deal with travel, finance and other administrative aspects relating to persons with such a status consider the arrangement and payment of travel insurance, including medical insurance, to be the responsibility of the person concerned, and not of the Court.

15. Such an approach stems from the independent status of counsel, the importance of which is reflected in the Code of Professional Conduct for counsel.⁸ Counsel, as members of a "profession libérale", who are assumed to have a practice outside of their appearance before the Court and a range of clients other than those they represent before the Court, take it upon themselves to make arrangements such as medical insurance, which are not costs that would normally be billed to clients.

16. The Registrar believes that such an approach is consistent with the practice of other international tribunals such as the ICTY and the ICTR.

⁸ See for instance Article 16

FOR THE FOREGOING REASONS the Registrar respectfully requests the Presidency:

To reject the request for review submitted by the legal representatives on 11 March 2009;

To confirm the decision of the Registrar of 25 February 2009.



Mr Didier Preira, Deputy Registrar
on behalf of
Silvana Arbia, Registrar

Dated this 1 day of April 2009

At The Hague