

IT-05-88/2-AR73.2

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12 NOVEMBER 2009

**UNITED
NATIONS**



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

Case No. IT-05-88/2-AR73.2

Date: 12 November 2009

Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron
Judge Bakone Justice Moloto

Registrar: Mr. John Hocking

Decision of: 12 November 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

CONFIDENTIAL AND EX PARTE

**DECISION ON ZDRAVKO TOLIMIR'S APPEAL AGAINST
THE DECISION OF TRIAL CHAMBER II ON THE
REGISTRAR'S DECISION CONCERNING LEGAL AID**

The Accused

Mr. Zdravko Tolimir

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THE APPEALS CHAMBER of 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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of an appeal filed confidentially and *ex parte* by Zdravko Tolimir (“Appellant”)¹ against the “Decision on Request for Review of the Registry’s Decision on Remuneration for Accused’s Legal Aid” rendered confidentially and *ex parte* by Trial Chamber II (“Trial Chamber”) on 9 March 2009 (“Impugned Decision”).²

I. BACKGROUND

1. The relevant procedural history following the transfer of the Appellant to the seat of the Tribunal on 1 June 2007 has been set out by the Trial Chamber.³

1. On 6 August 2007, the [Appellant] elected to defend himself in this case pursuant to Rule 45(F) of the Rules of Procedure and Evidence (“Rules”). He has two legal advisers and one case manager who were assigned to his defence team between January and March 2008.

2. On 3 June 2008, the Deputy Registrar of the Tribunal (“Registry”) rendered a decision on remuneration [“Registry’s Decision”].⁴ The Registry found that, following an assessment of the [Appellant’s] disposable means and living expenses in accordance with the Directive on the Assignment of Defence Counsel (“Directive”)⁵ and the Registry Policy for Determining the Extent to which an Accused is able to Remunerate Counsel (“Indigency Policy”)⁶ applied *mutatis mutandis* to self-represented accused, the [Appellant] is able to remunerate his defence team in part [REDACTED] to the cost of his defence before the Tribunal. The Registry also informed the [Appellant] and his legal advisers [REDACTED] would be deducted from the maximum allocations available to his defence team.

2. On 31 July 2008, pursuant to Article 13(B) of the Directive, the Appellant filed confidentially and *ex parte* a motion before the Trial Chamber requesting it to reverse the Registry’s Decision, to establish that he is unable to pay the costs of his defence and to decide that the costs of his defence should be fully borne by the Registry.⁷ On 9 March 2009, the Trial

¹ Confidential and *Ex Parte* Zdravko Tolimir’s Appeal Against the Decision of Trial Chamber II on His Request for Review of the Tribunal Registrar’s Decision on Remuneration for Legal Aid: the B/C/S original was submitted on 15 July 2009, the English translation was filed on 28 July 2009 and a revised and corrected English translation was filed on 11 August 2009 (“Appeal”).

² *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Confidential and *Ex Parte* Decision on Request for Review of the Registry’s Decision on Remuneration for Accused’s Legal Aid, 9 March 2009.

³ Impugned Decision, paras 1-2 (footnotes partly omitted).

⁴ Deputy Registrar’s Decision, partly Confidential and *Ex Parte*, issued on 29 May 2008, filed on 3 June 2008.

⁵ Directive on the Assignment of Defence Counsel (Directive No. 1/94), IT/73/REV.11, as amended 29 June 2006.

⁶ Registry Policy for Determining the Extent to Which an Accused is Able to Remunerate Counsel, 4 May 2004.

⁷ Appeal Against the Decision of the Deputy Registrar of 29 May 2008, Annexes Partly Confidential, submitted on 26 June 2008 and filed on 31 July 2008 (“Motion”). See Impugned Decision, para. 3 regarding the procedural history of this submission. See also Corrigendum to the English translation of Appeal Against the Decision of the Deputy Registrar of 29 May 2008, 2 September 2008. In response, the “Registrar’s submission pursuant to Rule 33(B) on Zdravko Tolimir’s Appeal” was filed confidentially and *ex parte* by the Registry on 24 September 2008 (“Registry’s Submission before the Trial Chamber”). In reply, the Appellant confidentially and *ex parte* submitted

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Chamber dismissed the Motion, finding that the Registry had “applied a proper procedure and [taken] the decision in a reasonable and appropriate manner.”⁸ On 2 July 2009, the Trial Chamber granted the Appellant’s application for certification.⁹

3. On 11 August 2009, the Appellant filed a revised and corrected version of the English translation of his Appeal. On 11 September 2009, the Registry filed confidentially and *ex parte* its submission before the Appeals Chamber pursuant to Rule 33(B) of the Rules (“Registry’s Submission before the Appeals Chamber”).¹⁰

II. SUBMISSIONS

4. In his Appeal, the Appellant submits that the Impugned Decision is “unsubstantiated”¹¹ and requests the Appeals Chamber to: (a) reverse the Registry’s Decision, (b) establish that he is unable to bear partial costs of his defence and (c) decide that the costs of his defence should be fully borne by the Registry.¹² In particular, he challenges the assessment of his disposable means and living expenses, as well as the exchange rate referred to in the Impugned Decision.

5. The Registry responds that the Trial Chamber correctly applied the standard for proper administrative decision-making as set out in the jurisprudence of the Appeals Chamber.¹³ The Registry also asserts that “the question whether a judicial decision on review can be subject to appellate scrutiny is not free of doubt.”¹⁴ It further argues that if the Appeals Chamber deems a second judicial review of an administrative decision admissible, the Appeal should be dismissed on the sole ground that the Appellant repeats the same arguments that were unsuccessful before the Trial Chamber.¹⁵ Should the Appeals Chamber nonetheless decide to entertain the Appeal,

the “Brief in Reply to the Registry’s Submission of 24 September 2008 with a Request to Remove the Confidentiality Status” on 20 November 2008 and filed its English version on 28 November 2008.

⁸ Impugned Decision, para. 69.

⁹ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Confidential and *Ex Parte* Decision on Tolimir Request for Certification to File an Appeal Against the Decision on Request for Review of the Registry’s Decision on Remuneration for Accused’s Legal Aid, 2 July 2009 (B/C/S translation, 9 July 2009). See also *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Zdravko Tolimir’s Request for Certification to File an Appeal Against the Decision on Request for Review of the Registry’s Decision on Remuneration for Accused’s Legal Aid, submitted on 5 May 2009 and filed confidentially and *ex parte* on 12 May 2009.

¹⁰ Confidential and *Ex Parte* Registrar’s Submission on Zdravko Tolimir’s Appeal on Remuneration for Legal Aid, 11 September 2009.

¹¹ Appeal, para. 6.

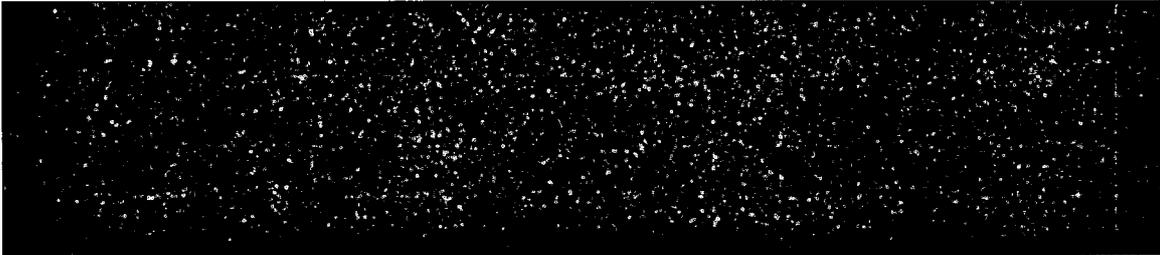
¹² Appeal, para. 111.

¹³ Registry’s Submission before the Appeals Chamber, paras 13-14, 17, referring to *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30-1/A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 (“*Kvočka et al.* Appeal Decision”).

¹⁴ Registry’s Submission before the Appeals Chamber, para. 15.

¹⁵ Registry’s Submission before the Appeals Chamber, para. 20.

the Registry refers the Appeals Chamber to the Registry's Decision and the Registry's Submission before the Trial Chamber for a more detailed explanation of its findings.¹⁶



III. PRELIMINARY ISSUE

7. Contrary to the Registry's submission, the Appeals Chamber has deemed that a judicial review of an administrative decision may be subject to appellate scrutiny.¹⁸ In keeping with the precedents of the Tribunal, the Appeals Chamber in the present case considers that it is properly seized of the Appellant's appeal against the Trial Chamber's judicial review of the Registry's Decision.

IV. STANDARD OF REVIEW

8. At the outset, the Appeals Chamber recalls the established jurisprudence setting out the standard of review for a first judicial review of an administrative decision made by the Registry:

A judicial review of such an administrative decision is not a rehearing. Nor is it an appeal, or in any way similar to the review which a Chamber may undertake of its own judgment in accordance with Rule 119 of the Rules of Procedure and Evidence. A judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned initially with the propriety of the procedure by which [the] Registrar reached the particular decision and the manner in which he reached it.¹⁹

An administrative decision by the Registry may be quashed if the decision-maker:

(a) failed to comply with the legal requirements of the Directive, or

¹⁶ Registry's Submission before the Appeals Chamber, para. 21.

¹⁷ Registry's Submission before the Appeals Chamber, para. 43.

¹⁸ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009 ("*Karadžić Appeal Decision*"), para. 9; *Prosecutor v. Milan Milutinović, Dragoljub Ojdanić and Nikola Šainović*, Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 ("*Milutinović et al. Appeal Decision*"). See also

Cf. Prosecutor v. Vidoje Blagojević, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003 ("*Blagojević Appeal Decision*"), paras 7-8.

¹⁹ *Kvočka et al. Appeal Decision*, para. 13; *Martić Appeal Decision*, para. 16; *Karadžić Appeal Decision*, para. 10. See also *Impugned Decision*, para. 46.

(b) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or

(c) took into account irrelevant material or failed to take into account relevant material, or

(d) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).²⁰

In the absence of established unreasonableness, there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled.²¹

9. In the review, the party contesting the administrative decision bears the onus of persuasion and must show that (a) an error of the nature described has occurred, and (b) that such an error has significantly affected the administrative decision to his detriment.²² Only when both matters are shown, may the administrative decision be quashed. Nonetheless, in cases of legal aid, "it is clear, from the implicit restriction that only the Registrar may determine the *extent* to which the accused has the means partially to remunerate counsel, that the power of the Chamber to substitute its own decision for that of the Registrar is limited."²³

10. With respect to the standard of review to be applied to an appeal against a judicial review by a Trial Chamber of an administrative decision (a second judicial review of an administrative decision), the Appeals Chamber recently clarified that the standard of review of a Trial Chamber's discretionary decision is applicable.²⁴ In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber has committed a "discernible error" resulting in prejudice to that party.²⁵ The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be (1) based on an

²⁰ *Kvočka et al.* Appeal Decision, para. 13; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007 ("*Krajišnik* Appeal Decision"), para. 30; *Karadžić* Appeal Decision, para. 10. *See also* Impugned Decision, para. 46.

²¹ *Kvočka et al.* Appeal Decision, para. 13; *Krajišnik* Appeal Decision, para. 30; *Karadžić* Appeal Decision, para. 10. *See also* Impugned Decision, para. 46. *Cf. Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, 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 ("*Nahimana et al.* Appeal Decision"), para. 9.

²² *Kvočka et al.* Appeal Decision, para. 14; *Karadžić* Appeal Decision, para. 10. *See also* Impugned Decision, para. 47. *Cf. Nahimana et al.* Appeal Decision, para. 9.

²³ *Kvočka et al.* Appeal Decision, para. 14. *See also* Impugned Decision, para. 47.

²⁴ *Karadžić* Appeal Decision, para. 11, referring to, *inter alia*, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.1, Decision on Appellant Radovan Karadžić's Appeal Concerning Holbrooke Agreement Disclosure, 6 April 2009, para. 14; *Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač*, Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 26 January 2009, para. 5. *Cf. Milutinović* Appeal Decision, paras 21, 24-26; *Blagojević* Appeal Decision, paras 16-22, 24-33, 48-54.

²⁵ *Karadžić* Appeal Decision, para. 11.

incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.²⁶

V. DISCUSSION

11. Paragraph 1.3 of the "Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused" of 28 September 2007 ("Payment Scheme") provides that the Directive and the Indigency Policy apply *mutatis mutandis* to self-represented accused seeking Tribunal funding for their defence teams.²⁷ Accordingly, in accordance with Articles 8 and 10 of the Directive²⁸ and the Indigency Policy, the Registry calculated the Appellant's disposable means and deducted from it the estimated living expenses of his household and dependants [REDACTED] [REDACTED] during the estimated period in which he will require legal assistance before the Tribunal.²⁹

²⁶ *Karadžić* Appeal Decision, para. 11.

²⁷ See Payment Scheme, para. 1.3.

²⁸ Article 8 (Burden of Proof) of the Directive reads:

- (A) A suspect or accused who requests the assignment of counsel must produce evidence establishing that he is unable to remunerate counsel.
- (B) Where the Registrar has opened an inquiry into the means of a suspect or accused pursuant to Article 9, the suspect or accused shall provide or facilitate the production of information required to establish his ability to remunerate counsel.
- (C) Where a suspect or accused fails to comply with his obligations under Articles 8(A) and (B) to the extent that the Registrar is unable to properly assess the suspect or accused's ability to remunerate counsel, the Registrar may deny the request for the assignment of counsel after warning the suspect or accused and giving him an opportunity to respond.

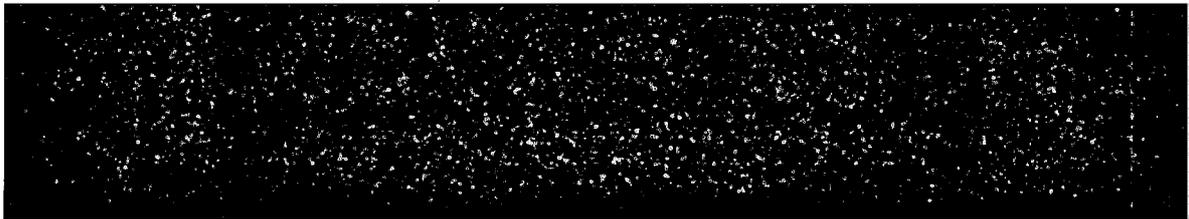
Article 10 (Determination of the means of suspects and accused) of the Directive provides:

- (A) The Registrar shall determine whether and to what extent the suspect or accused is able to remunerate counsel by taking into account means of all kinds of which the suspect or accused has direct or indirect enjoyment or freely disposes, including but not limited to direct income, bank accounts, real or personal property, pensions, and stocks, bonds, or other assets held, but excluding any family or social benefits to which he may be entitled. In assessing such means, 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.
- (B) For the purpose of determining whether the suspect or accused has an ownership interest in any property, the Registrar may consider the apparent lifestyle of a suspect or accused, and his enjoyment of that or other property, and whether or not he derives income from it.

A. Alleged errors relating to the Appellant's disposable means (Grounds 2-7, 11)

1. Principal family home (Grounds 2-3, 11)

12. The Appellant contests the Trial Chamber's finding that the Registry reasonably concluded that his principal family home [REDACTED], exceeds [REDACTED] reasonable needs, and therefore that the equity exceeding the "reasonable needs" is included in disposable means.³⁰



14. Second, the Appellant argues that it was not for the purpose of concealing the principal family home that he transferred his share of it to [REDACTED] by deed of gift when he arrived at the United Nations Detention Unit in The Hague ("UNDU").³³ By stating so, he appears to refute the Trial Chamber's finding that it was reasonable for the Registry to disregard this transfer and consider the Appellant as an equitable/true owner of the principal family home.³⁴

15. Third, the Appellant contends that the Trial Chamber erred in considering the principal family home as a single property mass of which he can freely dispose, and disregarding interests of [REDACTED]³⁵ Referring to the "civilized legal principle" that "a person may be responsible for his obligations only with his own property or his share of joint (marital) property"³⁶ and to the Family Law [REDACTED] ("Family Law")³⁷ purportedly reflecting this principle,³⁸

³⁰ Appeal, paras 24, 26, 31, 52-54.

³¹ Appeal, paras 26-31, referring to the [REDACTED] Annex 1 to the Appeal, and the Rules [REDACTED] Annex 2 to the Appeal.

³² Appeal, para. 27.

³³ Appeal, para. 24, stating that [REDACTED]

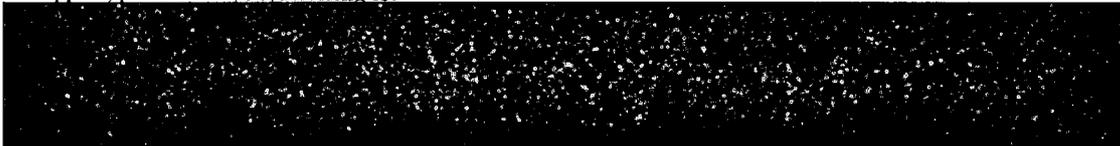
³⁴ Impugned Decision, para. 56.

³⁵ Appeal, paras 16-18, 38.

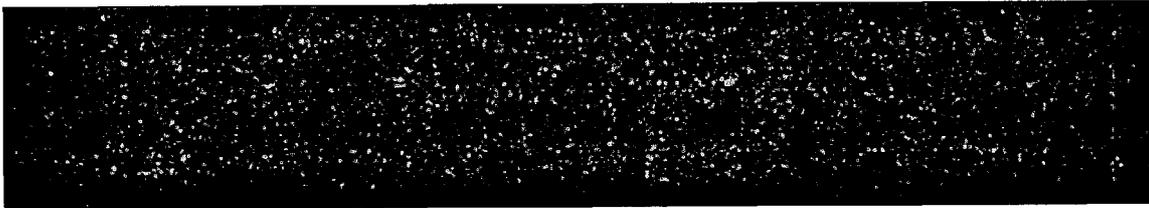
³⁶ Appeal, paras 8-12, 45.

³⁷ [REDACTED]

³⁸ Appeal, paras 13-14, 38, referring to:



the Appellant asserts that (1) disposable means may include only his separate property and his share in joint marital property; and (2) that it must be assumed that the share in joint marital property is one half.³⁹ Therefore, according to him, even if his principal family home is to be regarded as joint marital property, only one half of its value [REDACTED] may be taken into account in assessing whether he is able to bear the costs of defence; and considering that the average number of square meters of living space per person in the [REDACTED] only the value of [REDACTED] is surplus housing space.⁴⁰ The Appellant avers that, as the sale of this property would incur expenses (e.g. agency fees, taxes, costs of moving), it would hardly constitute a disposable asset and that such a sale could easily be interpreted as a punitive measure against a person who is still presumed innocent.⁴¹ Moreover, he contends that the Registry's Decision endorsed by the Trial Chamber is unreasonable and unenforceable, on the grounds that he can neither dispose of nor take a mortgage on his share of his principal family home without his wife's consent or a court decision, and that no bank would grant him a mortgage because of his current situation as an accused.⁴²



17. The Registry responds that it was reasonable for the Trial Chamber to affirm the Registry's determination to include the equity of the Appellant's principal family home exceeding the "reasonable needs" in his disposable means.⁴⁴

18. In support of its contention, the Registry first submits that the Trial Chamber was correct in finding that the Registry applied its standard policy and properly used official documentation

(As translated in the English version of the Appeal. While the Appellant refers to Article 10 of the Family Law in para. 14 of the Appeal, the Appeals Chamber understands, based on the content of the quoted provision, that he meant to refer to Article 180(2).)

³⁹ Appeal, paras 23, 32, 42-43. The Appellant also contends that Article 10 of the Directive (mistakenly referred to as Article 8 in the Appeal) is in line with his view and must be interpreted in such a way that it would not infringe the property right of his wife, Appeal, paras 15, 20-22, 46. Furthermore, he challenges the Registry's finding endorsed by the Trial Chamber that his principal family home constitutes joint marital property owned "jointly and inseparably" by him and his spouse, on the ground that the "fundamental rules" of joint property dictate: (1) in the case of joint ownership, the shares of the owners are not defined, but are definable; and (2) creditors must first request division of the joint property and collect their debt after the share of the debtor has been determined, Appeal, paras 39-41 and Annex 3 to the Appeal.

⁴⁰ Appeal, paras 33, 44.

⁴¹ Appeal, paras 34-35, 51.

⁴² Appeal, paras 47-50, referring to Articles 174(3) and 180(1) of the Family Law.

⁴³ Registry's Submission before the Appeals Chamber, para. 28.

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from [REDACTED] in determining the average number of square meters of living space per person at the location of the Appellant's principal family home.⁴⁵

19. Second, the Registry argues that the Trial Chamber rightly found that the Registry acted reasonably in applying the provisions of the Family Law to conclude that the deed of gift provided by the Appellant did not change the status of his principal family home.⁴⁶

20. Third, the Registry contends that the Trial Chamber correctly confirmed that the Appellant's principal family home constitutes his joint marital property and not separate "means of the spouse" within the meaning of Article 10(A) of the Directive, and that it would be improper to take into account only half of its value.⁴⁷ According to the Registry, "in most cases the principal family home represents joint and inseparable property of the union," and therefore "it was reasonable for the Registry to consider the whole property and include all members of the household in the equation to prevent any injustice."⁴⁸

21. The Appeals Chamber does not find any error in the Trial Chamber's conclusion that the Registry reasonably found that the equity in the Appellant's principal family home exceeding the reasonable needs of the Appellant and his spouse is included in his disposable means.⁴⁹

22. In reaching this conclusion, the Trial Chamber found that the Registry, in accordance with its standard policy, "properly used official documentation [REDACTED] in determining the average number of square meters of living space per person at the location of [the Appellant's principal family home]."⁵⁰ The Appeals Chamber finds this conclusion reasonable, considering that the Registry applied the standard policy, and not the special standards [REDACTED] in order to ensure the equality among all the accused.⁵¹ Furthermore, according to Article 10(B) of the Directive,⁵² the fact that the Appellant does not enjoy any immovable property other than his principal family home is to be taken into account in determining whether he has an *ownership interest* in his principal family home. Accordingly, the Appeals Chamber is not satisfied that the Registry and the Trial Chamber erred in making no particular reference to this fact in determining his and his spouse's *reasonable needs*.

⁴⁵ Registry's Submission before the Appeals Chamber, para. 31.

⁴⁶ Registry's Submission before the Appeals Chamber, para. 30.

⁴⁷ Registry's Submission before the Appeals Chamber, para. 28.

⁴⁸ Registry's Submission before the Appeals Chamber, para. 29.

⁴⁹ Impugned Decision, paras 53, 57.

⁵⁰ Impugned Decision, para. 56.

⁵¹ Registry's Submission before the Trial Chamber, para. 32.

⁵² The Appellant cites the wording of this provision as "the criterion of reasonableness", Appeal, para. 27.

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23. The Appeals Chamber also notes that the Appellant does not substantiate his claim that the purpose of the transfer [REDACTED] of the principal family home [REDACTED] is not to conceal this property.⁵³ Consequently, the Appellant has failed to show any error in the Trial Chamber's finding that it was reasonable for the Registry to disregard this transfer.

24. With respect to the Appellant's argument on his share in the principal family home, the Appeals Chamber recalls that the Registry considered that under the property law of the [REDACTED] the Appellant's principal family home constitutes marital property jointly owned by the Appellant and his spouse, and does not fall within the meaning of separate "means of the spouse" under Article 10(A) of the Directive.⁵⁴ The Indigency Policy, enacted under the legislative authority enshrined in Articles 8 and 10 of the Directive,⁵⁵ establishes the regime whereby the equity in assets owned by an applicant, his spouse or the persons with whom he habitually resides and exceeding their reasonable needs is considered as his disposable means, while the equity in assets owned by the applicant's spouse that *do not* constitute marital property is excluded from disposable means.⁵⁶ Consequently, the equity in marital property jointly owned by an applicant and his spouse and exceeding the reasonable needs of the applicant, his spouse and the persons with whom he habitually resides has been included in the applicant's disposable means.⁵⁷ The Registry applied this scheme equally to the Appellant's case. The Trial Chamber therefore committed no error in concluding that the Registry reasonably took into account the Appellant's principal family home in assessing his disposable means. As regards the alleged difficulties to sell, or take a mortgage on, his principal family home, the Appeals Chamber

[REDACTED]

⁵⁴ Registry's Decision, p. 3 referring to Article 171(1) of the Family Law, and Confidential and *Ex Parte* Annex, para. 7; Registry's Submission before the Trial Chamber, para. 35.

⁵⁵ Section 3 of the Indigency Policy.

⁵⁶ Sections 5 and 6 (in particular, Section 5(a) and (f) and Section 6(e)) of the Indigency Policy.

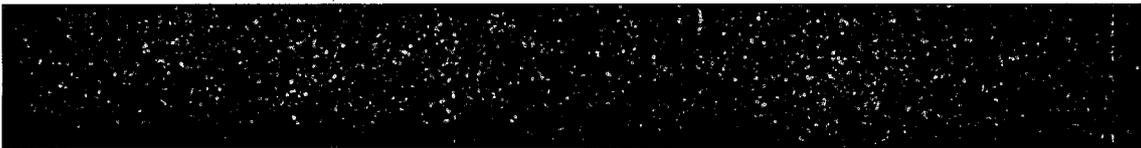
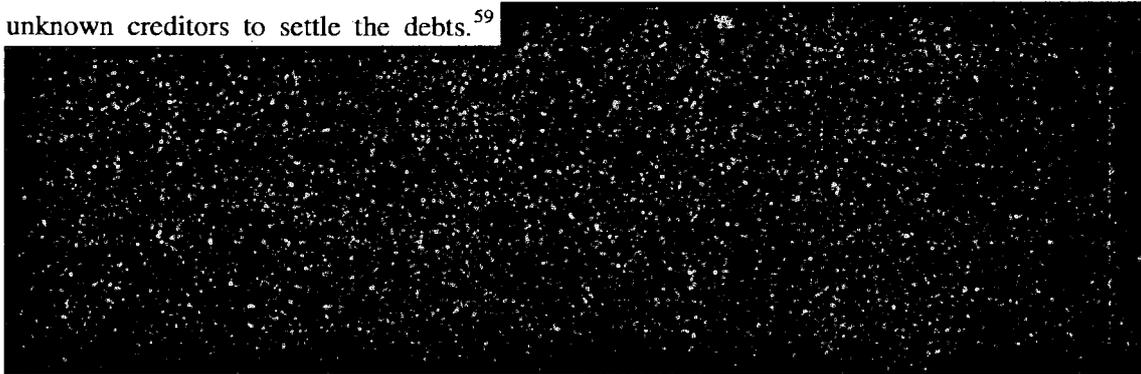
[REDACTED]

observes that the Appellant merely asserts the difficulties without any substantiation. Since the burden of persuasion is on the Appellant, the Appeals Chamber is not satisfied that the Trial Chamber erred in accepting the Registry's submission that there is a reasonable prospect of the Appellant being able to raise funds against his principal family home not solely by selling but also by way of a mortgage against this property.⁵⁸



2. The Appellant's alleged debts (Ground 4)

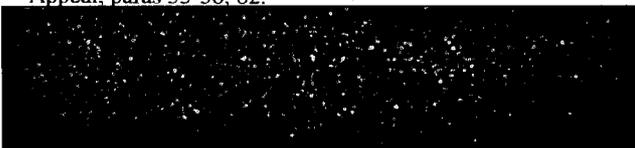
26. The Appellant submits that the Trial Chamber erred in affirming the Registry's finding that he failed to prove the existence of his alleged debts and that [REDACTED] had been paid to unknown creditors to settle the debts.⁵⁹



28. The Appeals Chamber recalls that before the Registry, the Appellant bore the burden of proof to demonstrate that he was unable to remunerate counsel.⁶⁵ In view of his inconsistent

⁵⁸ Registry's Submission before the Trial Chamber, para. 38.

⁵⁹ Appeal, paras 55-56, 62.



statements concerning the purported debts in his declaration of means,⁶⁶ as well as the evidence provided by the Appellant which lacks satisfactory precision, in particular, regarding to whom such debts were owed,⁶⁷ it was reasonable for the Registry to conclude that the Appellant failed to establish the existence of the purported debts and the fact that [REDACTED] had been paid to creditors. The Appellant fails to provide any cogent reason why the evidence adduced by the Appellant, including the [REDACTED] as a third party, suffices to prove such debts and repayment. Consequently, the Appeals Chamber finds no discernible error in the Trial Chamber's affirmation of the Registry's finding to include this [REDACTED] as part of the Appellant's disposable means.

3. The Appellant's pension (Ground 5)

29. The Appellant submits that the Trial Chamber erred in concluding that his pension [REDACTED] in its entirety may be included in the disposable means since the documentary evidence he submitted before the Trial Chamber proves that an invalidity benefit constitutes a substantial part of his pension.⁶⁸

30. The Registry responds that the Trial Chamber correctly found that the Registry acted reasonably in including the Appellant's pension in his disposable means pursuant to Section 7(h) of the Indigency Policy since he submitted insufficient documentation to establish that an invalidity benefit is included in his pension.⁶⁹

31. In support of his arguments on the pension, the Appellant provided the Trial Chamber with a certificate of his pension from the [REDACTED] accompanied by a statement of account issued by the [REDACTED].⁷⁰ Although there might have been insufficient explanation as regards the characterisation of these documents, the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude, based on the Registry's sound analysis, that these documents do not indicate that an invalidity benefit is *included in the*

⁶⁵ Article 8 of the Directive; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on the Financing the Defence of the Accused, 30 July 2007 (The English version was filed on 10 August 2007), paras 57, 59 stating: "it is absolutely necessary for [an accused] to cooperate with the Registry by filing out *the entire* declaration of means form and by enabling the Registry to use appropriate means to access the financial situation of the [a]ccused in a satisfactory manner (emphasis in original)." See also Impugned Decision, para. 62.

⁶⁶ Registry's Decision, Confidential and *Ex Parte* Annex, paras 24, 26; Registry's Submission before the Trial Chamber, para. 66; Registry's Submission before the Appeals Chamber, para. 38.

⁶⁷ Registry's Decision, Confidential and *Ex Parte* Annex, paras 25-26; Registry's Submission before the Trial Chamber, paras 64-65; Registry's Submission before the Appeals Chamber, para. 38.

⁶⁸ Appeal, paras 63-66.

⁶⁹ Registry's Submission before the Appeals Chamber, para. 34.

⁷⁰ Annex 3 to the Motion (and re-submitted in Annex 5 to the Appeal).

Appellant's pension.⁷¹ As another piece of evidence, the Appellant has additionally submitted to the Appeals Chamber a certificate of personal disability benefit issued by the [REDACTED].⁷² The Appeals Chamber declines to take this document into consideration, since it was neither provided in the proceedings before the Registry or the Trial Chamber, nor adduced before the Appeals Chamber in accordance with Rule 115 of Rules.⁷³ In sum, the Appellant has failed to prove that any "social benefits" or "government welfare payments" that cannot be included in disposable means pursuant to Article 10(A) of the Directive and Sections 7(e) and 8(a) of the Indigency Policy form part of his pension. Consequently, the Appeals Chamber is not satisfied that the Trial Chamber erred in affirming the Registry's analysis and conclusion.

4. The salary of the Appellant's [REDACTED] (Ground 6)

33. The Registry responds that the Trial Chamber correctly found that the Registry acted reasonably in including the employment income of the Appellant's [REDACTED] in the assessment of his disposable means in accordance with Section 7(a) of the Indigency Policy.⁷⁵

34. Section 7(a) of the Indigency Policy allows the Registry to take into account the employment income of an applicant's [REDACTED] in the assessment of disposable means of the applicant. The Registry therefore properly applied this Section to the salary of the Appellant's [REDACTED]. This is also in line with the Registry's consistent policy to include [REDACTED] in disposable means, since, as the Appellant asserts, the salary of the Appellant's [REDACTED] is

⁷¹ Impugned Decision, para. 59, referring to Registry's Submission before the Trial Chamber, paras 43-45; Registry's Submission before the Appeals Chamber, para. 34.

⁷² Annex 6 to the Appeal.

⁷³ See *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11bis.1, Decision on Appeal Against Decision on Referral Under Rule 11bis, 4 July 2006, para. 26; *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-AR65.1, Decision on Motion for Clarification of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings and for Extension of Time, 22 November 2005, para. 7; *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defense [sic] Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, 16 November 2005, para. 6. The Appeals Chamber nonetheless notes that this document could not alter its conclusion, since it shows, at best, that the Appellant receives a certain amount of invalidity benefit, but does not prove that such an invalidity benefit constitutes a part of his pension.

⁷⁴ Appeal, paras 68-71.

⁷⁵ Registry's Submission before the Appeals Chamber, para. 35.

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classified as [REDACTED]⁷⁶ It was also reasonable for the Registry to assume that as far as the Appellant's [REDACTED] is employed, [REDACTED] is receiving her salary, or will be at some point.⁷⁷ Consequently, the Appeals Chamber finds no discernible error committed by the Trial Chamber in affirming the Registry's conclusion. The Appeals Chamber endorses the Trial Chamber's observation that "[i]nsofar as there are suggestions that the income may change in the future, certainly that would be a matter that the Registry should reconsider should such evidence be adduced."⁷⁸

[REDACTED]

[REDACTED]

[REDACTED]

37. The Appeals Chamber notes that the Appellant merely repeats his arguments which he once presented before the Trial Chamber. In light of the jurisprudence of the Tribunal⁸⁴ and the

[REDACTED]

⁷⁷ Registry's Submission before the Trial Chamber, para. 50.

⁷⁸ Impugned Decision, para. 60.

[REDACTED]

relevant provisions in the Directive and Indigency Policy,⁸⁵ the Trial Chamber reasonably concluded that the financial assistance provided to the Appellant [REDACTED]

[REDACTED]⁸⁷ The Appellant has failed to show that the Trial Chamber erred in reaching this conclusion.

B. Alleged error relating to living expenses (Grounds 8-9)

1. Average monthly expenditure (Ground 8)

38. The Appellant submits that the Trial Chamber erred in finding that he “failed to provide any documentation indicating that the data of the Statistical Office [REDACTED] is an inappropriate reference for the calculation of reasonable average living expenses in the area where the [Appellant] resides.”⁸⁸ He contends that the average monthly expenditures calculated based on the data are “obviously unreasonable” and “unreliable” given that they reflect living standards below or at bare subsistence level and that he resides in the UNDU.⁸⁹ In his view, the calculation of reasonable and necessary living costs should be based on the standard of living enjoyed by the Appellant and [REDACTED].⁹⁰ He also avers that the Registry’s Decision is no longer tenable in view of the recent economic deterioration in [REDACTED].⁹¹

39. The Registry responds that the Trial Chamber rightly confirmed the Registry’s method of calculating the estimated living expenses of the Appellant [REDACTED], which was in compliance with the formula set out in Section 10 of the Indigency Policy.⁹² The Registry also submits that the Appellant failed to prove the alleged inappropriateness of the use of the official data provided by the Statistical Office [REDACTED].⁹³

⁸⁵ Article 10(A) of the Directive, Sections 7(e) and 8(a) of the Indigency Policy.

⁸⁶ The Appeals Chamber particularly notes that the conditions for an applicant to be granted such a financial assistance do not include the precariousness of the applicant’s financial situation. *see* [REDACTED]

⁸⁷ Impugned Decision, para. 61.

⁸⁸ Appeal, para. 78, citing Impugned Decision, para. 64.

⁸⁹ Appeal, paras 79-85, 87-88, arguing that the Registry’s calculation would lead to the conclusion that the average living expenses per person should merely amount to [REDACTED] per day. The Appellant also submits that he did not mention to the Registry [REDACTED]

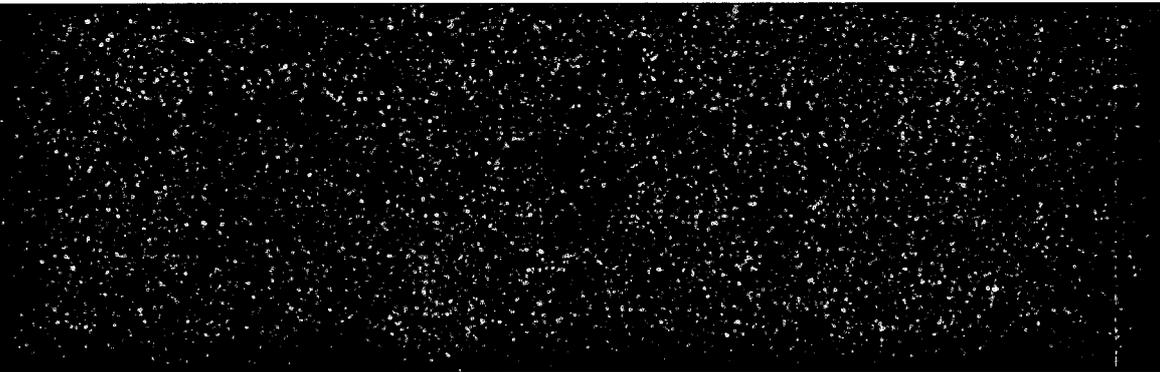
⁹⁰ Appeal, paras 80, 88.

⁹¹ Appeal, para. 86.

⁹² Registry’s Submission before the Appeals Chamber, paras 40-41.

⁹³ Registry’s Submission before the Appeals Chamber, para. 41.

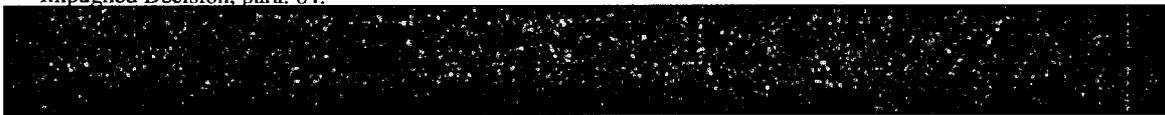
40. As the Trial Chamber correctly ruled,⁹⁴ it is not sufficient for the Appellant to merely assert that the data of the Statistical Office [REDACTED] relied upon by the Registry is “obviously unreasonable” and “unreliable”, without providing any evidence to substantiate this claim. If the Appellant believes that the data of the Statistical Office [REDACTED] represent living standards below subsistence level in the area where his household resides,⁹⁵ he should have provided evidence to support this allegation. The Appeals Chamber reiterates that the burden was on the Appellant to persuade the Trial Chamber that the Registry had rendered an erroneous decision. The Appeals Chamber also notes that, as rightly pointed out by the Trial Chamber,⁹⁶ the Registry took into account the expenses that are particular to the situation of the Appellant’s household, in addition to the average monthly expenditure which is standard to all accused.⁹⁷ As regards the recent economic deterioration [REDACTED], the Appellant neither substantiates his claim with documentation nor explains how it affected the average monthly expenditure in the relevant area and the additional expenses that are particular to his household. Consequently, the Appeals Chamber finds that the Appellant has failed to demonstrate any discernible error in the Trial Chamber’s finding.



⁹⁴ Impugned Decision, para. 64.

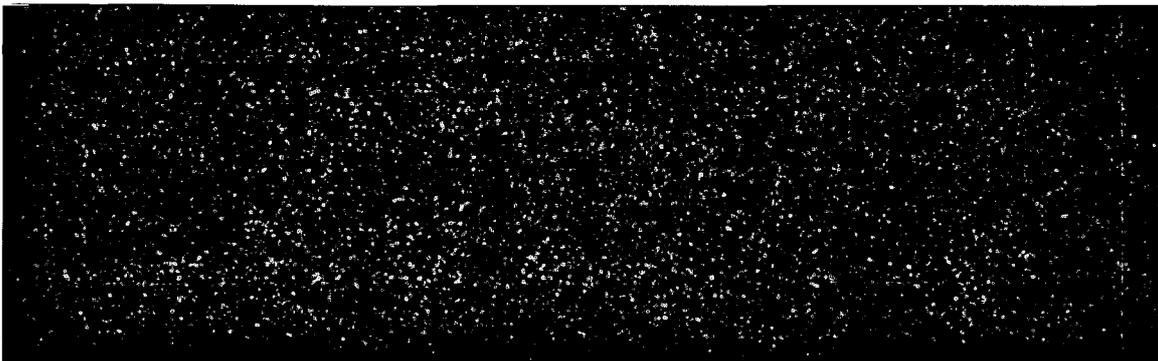
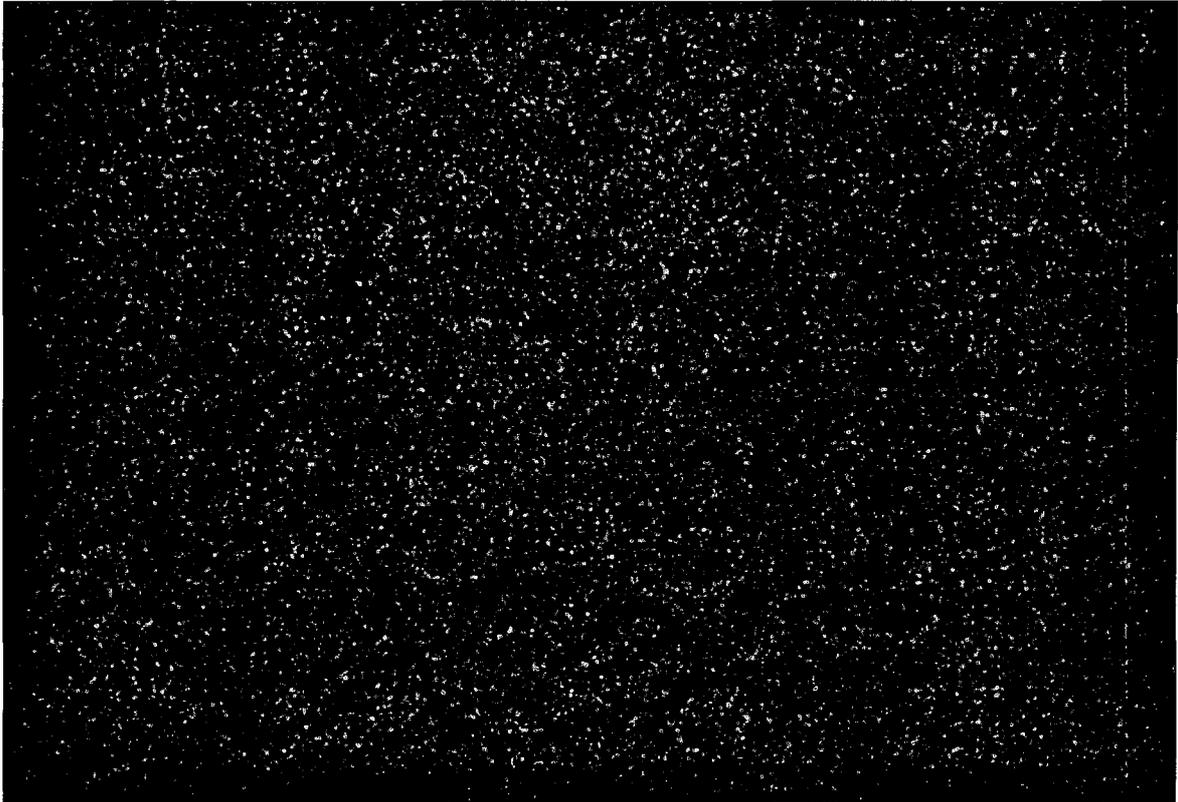
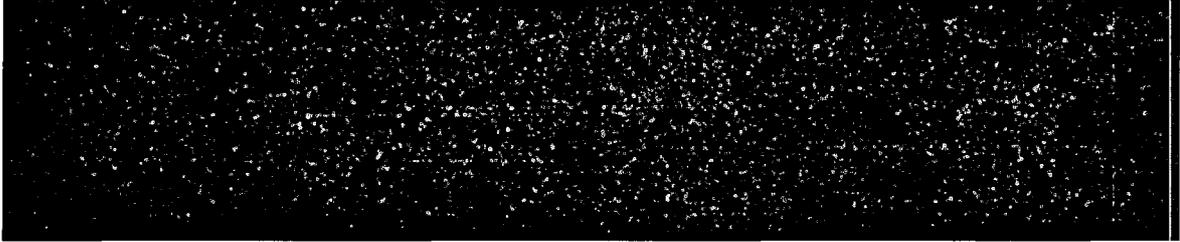
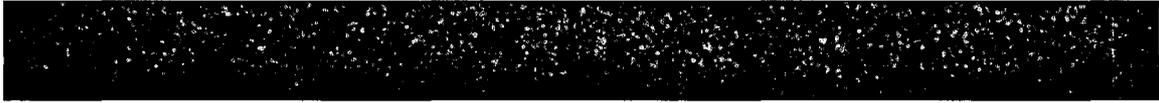
⁹⁵ Considering that the Appellant is provided with the necessities of life (e.g. basic food, clothing) in the UNDU, it was in favour of the Appellant and therefore appropriate for the Registry to apply the average monthly expenditure in the area where his household resides, i.e. where he would habitually reside if he were not in custody.

⁹⁶ Impugned Decision, para. 64.



⁹⁷ Appeal, para. 89.

⁹⁸ Appeal, paras 93-94, also arguing that limiting the right to these expenses would result in placing the Appellant’s [REDACTED] in a worse position than if he were to stand trial in [REDACTED] and in violating his right under Article 17 of the International Covenant on Civil and Political Rights (“ICCPR”). The Appeals Chamber notes that Article 17 of the ICCPR concerns the right to privacy whereas Article 10 of the ICCPR pertains to the right of detainees and accused persons. See also Appeal, para. 105.



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C. Alleged error relating to the exchange rate (Ground 10)

44. The Appellant avers that the Trial Chamber erroneously affirmed that “the Registry [had] applied, in accordance to standard policy, the official United Nations exchange rate,” although the Registry did not submit any evidence proving that the rate it had applied was indeed the official United Nations exchange rate on the relevant day.¹⁰⁸ He adds that it was a highly unfavourable rate to him.¹⁰⁹ Furthermore, in light of the significant change in the exchange rate since the signature date of the Registry’s Decision, he seeks the Appeals Chamber to order the Registry to make a new calculation using the current and accurate exchange rate.¹¹⁰

45. The Registry responds that the Trial Chamber correctly affirmed the Registry’s application of the official United Nations exchange rate.¹¹¹

46. The Appeals Chamber recalls that it is the Registry’s standard policy to apply the official United Nations exchange rate of the date when its decision is rendered. The Registry properly applied this standard policy in the present case. The Appeals Chamber is satisfied that the rate utilised by the Registry is the correct official United Nations exchange rate on the day when the Registry’s Decision was rendered, and that there was no discernible error in the finding of the Trial Chamber affirming the Registry’s Decision, considering that the said rate is available in public.¹¹²

D. Conclusion

47. For the reasons set out above, the Appeals Chamber concludes that no discernible error in the Impugned Decision has been shown by the Appellant.

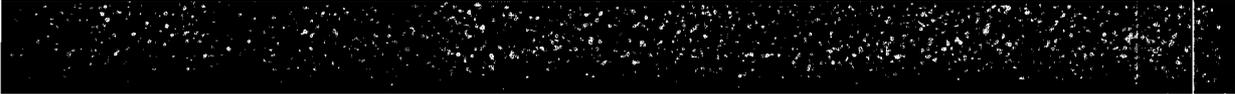
¹⁰⁸ Appeal, paras 96-97, stating that the official exchange rate of the National Bank of [redacted] between [redacted] and Euros on 29 May 2008 (the signature date of the Registry’s Decision) was [redacted] (buying) and [redacted] (selling) for one Euro, whereas the Registry considered the official United Nations exchange rate on that day as [redacted] for one Euro.

¹⁰⁹ Appeal, paras 98-99.

¹¹⁰ Appeal, paras 100-103, maintaining that the official exchange rate of the National Bank of [redacted] on 14 July 2009 became [redacted] (buying) and [redacted] (selling) for one Euro.

¹¹¹ Registry’s Submission before the Appeals Chamber, para. 26.

¹¹² See e.g., the website of the United Nations Treasury: <http://www.un.org/Depts/treasury/>.

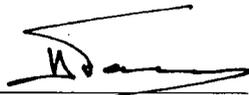

VI. DISPOSITION

48. For the foregoing reasons, the Appeals Chamber

DISMISSES the Appeal in its entirety.

Done in English and French, the English text being authoritative.

Dated this 12th day of November 2009
At The Hague
The Netherlands



Judge Andréia Vaz
Presiding

[Seal of the Tribunal]